

The FMLA and a “Pre-Eligibility” Leave Request.

The federal Family and Medical Leave Act (FMLA) provides certain qualifying employees with unpaid leave in the event of personal or family medical conditions, such as serious health problems or the birth of a child. Though simple in concept, the FMLA continues to generate questions in its application, as illustrated by a recent federal suit involving an Alabama employer. In August 1999, Brandi Walker was hired by the Elmore County Board of Education to teach the third grade for one year. She reported to work on August 9, 1999 under a contract that required her to teach until the end of the school year, May 19, 2000. The contract was automatically renewable unless the School Board chose not to renew it.

Walker informed her principal in December 1999 that she was pregnant. The following April she told the principal that her baby was due on August 2 and asked what she should do to obtain maternity leave after the child’s arrival. The principal responded that she should submit a written request to the School Board but recommended that she wait until the Board decided whether her contract would be renewed. The Board decided on May 15 not to renew her contract. Walker gave birth on July 27, 2000. On August 3, teachers in the Elmore County school system reported to work for the 2000-01 school year.

On January 17, 2001, Ms. Walker brought suit claiming, first, that she was entitled to and was wrongly denied leave under the FMLA. The district court granted all defendants a summary judgment on this issue, concluding that Walker had no right to the requested leave. This conclusion was based on the fact that Walker was not able to qualify for FMLA leave as an “eligible employee.” An eligible employee must have been employed for at least twelve months by the employer and must have actually worked at least 1,250 hours for that employer during the previous twelve month period. The determination regarding these eligibility requirements is made as of the date the leave commences. The FMLA regulations provide that, with respect to the 1,250 hour requirement, a full-time teacher in an elementary or secondary school system or in an institution of higher education is deemed to satisfy the requirement. In this case, however, Walker was unable to satisfy the 12 month employment requirement. Even if her contract been renewed, her leave would have begun on August 2, 2000 and she would not have been employed for 12 months until several days later, August 9.

Walker’s second claim was that the Board’s nonrenewal decision was made in retaliation for her FMLA request. The district court initially held that Walker was protected against retaliation. The theory adopted by the court was that an employee who, though not yet eligible for FMLA leave, notifies the employer of an intent to take leave that will occur (at least in part) after becoming eligible, may not be subjected to retaliation for making that request. The court then, however, ruled against Walker, finding that she failed to show that the Board’s action was in fact retaliatory.

The district court’s ruling on the retaliation claim was appealed to the Eleventh Circuit Court of Appeals. Walker apparently argued that her pre-eligibility request for leave was an “attempt to exercise” an FMLA right and that such right is protected from employer interference. In response, however, the court declared there “can be no doubt that the request - made by an ineligible employee for leave that would begin when she would still have been ineligible - is not

protected by the FMLA.” *Walker v. Elmore County Board of Education*, No. 02-16509 (11th Cir. Aug. 5, 2005). Not only did Walker lack present entitlement to leave, that is, eligibility at the time she made the request, she lacked “future” entitlement, in the sense of eligibility at the projected leave start date. The court did, however, expressly reserve to be addressed “on another day” the related situation involving a pre-eligibility request for leave that is to begin *after* the employee *does become eligible*. *Id.*

As one commentator observed regarding this case, timing in this area may, indeed, be everything. When questions arise at UAH about the application of the FMLA to a particular employee, assistance from Human Resources and the Office of Counsel should be sought.

WBW/RWR