

## Supreme Judicial Court Reinstates Jury Verdict for Former Employee on FMLA Retaliation Claim

March 14, 2016

Last week's Massachusetts Supreme Judicial Court (SJC) decision in *Esler v. Sylvia-Reardon* serves as an important reminder of the potential scope of employees' rights under the federal Family and Medical Leave Act (FMLA). This case began as a trial in Superior Court, in which the jury found for plaintiff Marie Esler on her claim that Massachusetts General Hospital (MGH) retaliated against her for taking a leave pursuant to the FMLA. The trial judge nonetheless concluded that there was insufficient evidence to support the jury's verdict and entered judgment in favor of the defendants. On March 8, 2016, the SJC reversed that decision, concluding that although it was a close case, there was sufficient evidence to support the jury verdict.

Esler was employed by MGH as a hemodialysis nurse. In November and December 2008, Esler was granted FMLA leave in connection with a blood disorder. While on leave, she fell and injured her wrist while ice-skating on a vacation in New York. Because of her wrist injury, she applied for and received an extension of her FMLA leave through February 6, 2009, the end of her 12-week allowance. Esler's injury required surgery, and she was also required to wear a cast for six weeks. On January 14, 2009, Esler's cast was removed, and she began occupational therapy. Esler asked for and obtained a 10-day extension of her leave to February 16.

However, MGH did not reinstate Esler to her former position. According to the hospital, this was due to the fact that Esler was unable to perform the essential functions of the job. Specifically, Esler's physician had informed MGH in January that upon her return to work, Esler would not be able to lift more than five pounds and would need to wear a splint. MGH concluded that it could not accommodate these restrictions. Esler told her supervisor, though, that she was making good progress and the restrictions might be different upon her return to work date. On February 5, 2009, Esler's supervisor announced to her staff that a part-time nurse would be replacing Esler.

Esler brought a lawsuit, claiming that she was terminated in retaliation for taking FMLA leave. She conceded that she was unable to perform the functions of her job at either the conclusion of her twelve weeks of FMLA leave or the extension of her leave and thus that she was not entitled to reinstatement under the FMLA. She nonetheless argued that the hospital's refusal to reinstate her was in retaliation for taking a leave. A jury found in Esler's favor and awarded her \$567,500 in back pay damages and \$672,686 in front pay damages. The judge found there was insufficient evidence to support the jury's verdict and entered judgment for the defendants. The judge also found that the issue of front pay should not have been given to the jury and the evidence did not support the front pay award. On appeal, the Appeals Court agreed that the award of front pay was inappropriate, but reinstated the jury verdict. MGH then appealed the decision to the SJC.

While affirming the elimination of any front pay award, the SJC agreed with the Appeals Court that the evidence was sufficient to support the jury's verdict. It explained that Esler's statement that she was progressing plus her supervisor's announcement that Esler was being replaced before the conclusion of her leave were enough to support the verdict "even if far from compelling."

The decision in *Esler* is a reminder that an employee's inability to return to work at the conclusion of an FMLA leave does not mean that an employer can avoid any potential liability if it terminates the employee. While the hospital did not have to reinstate Esler at that time, its decision to announce her replacement before the end of her FMLA leave was enough to support the conclusion that it had a retaliatory motive. Further, although not an issue in the case, the Americans with Disabilities Act (ADA) may require an employer to grant a temporary leave of absence beyond the twelve weeks of leave under the FMLA as a reasonable accommodation.

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