

# Federal court rules on question of maternity leave

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Is an employee who requests maternity leave under the Family Medical Leave Act in advance and before being eligible protected if the actual leave period is after her FMLA eligibility begins? In a precedent-setting case, the U.S. Court of Appeals for the Eleventh Circuit recently held that such an employee is protected by the FMLA.<sup>1</sup>

Eight months into her employment with Brookdale Senior Living Communities, Kathryn Pereda notified her employer that she was pregnant and would be requesting FMLA leave in the future after the birth of her child. Pereda claimed that after learning about her pregnancy, Brookdale began harassing her, causing her stress and other complications in her pregnancy, and eventually firing her before her delivery date.

Pereda filed suit against Brookdale alleging claims for interference and retaliation under the FMLA. Under the FMLA, an employee may bring two types of claims: interference claims that his/her employer denied or otherwise interfered with the employee's substantive rights under the act; and retaliation claims that the employer discriminated against the employee because he/she engaged in an activity protected by the act.

Brookdale took the position it could not have interfered with Pereda's FMLA rights because she was not entitled to FMLA leave at the time she requested it. Further, Brookdale asserted they could not have retaliated against her since she was not eligible for FMLA leave and, therefore, could not be engaging in protected activity. The district court held in favor of Brookdale and dismissed Pereda's complaint.

## Eligible and entitled

In order to receive FMLA protections, an employee must be both "eligible" (meaning working for an employer at least 12 months and working at least 1,250 hours during the preceding

12-month period), and "entitled" to leave (meaning the employee has experienced a triggering event—in this case, the birth of a child).

At the time she requested leave, Pereda was: (i) not eligible for FMLA protection because she had not worked the required 12-month period; and (ii) not entitled to FMLA protection because she had not yet experienced a triggering event. However, the court did not dispute the fact that Pereda would indeed have been eligible and entitled to begin FMLA leave as of her delivery date had she not been terminated.

In its decision, the district court reasoned that the FMLA did not permit employees the right to request leave before becoming eligible. Because Pereda was not eligible for FMLA leave when she made her request, there was no attempt to exercise a protected right. Pereda argued that employees: (i) would fear addressing leave with their employer in expectation of the birth of a child, and (ii) would not provide their employers with adequate notice of an imminent absence in fear of retaliation.

## Reversed on appeal

The district court's ruling was appealed to the U.S. Court of Appeals for the Eleventh Circuit, which had to consider the novel issue of "whether the FMLA protects a pre-eligibility request for post-eligibility leave." The Eleventh Circuit rejected the lower court's decision as too "narrow" and reversed the decision.

The appellate court concluded that "allowing the district court's ruling to stand would violate the purposes for which the FMLA was enacted." While the circuit court affirmed that the FMLA "aims to support both employees in the process of exercising their FMLA rights and employers in planning for the absence of employees on FMLA leave," the FMLA should be executed in the genuine interest of employers "without abusing the interests of employees."

The court affirmed "an employee need not be currently exercising her rights or currently eligible for FMLA leave in order to be protected from retaliation." Although the FMLA requires an employee give advance notice of leave, the appeals court contended that to rule an employee is not protected against pre-eligibility interference creates a loophole that would allow employers freedom to retaliate against employees before they became eligible under the law.

A crucial take-away from this decision is that an employee who is not yet eligible for FMLA leave but makes an advance request for leave may have a cause of action against his or her employer when he or she is terminated in retaliation for the request before becoming eligible for FMLA leave.

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<sup>1</sup>*Pereda v. Brookdale Senior Living Cmty. Inc.*, 11 Cir. No. 10-14723, 1/10/12.



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Employment Update

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