

## OPINION

# For employer, paid admin leave not always a safe harbor

By David C. Henderson



A recent ruling from the U.S. District Court may surprise employers who order paid administrative leave for employees being

investigated. The lesson of the case is that, depending on circumstances, paid administrative leave might constitute a materially adverse employment action sufficient to prove an unlawful retaliation claim against the employer.

Judge Rya W. Zobel issued the opinion on Feb. 26 in *U.S. ex rel. Herman v. Coloplast Corp.* And although the 1st U.S. Circuit Court of Appeals itself has not addressed this paid administrative leave issue directly, five other federal circuits have ruled contrary to *Coloplast* that paid administrative leave during a disciplinary investigation had not been an adverse employment action.

Part of the reasoning in the other federal circuits has been that an employee generally does not suffer a materially adverse change in the terms and conditions of his employment when placed on paid administrative leave during an investigation, because those terms and conditions do not include a right to expect being allowed to continue with normal workplace responsibilities while serious charges are pending.

An employment claim based on unlawful retaliation typically requires the employee to prove that he was harmed by the employer's materially adverse action. Some materially adverse actions are recognized easily. They include employment terminations; demotions evidenced by a decrease in compensation, a less distinguished title, a material loss of benefits, or significantly reduced responsibilities; and other changes unique to a particular situation.

But placing an employee on paid administrative leave has been seen by many employers, as well as many

courts, as a relatively risk-free way to proceed. The theory has been that even though the employee may have engaged in some type of protected activity (such as, e.g., complaining of unlawful discrimination), the employer cannot be liable for unlawful retaliation because paid administrative leave is not a materially adverse change in the employee's circumstances.

For example, as the U.S. Supreme Court has explained, an employee complaining of unlawful discrimination under Title VII generally is protected

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"not from all retaliation, but from retaliation that produces an injury or harm," and to prevail on a retaliation claim he therefore "must show that a reasonable employee would have found the challenged action materially adverse," meaning that it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2415-16 (2006).

*Coloplast* involved the anti-retaliation provision of the False Claims Act. That provision shields employees who engage in protected FCA conduct from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment."

The plaintiff in *Coloplast* had been one of the defendant's key account managers, or KAMs. The plaintiff also had engaged in protected activity under the FCA by filing a qui tam action alleging that her employer had engaged in fraudulent activity. And according to the employee, an unlawful retaliation claim was warranted as well, because her employer took various

administrative actions against her during its investigation of a third-party's demand that she be removed from one of her accounts.

As the judge noted, those administrative actions, depending on one's viewpoint, could be labeled either a "suspension" or a "paid administrative leave." The key dispute was whether the interim administrative actions had been "materially adverse" and therefore sufficient to constitute retaliation under the FCA.

A major lesson in *Coloplast* thus

turned out to be one that we have seen many times in other cases — that is, mere labels (e.g., "suspension" or "paid administrative leave") do not determine liability.

And even though a particular administrative action may be intended as a "no harm to the employee, therefore no exposure by the employer" measure, a more nuanced analysis is required that will go beyond the labels to determine the merits of an unlawful retaliation claim.

It was, for example, obvious in *Coloplast* that the employer had made an effort to maintain many of the positive aspects of the status quo during the employee's administrative leave. The employer had advised in advance that salary and commission would be paid according to the regular processes; guaranteed a minimum commission payment of 100 percent of the eligible target incentive for each month; and promised full eligibility for enrolled benefits would continue.

And, in fact, the employer had paid the employee \$80,000 in commissions while on leave whereas the average KAM commission had been less than

\$68,000 during the same period.

The employer also had given the employee a raise during her leave; allowed continued use of the company-issued vehicle and fuel card; allowed accrual of paid time off; continued making contributions to the employee's 401(k); and maintained health, disability and life insurance benefits.

But those non-adverse circumstances, by themselves, were not the end of the analysis. The judge also found that, while on leave, the employee had been prohibited from performing any services on behalf of her employer or having any contact with her employer's customers or employees relating to her accounts or the employer's business. Those prohibitions, the employee said, showed that she "could not grow herself professionally."

Further, the employee also had lost opportunities to attend a "President's Circle trip" and earn commissions above the 100 percent quota level.

As a result, Zobel denied the employer's motion for summary judgment on the unlawful retaliation claim. Her rationale was that a jury could conclude that a reasonable employee in the plaintiff's position might be dissuaded from engaging in protected activity by the threat of such materially adverse changes in his circumstances at work.

The bottom line for employers thus is clear: Because paid administrative leave can have many ramifications, it may not always be a safe harbor for an employer during an employee investigation.

When the employee has engaged in protected activity, all possible ramifications of the administrative leave have to be scrutinized in advance, because any materially adverse ramification may be claimed by the employee as evidence of unlawful retaliation. **MLW**

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