Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FLSA Case Shows Talking To New Moms May Curb Legal Woes

By **Abigail Rubenstein**

Law360, New York (January 07, 2013, 8:51 PM ET) -- A recent appeals court decision that interpreted the breastfeeding provisions of the Fair Labor Standards Act for the first time found in favor of the employer, but attorneys say the ruling nevertheless underscores the importance of communication with employees returning to the workforce after giving birth.

In the first appeals decision interpreting the Affordable Care Act's amendments to the FLSA, the Eleventh Circuit on Dec. 26 ruled that Roche Surety & Casualty Co. had not violated the provisions, which require employers to provide nonexempt workers with reasonable break time and a private place that is not a bathroom to express breast milk for one year after the birth of a child.

The Eleventh Circuit upheld a Florida federal court's ruling that although former employee Danielle Miller accused Roche of failing to provide her with a time and place to express milk and of illegally terminating her after she requested them, Miller's own testimony at trial showed that she had actually been provided with both break time and a place to express milk during the workday.

“I think that the court was correct that there was not a violation of the law, but, that said, the case provides important guidance for employers because this was costly and protracted litigation that may have been easily avoided by better communication,” Sarah Bouchard of Morgan Lewis & Bockius LLP told Law360.

Although Miller maintained that she was not given break time to express milk, the trial testimony showed that she was free to take breaks that were neither counted nor timed and that she was never criticized for taking breaks.

And while she claimed not to have been given a private place to express milk, vacant, nearby offices would have been available to her and she instead preferred to use her own office, taping folders to the windows to facilitate privacy, the appeals court said. According to the appeals court, Miller never told her employer that she was expressing breast milk in her office or asked for a different location.

As such, the Eleventh Circuit concluded that Miller's testimony showed that she had break time and a place to express milk and that Roche therefore had fulfilled its obligations under the FLSA as a matter of law.

“The key to the employer’s success in defense of the lawsuit was communicating these reasonable accommodations upfront,” Benjamin Sharkey of Jackson Lewis LLP said.

Although both the defense and the court's decision turned on the specific facts of the case, attorneys say it holds a broader lesson for employers struggling with how to comply with the new FLSA provisions.

“The decision provides helpful guidance to Florida employers in transitioning mothers who to return to work following the birth of a child,” Sharkey said. “Effective communication with the employee to ensure that reasonable breaks and a private place are provided is essential.”

And while Roche ultimately triumphed both at trial and before the Eleventh Circuit, the case shows employers the potential dangers that exist when such communication is absent, according to Bouchard.

“What you saw in the briefs and at the trial is that there were probably some potential insensitivities and missteps that could have been avoided if both parties had sat down together when the employee was being reintegrated into the workplace to see what the plan was and to be proactive in obtaining a space that was private and understanding her needs,” Bouchard said.

Such proactive steps could keep an employer from having to face the kind of suit Miller brought in the first place, she said.

The appeals court's dismissal of Miller's claim that Roche had violated the FLSA's anti-retaliation provision by firing her after she asked for time and a place to pump breast milk at the office also hinged on what communication did and did not take place between Miller and her employer, with the court finding that Miller's communications to Roche were not sufficient to trigger the provision.

The court held that an email Miller sent asking a supervisor for a time and place to express breast milk did not constitute a complaint sufficient to alert Roche that she was asserting rights provided by the FLSA and calling for the protection of those rights, as before sending the email, Miller had never asked for, or been denied, a time or place to express breast milk.

Unlike some other employment laws, the FLSA does not protect workers' requests for future compliance but instead only protects employees' complaints of past violations, the court said.

The Eleventh Circuit further rejected Miller's claim that because Roche monitored her emails, other emails sent to friends and family that did invoke the statute were sufficient to provide the employer with notice that a complaint had been filed.

The court's discussion of what constitutes a complaint in the FLSA context could provide guidance to employers on communication even outside of the law's breastfeeding rules, according to Steven Pockrass of Ogletree Deakins Nash Smoak & Stewart PC.

“The Eleventh Circuit’s determination that a prospective request for future compliance does not constitute a 'complaint' for purposes of the FLSA makes good sense and is consistent with the U.S. Supreme Court’s 2011 decision in Kasten v. St. Gobain Performance Plastics Corp., which requires that an employer be given fair notice that the employee is lodging an FLSA complaint,” he said. “If a communication does not actually 'complain' about something, then it should not be viewed as a 'complaint.'”

When it comes to the breastfeeding provisions, however, the conclusion that a prospective request is not protected could mean that it is time for Congress to step in and make some changes, since accomodations for nursing mothers are different from the denial of overtime and minimum wages that the FLSA generally protects against, Miller's attorney Luis A. Cabassa told Law360.

“This might be an opportunity for Congress to clarify the law to ensure that individuals like Ms. Miller are afforded protection similar to the employees under the [Family and Medical Leave Act] and the [Americans With Disabilities Act] who assert their rights,” Cabassa said.

He said the decision whether Miller would appeal her case further had not yet been made.

An attorney for Roche did not immediately respond to a request for comment Monday.

Miller is represented by Luis A. Cabassa and David H. Browne of Wenzel Fenton Cabassa PA.

Roche is represented by Thomas M. Gonzalez of Thompson Sizemore Gonzalez & Hearing PA.

The case is Danielle Miller v. Roche Surety & Casualty Co. et al., case number 12-10259, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Elizabeth Bowen and Richard McVay.