

# Eleventh Circuit Deepens Circuit Split Over Causation Standard for FMLA Retaliation Claims

**Law and the Workplace** on December 26, 2023

On December 13, 2023, an Eleventh Circuit panel [firmly established “but-for” causation](#) as the Circuit’s causation standard for Family and Medical Leave Act (FMLA) retaliation claims. Courts across the nation have adopted different standards, with the Eleventh Circuit decision only further deepening the circuit split on the topic.

## **Background**

In *Lapham v. Walgreen Co.*, No. 21-10491 (11th Cir. Dec. 13, 2023), an employee of Walgreens filed suit against the corporation, alleging unlawful termination based on retaliation for her FMLA leave request. The plaintiff frequently used intermittent FMLA leave to care for her son, who was diagnosed with two forms of epilepsy. The company asserted that, irrespective of her leave requests, the plaintiff continually had performance issues during her almost ten years of employment with the company. Her annual performance reviews varied, from not meeting expectations to partially meeting expectations. The company further asserted that plaintiff exhibited other performance issues, such as actively disregarding instructions, lying to management, and sabotaging the store. At one point, the plaintiff was placed on a 60-Day Performance Improvement Plan (“PIP”). About a month after being placed on the PIP, she requested intermittent FMLA leave spanning a year-long period. While the leave request was still pending, the plaintiff’s manager terminated her on the stated basis of insubordination and dishonesty.

The plaintiff filed suit against Walgreens in state court, and Walgreens timely removed the case to the Middle District of Florida. The district court originally denied Walgreens’ summary judgment motion and ruled that plaintiff’s FMLA retaliation claim should go to trial because, applying the “motivating factor” standard, the plaintiff had presented sufficient evidence for a jury to find that her FMLA leave request was at least a motivating factor in the company’s termination decision.

Walgreens filed a motion for reconsideration, arguing that the “but-for” causation standard – and not the motivating factor standard – applies to FMLA retaliation claims. On reconsideration, the district court agreed with Walgreens that but-for causation is the proper causation standard for FMLA retaliation claims in light of the Supreme Court’s reasoning in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), in which the Court held that the proper standard of causation for retaliation claims under Title VII of the Civil Rights Act of 1964 is but-for causation based on 42 U.S.C. § 2000e-3(a)’s use of the word “because.” Applying the but-for causation standard to the present matter, the district court held that the plaintiff could not prove that, but-for her FMLA leave request, she would not have been terminated.

On appeal, the plaintiff argued that the motivating factor standard is used in other circuits and consistent with Department of Labor regulations. The Eleventh Circuit panel found no merit in her argument, but instead agreed with the district court in finding common ground in the FMLA retaliation provision and in Title VII’s retaliation clause, as per *Nassar*. The panel concluded that the congressional intent in the FMLA’s retaliation provision requires the application of but-for causation.

### **Takeaways**

Employees filing FMLA retaliation claims in Eleventh Circuit courts (Florida, Georgia, or Alabama) now have a heightened burden of proof under the but-for causation standard. This higher burden of proof may in turn result in a decrease in the number of FMLA retaliation claims that survive summary judgment in the circuit.

Across the United States, circuit courts have varied significantly on which causation standard applies to FMLA retaliation claims. In an unpublished opinion in *Sharp v. Profitt*, 674 F. App’x 440 (6th Cir. 2016), the [Sixth Circuit](#) tiptoed around the issue but stated that the but-for standard “seems” correct. The [Fourth Circuit](#) has also applied the but-for causation standard in this context. On the other hand, the [Second](#) and [Third](#) Circuits have looked to the motivating factor standard, whereas [other circuits](#) have expressed uncertainty as to which causation standard applies. Due to this ever-growing circuit split, it is possible that the Supreme Court may take up the issue in the near future.

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