A Timely Analysis of Legal Developments

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The Third Circuit Provides Guidance on Thorny FMLA and ADA Issues

By Martha Keon and Sarah Powenski

The United States Court of Appeals for the Third Circuit's recent decision in *Erdman v. Nationwide Insurance Co.*[1] No. 07-3796 (Sept. 23, 2009) provides much-needed guidance to employers on several Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) issues including : (1) how to analyze FMLA hours eligibility when the employee claims off-the-clock work, (2) what is considered a protected activity for purposes of an FMLA retaliation claim, and (3) how the ADA applies to employees who request leave to care for a disabled family member.

Factual Background

Nancy Erdman was a long-term employee of Nationwide Insurance Company. In 1998, she began working part-time in order to care for her disabled daughter. When she worked extra hours outside of the office, her supervisor allowed her to take compensatory time off ("comp time"). During 2002-2003, Erdman alleged that the following events occurred:

- In early 2002, Erdman switched to a four-day schedule, was reclassified as nonexempt, and her supervisor told her to "put in the hours that . . . you're supposed to put in and nothing more than that."
- In September 2002, Erdman e-mailed her new supervisor, asking if she could still work extra hours in exchange for comp time. Her supervisor did not respond.
- In January 2003, Erdman appeared to have exceeded her allotment of vacation days, but she explained that her days off had been covered by comp time, not vacation time. Her explanation was accepted.
- In late January 2003, Erdman was told that her overtime was not approved, and she should stop doing fieldwork.
- In early February 2003, Erdman was told that she could not work extra hours in exchange for comp time. Shortly thereafter, the company told Erdman that her part-time position would be eliminated, but she could work full time.

- On April 14, 2003, Erdman returned to a fulltime schedule, and Nationwide claimed that she was disgruntled and was difficult in the office.
- On April 21, 2003, after being told that she could not take the month of August off as vacation (she typically took this month off to prepare her daughter for school), Erdman submitted a request for FMLA leave for July and August 2003. She was told by the Human Resources representative that FMLA probably would not be a problem.
- On May 9, 2003, Erdman's employment was terminated after she used profanity during a phone conversation that was monitored for quality control purposes. This conversation occurred two months before she was to take FMLA leave.

Erdman's Claims Are Dismissed on Summary Judgment

Erdman sued Nationwide, claiming FMLA retaliation and disability discrimination based on her association with her daughter who was disabled. The district court dismissed the case on summary judgment. It ruled that her FMLA retaliation claim was defective because she failed to meet the 1,250 hour eligibility requirement.[2] The court noted that in determining eligibility, hours worked beyond an employee's regular schedule or off site count if the employer knew or had reason to know about them, citing 29 C.F.R. § 785.11. The court concluded that Nationwide only had constructive knowledge of a portion of Erdman's comp time – from September 2002 (when Erdman e-mailed her new supervisor asking if she could continue to earn comp time) until January 2003 (when she was told not to work overtime and to stop doing fieldwork). The district court rejected Erdman's argument that Nationwide had constructive knowledge dating back to early 2002, reasoning that Erdman had been told at that time to only put in the hours that she was supposed to put in and nothing more. Including only this portion of her comp time, the court found that Erdman was 28.75 hours short of the 1,250-hour requirement, and her FMLA retaliation claim thus failed. The court also dismissed her ADA claim, holding that she had failed to demonstrate that she had been discriminated against based on her association with a disabled individual. Erdman appealed.

The FMLA Retaliation Claim on Appeal

On appeal, the Third Circuit reversed the dismissal of Erdman's FMLA retaliation claim.

As to FMLA hours eligibility,[3] the court held that the time period during which Nationwide could have had constructive knowledge of Erdman's comp time was a disputed issue of material fact that could not be resolved on summary judgment. The court observed that constructive knowledge could date back to early 2002, because telling Erdman at that time that she was to "put in the hours that . . . you're supposed to put in and nothing more than that" did not rule out working off the clock and accruing comp time (rather than being paid overtime). Similarly, the court noted that constructive knowledge could extend to as late as February 10, 2003, when Nationwide explicitly told her that no comp time was allowed. The court reasoned that telling Erdman in late January 2003 that her overtime was not approved did not rule out the possibility that it was continuing to allow her to work off the clock and to accrue comp time. The court concluded that were a jury to reach this conclusion, Erdman would exceed the 1,250-hour requirement by 32.25 hours.

The court also rejected Nationwide's effort to disclaim that it had constructive knowledge based on the change in Erdman's supervisors, ruling that the former supervisor's knowledge was imputed to the company. The court addressed Erdman's argument that her superior productivity had also put the company on notice of her extra hours, holding that while it was conceivable that "stellar productivity may be probative of an employer's constructive knowledge of extra work hours in rare case[s]," in this case, any extra hours were offset by paid vacation hours at some point in the future, so there was no constructive notice of extra hours worked.

In addition, the court rejected Nationwide's argument that Erdman could not state a claim for FMLA retaliation because she had never taken FMLA leave. The court reasoned that "it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins." The court discounted Nationwide's argument that a prior Third Circuit decision requires an employee to have taken FMLA leave,[4] by pointing out that there are three possible sources for

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an FMLA retaliation claim – two statutory provisions and one regulation,[5] and only the regulation requires that the employee actually take FMLA leave. The court concluded that the key inquiry is whether the employee had invoked his or her FMLA rights, and that "firing an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee.[6]

ADA Association Claim

The court next addressed Erdman's claim, which Nationwide had violated the ADA that prohibits, among other things, "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."[7] The court observed that the ADA requires employers to provide reasonable accommodations to the disabled, not to relatives of the disabled, and that the question is whether Nationwide terminated Erdman's employment because of her daughter's disability – not because of the need to take time off to care for her:

> Under the association provision, there is a material distinction between firing an employee because of a relative's disability and firing an employee because of the need to take time off to care for the relative. The statute clearly refers to adverse employment actions motivated by the "known disability of an individual with whom an employee associates, as opposed to actions occasioned by the association. Therefore, Erdman must show that Nationwide was motivated by [her daughter's] disability rather than by Erdman's stated intention to miss work; in other words, that she would not have been fired if she had requested time off for a different reason.

The court distinguished the line of association cases in which an employee was allegedly fired based on the employer's fears that the employee might miss work to care for a disabled relative even though he or she had not taken or requested time off, reasoning that "a decision motivated by unfounded stereotypes or assumptions about the need to care for a disabled person may be fairly construed as 'because of the . . . disability itself.'" The court concluded that there was no dispute in the record that Erdman had been employed for years after her daughter was born with a disability. "The most Erdman can hope to show is that she was fired for requesting time off to care for [her daughter] (the basis for her FMLA claim), not because of unfounded stereotypes or assumptions on Nationwide's part about care required by disabled persons." The court thus affirmed the dismissal of her ADA claim.

Lessons Learned

This decision is a reminder for employers to:

- Have a clear policy prohibiting off-the-clock work that supervisors are trained to enforce.
- Respond promptly to employee inquiries regarding what time counts toward hours worked.
- Remember that requests for FMLA leave can form the basis for an FMLA retaliation claim, even if leave is not taken.
- Make sure that adverse employment decisions are based on legitimate business reasons that are documented and applied consistently to all employees who are similarly situated, including employees outside of a protected class.

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[1] __ F.3d __, No. 07-3796, 2009 WL 3018116 (3d Cir. Sept. 23, 2009).

[2] Erdman did not make the alternative argument that establishing eligibility is not required for an FMLA retaliation claim.

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[3] Erdman waived the argument that eligibility is not required for an FMLA retaliation claim. Id. at *6, n.2.

[4] *Conoshenti v. Public Serv. Elec. & Gas Co*., 364 F.3d 135, 146 (3d Cir. 2004).

[5] 29 U.S.C. § 2615(a) contains two subsections: one prohibiting interference, restraint or denial of the exercise or attempt to exercise FMLA rights, and the other prohibiting discharge or other discrimination against those who oppose practices made unlawful by the FMLA. The regulation prohibits employers from "discriminating against employees or prospective employees who have used FMLA leave." 29 C.F.R. § 825.220(c).

[6] The court rejected Erdman's alternative argument that she was eligible for FMLA leave even if she failed to meet the 1,250-hour eligibility requirement under the version of 29 C.F.R. § 825.110(d) then in effect. The court relied on decisions from other circuits invalidating the regulation as expanding FMLA eligibility beyond the statutory language based on the removal of the remedial eligibility provision from 29 C.F.R. § 825.110 following the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81 (2002) (invalidating a similar remedial eligibility provision contained in 29 C.F.R. § 825.700).

[7] 42 U.S.C. § 12112(b)(4).

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