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EXPERT ANALYSIS

The 3rd Circuit Tells Employers That Saying 'It's in the Mail' Does Not Prove Receipt of FMLA Notice

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In early August the 3rd U.S. Circuit Court of Appeals ruled that an employer may not rely on "the mailbox rule" to prove that the employer provided an employee with notice of his or her rights under the Family and Medical Leave Act. The ruling appears to impose a new obligation on employers to prove that they provided the required FMLA notice of rights to every employee by a traceable means rather than first-class mail.

In *Lupyan v. Corinthian Colleges Inc.*, the 3rd Circuit reversed an order granting summary judgment to the company on an employee's FMLA interference claim simply because she denied ever receiving the FMLA notice the company said it mailed to her.[1] This ruling will have a significant impact on the way employers in the 3rd Circuit communicate with employees regarding their FMLA rights.

PLAINTIFF'S INTERFERENCE CLAIM AND THE TRIAL COURT'S RULINGS

Lisa Lupyan worked for Corinthian Colleges Inc. In December 2007 she requested a personal leave of absence due to depression. Lupyan's manager suggested that she apply for short-term disability, and she returned a Labor Department "certification of health provider" form that month, indicating she could return to work April 1, 2008, after her 12-week FMLA leave expired. Relying on this form, CCI determined that she was eligible for FMLA leave.

When Lupyan met with CCI, she was instructed to check the FMLA box on her request-for-leave form. The company did not discuss her FMLA rights at this meeting or the fact that her requested leave would exceed the 12 weeks of FMLA-protected leave and did not give her the required FMLA designation form and notice of her rights under the FMLA.[2]

Instead, CCI stated that it mailed Lupyan a letter later that afternoon in which it advised her that her leave was designated as FMLA leave and provided her with the notice of her rights under the FMLA. Lupyan denied receiving the letter.

Two weeks after her 12 weeks of FMLA leave expired, Lupyan notified CCI that she would be able to return to work with restrictions. Because CCI could not accommodate her restrictions, she was not permitted to return to work. By the time she provided a release to return to work without restrictions four and a half months after her leave began, CCI informed her that because of low student enrollment and her failure to return to work following her 12 weeks of FMLA-protected leave, her employment was being terminated.

Lupyan then sued CCI in the U.S. District Court for the Western District of Pennsylvania, alleging its failure to give her notice interfered with her FMLA rights.

The trial court originally denied CCI's motion for summary judgment on that claim, finding a question of fact as to whether Lupyan had received the required FMLA notice.

CCI then submitted an amended motion for summary judgment in which it raised the "mailbox rule," a traditional legal theory that allows for the "presumption of receipt" if one can show a letter was either mailed or given to the postal carrier. CCI submitted affidavits describing the timing and method of mailing the notice that Lupyan claimed to have never received. After reviewing this information, the trial court granted summary judgment to the company, relying on the mailbox rule.[3]

EMPLOYERS MUST PROVE THEY PROVIDED FMLA NOTICES

The 3rd Circuit overruled the trial court, holding that the mailbox rule did not create a conclusive presumption of Lupyan's receipt of the FMLA notice but rather created only a rebuttable "inference of fact." Lupyan's testimony that she never received the FMLA designation letter was sufficient to overcome that inference for the purposes of summary judgment.

Taking specific aim at the company for raising the presumption of receipt with "self-serving affidavits," provided four years after the plaintiff's termination, the 3rd Circuit took issue with the fact that the FMLA letter was sent only by "regular mail," not by certified mail or another means that would have created a receipt a tracking number, or required a signature.

Given that there was no direct evidence of receipt or non-receipt, the appeals court determined it was unfair to make the plaintiff "prove a negative." As such, the court found that where an employer uses only first-class mail to send an FMLA notice, requiring more than a sworn statement by the plaintiff to dispute receipt would elevate the weak legal presumption intended by the mailbox rule to a conclusive presumption.

The ruling will have a significant impact on the way employers in the 3rd Circuit communicate with employees regarding their FMLA rights.

In this age of computerized communication and handheld devices, it is certainly not expecting too much to require businesses that wish to avoid a material dispute about the receipt of a letter to use some form of mailing that includes verifiable receipt when mailing something as important as a legally mandated notice. The negligible cost and inconvenience of doing so is dwarfed by the practical consequences and potential unfairness of simply relying on business practices in the sender's mailroom.

The court held that Lupyan's denial of receipt of the letter was enough to create a genuine issue of material fact preventing the entry of summary judgment on her FMLA interference claim and remanded the case to the trial court to determine whether she received notice that her leave fell under the FMLA.

In its ruling, the 3rd Circuit also concluded Lupyan had presented sufficient evidence to show she may have been prejudiced by the company's alleged failure to provide her with the notice of her FMLA rights. The court relied primarily on her claim that she would have structured her leave differently had she known she only had 12 weeks of protected leave. In addition, it noted that the note that Lupyan's psychiatrist provided after she was off work for 14 weeks did not clearly state that she was unable to return to work then or after 12 weeks; it only stated that she would benefit from certain restrictions on her work.

This part of the ruling also is troubling for employers as courts generally have required that a plaintiff demonstrate he or she has been harmed by the employer's failure to provide notice of an entitlement to FMLA leave.

Here, as with its ruling on the mailbox rule, the 3rd Circuit found that a simple statement to the contrary by a plaintiff is sufficient for a claim to survive a motion for summary judgment even where there is no evidence that the plaintiff could have returned to work earlier.

Whether this part of the court's ruling will be limited to the particular facts of this case or signals a willingness of the 3rd Circuit to loosen the requirement that an employee must show prejudice from not being informed of his or her FMLA rights to bring a claim will remain to be seen.

IMPACT ON EMPLOYERS

The *Lupyan* ruling is likely going to require many employers operating in the 3rd Circuit to change their normal FMLA procedures if they use regular mail to send required FMLA notices.[4]

The court's ruling seemingly ignores the practical reality that many employees who go out on FMLA leave are not available to meet in person to receive the required written notification of their rights under the FMLA. The court has essentially created the extra burden — one it deems "negligible" — of requiring some form of tracking or certification of delivery of FMLA notices for employers to obtain summary judgment.

Under the 3rd Circuit's ruling, an employer's motion for summary judgment on the issue of notice will likely always be denied if an employee simply denies receiving the letter.

To counter this ruling, when an employer is required to send an FMLA notice to an employee, it should do so in a way that is traceable. While the safest bet would be to require signature (*e.g.*, certified mail), it would also likely be acceptable to send FMLA notices through a delivery service with tracking numbers (*e.g.*, overnight or two-day delivery services) or through email with an electronic receipt that an employer could use to prove delivery.

This ruling also provides employers with a reminder of the importance of designating FMLA-qualifying leave and ensuring that they provide employees with all required notices in a timely fashion, especially where an employee's leave is expected to exceed 12 weeks of FMLA-protected leave and warrants consideration of whether additional leave may be required by the Americans with Disabilities Act.

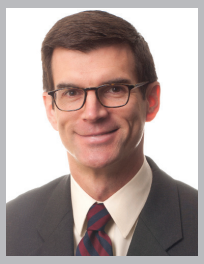
NOTES

[1] No. 13-1843, 2014 WL 3824309 (3d Cir. Aug. 5, 2014).

[2] The FMLA requires employers to provide both general notices of employees' rights under the FMLA and employee-specific notices of rights and obligations when an employee begins using FMLA leave. *See* 29 C.F.R. § 825.300.

[3] *Lupyan v. Corinthian Colls. Inc.,* 2011 WL 4017960 (W.D. Pa. Sept. 8, 2011).

[4] The 3rd Circuit covers Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands.



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