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FIGHTING FMLA CLAIMS: STRENGTHEN YOUR LEAVE PROTOCOL NOW

By Deborah H. Share, Esq.

A more thorough FMLA leave protocol has been shown to be a potent defense to the legal claims of an employee terminated for failure to return from leave. In reversing the trial court, the Third Circuit recently ruled that an employee who took FMLA leave, and was subsequently terminated, was potentially provided insufficient notice of her FMLA rights and obligations. *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314 (3d Cir. 2014).

FACTS

Lisa Lupyan was an instructor with Corinthian Colleges, Inc. ("CCI") for approximately three years. After a doctor certified Lupyan as having a mental health condition that required time away from work, Lupyan met with CCI's Supervisor of Administration to formalize her leave. Although the Supervisor of Administration had Lupyan initial a box marked "Family Medical Leave" on the Request for Leave form, and CCI's human resources department determined that her leave was to be Family and Medical Leave Act ("FMLA") leave, she did not raise with Lupyan her rights under the FMLA during their meeting.

CCI contends that it sent Lupyan written notification of her FMLA rights and obligations on the same day as the meeting. Lupyan submits that she never received the letter and was not aware that she was on FMLA leave. At a point in time after her FMLA leave time had expired,

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Lupyan received a release from her medical provider to return to work and notified CCI. It was at this time that CCI terminated her, which CCI stated was due both to low student enrollment and to Lupyan's failure to return to work in the timeframe required for FMLA protection.

Lupyan brought FMLA claims against CCI in federal court, for interference with her FMLA rights by failing to provide proper FMLA notice under 29 U.S.C. 2615(a)(1), and for retaliation for her taking FMLA leave under 29 U.S.C. 2615(a)(2). The District Court granted summary judgment in favor of CCI on both counts, and Lupyan appealed to the Third Circuit.

ANALYSIS AND OUTCOME

The Third Circuit determined that genuine issues of fact remained, warranting reversal of both of CCI's positive summary judgment outcomes.

With regard to Lupyan's interference claim, the Third Circuit ruled that CCI may have provided insufficient notice to Lupyan. The FMLA requires that employers provide both general and individual notice to employees regarding FMLA leave rights and obligations. General notice is satisfied by posting notice and including it in an employee handbook. Detailed individual notice is required when a specific employee goes out on leave covered by the FMLA.

Although general notice of FMLA rights and obligations was posted in CCI's employee handbook and may have satisfied CCI's general notice requirement, the Third Circuit stated that there were factual disputes regarding whether Lupyan had been individually informed of her FMLA rights and obligations sufficiently. The analysis largely concerned the "mailbox rule," which states that a letter properly delivered to the postal service is presumed to have reached the intended recipient. This presumption is weakened, however, when the letter is sent via a method that generates no proof of delivery or receipt. Although the sender can provide sworn statements that such mailing is part of a business's standard practices, the presumption of delivery will still be weaker than when delivery can be proven via direct evidence.

Here, the Third Circuit stated that, because CCI had no direct proof of delivery, the presumption under the mailbox rule was weaker. In addition, the sworn statements of CCI employees regarding CCI's customary business practices were made years after this particular letter was sent, and, according to the appellate court, were self-serving. Because receipt of the letter was an important contested issue in this matter, the Third Circuit ruled that Lupyan's single statement denying receipt of the letter was sufficient to overcome the mailbox rule's presumption.

The Third Circuit emphasized the fact that CCI easily could have avoided this issue, "[i]n this

age of computerized communications and handheld devices," where "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 included verifiable receipt when mailing something as important as a legally mandated notice." *Lupyan*, at 322. In a footnote, the Third Circuit further commented on the presence of an unsigned Acknowledgment of Receipt that was placed with a copy of the notice letter in Lupyan's personnel file. Although it was noted that the FMLA does not require such signed acknowledgment, the very fact that such an unsigned form existed was evidence for a factfinder to consider.

In addition to inadequate notice, to sustain a claim, an employee must be prejudiced in some way by the employer's failure. This means the employee must have suffered some injury, that was a consequence of being unable to assess or structure his leave in a meaningful way. Here, Lupyan claimed she might have structured her leave differently if she had been provided notice of her FMLA rights and obligations. The Third Circuit ruled that such credibility issues cannot be decided on a summary judgment motion.

Lupyan also challenged her termination, as an adverse employment decision made in retaliation for taking FMLA leave. CCI's attempt to provide a legitimate, non-discriminatory reason for terminating Lupyan was found inconclusive. Although CCI claimed low enrollment numbers were to blame for Lupyan's termination, there was evidence that CCI typically did not lay off instructors simply because of low enrollment. Additionally, a CCI witness claimed that there was a hiring freeze. However, Lupyan already was employed, and a new instructor was hired soon after the alleged hiring freeze was in effect. Such disputed fact issues led the Third Circuit to overturn the trial court's ruling in favor of CCI.

FILL IN THE GAPS OF YOUR FMLA LEAVE PROTOCOL

The most important takeaway from this case is that employers should shore up their FMLA protocols now. Employers should not leave holes in the standard procedure that future plaintiffs can use to claim interference with their FMLA rights. Specifically, employers should:

- Provide legally required written notice to employees going out on FMLA leave
 - If mailing the written notice, do so in a manner that can be tracked and where receipt requires acknowledgment, such as by certified mail
 - Although not legally required, it may be useful to document acknowledgment that the employee has received notice through a written form; if such a form is created, however, ensure it is consistently signed when the employee receives notice
- Specifically discuss what FMLA leave is when meeting with an employee, and explain that their leave is in fact FMLA leave
 - Set out the exact duration of leave permitted under the FMLA
 - Describe the legal ramifications of a failure to return within the FMLA timeline
 - Do not make assumptions about an employee's understanding of FMLA leave,

simply because he or she checked off an FMLA leave box on a form or any other rote sign-off

- Consider keeping a log of all notices that are required to be sent to employees regarding issues as important and legally grounded as the FMLA
 - Make it a standard business practice to keep track of each notice that goes out.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.