Proskauer

Trends in New Jersey Employment Law

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Third Circuit Renders Important Decisions on FMLA and FLSA

In recent weeks, the U.S. Court of Appeals for the Third Circuit rendered a trio of significant employment law decisions.

- *Lupyan v. Corinthian Colleges Inc.*, No. 13-1843, 2014 WL 3824309 (3d Cir. Aug. 5, 2014): The court held that, to establish that an employee received the written notice of rights required under the Family and Medical Leave Act (FMLA), the employer could not merely furnish affidavits from mailroom or HR personnel attesting that the notice had been mailed several years earlier.
- *Budhun v. Reading Hospital and Medical Center*, No. 11–4625, 2014 WL 4211116 (3d Cir. Aug. 27, 2014): The court for the first time addressed what "constitutes invocation of one's right to return to work" under the FMLA and, in so doing, denied the employer's motion for summary judgment where H.R. "seemingly overruled" a physician's conclusion that the plaintiff could return to work without restrictions.
- *Davis v. Abington Memorial Hospital*, Nos. 12-3512, 12-3514, 12-3515, 12-3521, 12-3522, 2014 WL 4198903 (3d Cir. Aug. 26, 2014): The court clarified the "level of detail" necessary to plead a claim for unpaid overtime under the Fair Labor Standards Act (FLSA), adopting the "middle-ground approach taken by the Court of Appeals for the Second Circuit" that "a plaintiff must sufficiently allege forty hours of work in a given workweek as well as some uncompensated time in excess of forty hours."

This newsletter summarizes these three decisions and discusses their implications for New Jersey employers.

Lupyan v. Corinthian Colleges Inc.

Background

The plaintiff, Lisa Lupyan, worked for the defendant, Corinthian Colleges, Inc. (CCI) as an instructor. In late 2007, Lupyan requested "personal leave." Lupyan subsequently met with her doctor and received a standard certification of a medical condition. Based on this documentation, CCI's HR department found Lupyan eligible for leave under the FMLA, not personal leave.

CCI's supervisor of administration allegedly informed Lupyan that she should initial the box marked "Family Medical Leave" on her request for leave form. Although it is undisputed that her FMLA rights were not discussed during the meeting, CCI allegedly mailed Lupyan a letter that: (i) stated the company had designated her request for leave as FMLA and (ii) further explained her rights under the statute (hereinafter, "Letter"). Lupyan claimed, however, that she did not receive the Letter.

When she attempted to return to CCI in April 2008, Lupyan was informed that her employment had been terminated due to low student enrollment and for her failure to return to work before the 12 weeks of FMLA-allotted leave expired. Lupyan maintained that this was the first she had heard of being placed on FMLA leave.

Lupyan later filed suit, alleging, among other things, that CCI interfered with her FMLA rights by purportedly failing to provide her with notice that her leave fell under the statute. The district court granted CCI's motion for summary judgment but, for the reasons set forth below, the Third Circuit reversed.

Analysis

Regulations require that employers provide employees with individual written notice that an absence falls under the FMLA.[1] 29 C.F.R. 825.208. To show that Lupyan received such notice (*i.e.*, the Letter), CCI relied on the "mailbox rule" that if a letter "properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed . . . that it reached its destination at the regular time, and was received by the person to whom it was addressed." CCI submitted affidavits from its mailroom supervisor and HR coordinator to help establish the presumption that the Letter had been placed in the outgoing mail bin.

The Third Circuit stressed, however, that "CCI provided no corroborating evidence that Lupyan received the Letter." It specifically emphasized that "[t]he Letter was not sent by registered or certified mail, nor did CCI request a return receipt or use any of the now common ways of assigning a tracking number to the Letter." The court held that, on summary judgment, "evidence sufficient to nullify the presumption of receipt under the mailbox rule may consist solely of the addressee's positive denial of receipt," and that "self-serving affidavits signed nearly four years after the alleged mailing date" could not overcome Lupyan's denial of receipt.

The court went on to conclude that "[i]n this age of computerized communications 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."

Takeaway

Given the Third Circuit's decision, employers should make every effort to establish receipt when mailing employees a notice of rights required under the FMLA. Absent definitive guidance from the court, ways that employers can demonstrate proof of receipt include requiring signature through certified mail, by means of a delivery service with tracking numbers (such as overnight or two-day delivery services), and/or by an electronic medium with electronic receipt. Moreover, in light of the Third Circuit's view that the "mailbox rule" is "simply an evidentiary presumption," not an "immutable legal command," employers should take the necessary steps to establish an employee's receipt of any other notices required under federal employment laws.

Budhun v. Reading Hospital and Medical Center

Background

In 2008, the plaintiff, Vanessa Budhun, was hired as a credentialing assistant by Berkshire Health Partners (BHP), an affiliate of the defendant Reading Hospital and Medical Center. Reading requires employees to submit a leave certification from a healthcare professional prior to approving any FMLA leave, as well as a "fitness-for-duty" certification that confirms that the employee can work "without restriction" upon his or her return. If an employee does not contact Reading's H.R. department upon expiration of his or her FMLA leave period, as a matter of company policy, the employee has "voluntarily resigned."

On July 30, 2010, Budhun broke a bone in her hand, but still arrived at work on August 2, 2010 with a metal splint. That day, she received an email from Stacey Spinka, a Reading H.R. employee, stating "[y]our supervisor has made us aware that you have an injury that prevents you from working full duty," and providing Budhun with FMLA leave forms. Budhun then left work and saw a physician assistant that same day (and in the coming days).

On August 12, 2010, Budhun emailed Spinka that she intended to return to work on August 16, attaching a note from her treating physician stating that she could return to work on that date with "no restrictions." In response, Spinka allegedly (i) questioned the doctor's assessment that she could return to work and (ii) informed her that she could not return until she had full use of all ten fingers. Subsequently (and somewhat inconsistently), on August 16, Budhun sent anothernote from her physician stating that she should be excused from work until September 8.

Budhun sent yet another doctor's note dated September 10, 2010 that she would be out of work until her next doctor's appointment in November. Spinka subsequently extended Budhun's FMLA leave until September 23, 2010 (the date at which her twelve weeks of allotted FMLA leave expired),[2] and approved non-FMLA leave through November 9, 2010. When Budhun did not return by the end of her FMLA leave, however, BHP offered the position to another employee on September 25, 2010. (Budhun was not eligible to transfer to another position within the hospital because of her prior written discipline).

Budhun remained on leave through November 9, 2010 (and continued to be eligible for fringe benefits). At the expiration of her leave, she did not contact Reading and, as a result, the company considered her to have voluntarily resigned. On November 19, 2010, Budhun filed suit alleging FMLA interference and retaliation. The lower court dismissed her claims on summary judgment, but the Third Circuit reversed.

Analysis

In reaching its decision, the Third Circuit looked to the FMLA regulation that provides the "employer may not delay the employee's return to work while contact with the health care provider is being made." 29 C.F.R. 825.312(b). According to the court, instead of following the regulations, Spinka (who is not a doctor) seemingly overruled Budhun's physician's conclusion by telling Budhun that if she was "truly unrestricted," she "would have full use of all of [her] digits." The Third Circuit accordingly determined that the record allowed a reasonable jury to conclude that Budhun attempted to invoke her right to return to work on August 12, 2010, and that Reading interfered with this right when it told Budhun she could not return (despite the subsequent correspondence from Budhun's doctor that she needed more leave time).

Even assuming Budhun attempted to return to work on August 16, 2010, Reading still argued that it was entitled to summary judgment on the grounds that she could not perform an "essential function" of her job (typing). Although had that been the case Reading could have lawfully prevented Budhun from returning to work, the Third Circuit determined that Budhun adduced enough evidence that she could, in fact, perform this essential function. That is, even though Budhun admitted that it was not likely she could type as quickly with seven fingers as she formerly could with ten, the court stressed that (i) "there was no minimum words per minute requirement in [Budhun's] job description," (ii) other employees with equivalent positions utilized only one finger on each hand to type, and (iii) with the use of ten fingers, Budhun had been able to complete deadlines far in advance.

Finally, the court dismissed Reading's argument that it could not have interfered with Budhun's right to restoration on August 16, 2010 because it did not approve her FMLA leave until August 17. The court emphasized, rather, that Budhun (i) notified Reading she was seeking FMLA leave as early as August 2 and (ii) submitted her papers by August 16. The court reasoned that "[a] reading of the statute that denies all rights that the FMLA guarantees until the time that an employer designates the employee's leave as FMLA would be illogical and unfair." [3]

Takeaway

Given the Third Circuit's decision, employers should make every effort not to "interfere" with an employee's right to return to work following FMLA leave, particularly where a physician has certified that the employee can work without restrictions. As part of this effort, employers should increase their HR training to make certain that all FMLA practices and procedures are followed in accordance with the law and company policy.

Davis v. Abington Memorial Hospital

Background

A federal district court dismissed on the pleadings several similar putative collective and class action stemming from the plaintiffs' allegations that their employers, defendant health care systems and affiliates (collectively, the "defendants"), implemented timekeeping and pay policies that failed to compensate them for all hours worked in violation of the FLSA and Pennsylvania state law.[4] For the reasons set forth below, the Third Circuit affirmed the lower court's dismissal.

Analysis

In rendering its decision, the Third Circuit first looked to other courts to gauge the proper standard of pleading for an FLSA overtime claim. A "difficult question" that has "divided courts across the country," "some courts have required plaintiffs to allege approximately the number of hours worked for which wages were not received" (*e.g.*, Southern District of Iowa). On the other end of the spectrum, some "courts have adopted a more lenient approach" that "a FLSA complaint will survive dismissal so long as it alleges that the employee worked more than forty hours in a week and did not receive overtime compensation" (*e.g.*, District of Maryland).

The Third Circuit ultimately "agree[d] with the middle-ground approach taken by the Court of Appeals for the Second Circuit" that "to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege forty hours of work in a given workweek as well as some uncompensated time in excess of forty hours." According to the Third Circuit, the plaintiffs here failed to meet this pleading standard, stressing that each named plaintiff merely pled that he or she "typically" worked shifts between 32 and 40 hours per week and that he or she "frequently" worked extra time. Indeed, "none of the named plaintiffs alleged a single workweek in which he or she worked at least forty hours and also worked uncompensated time in excess of forty hours."[5]

Takeaway

Employers should take note of the pleading standard as clarified by the Third Circuit when deciding whether to move to dismiss unpaid FLSA overtime claims on the pleadings. Although the Third Circuit embraced a more moderate standard, it was careful to note that a plaintiff need not identify the exact dates and times that she worked overtime to survive a motion to dismiss. For instance, the court postulated that "a plaintiff's claim that she 'typically' worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours he or she worked during one or more of those forty-hour weeks, would suffice." Given this roadmap for employees to avoid dismissal on the pleadings, employers may come to face more unpaid overtime claims on summary judgment and beyond.

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If you have any questions or concerns regarding these recent cases, please contact your Proskauer lawyer.

[1] The Third Circuit noted that the provision in CCI's employee handbook regarding FMLA rights only constituted "general notice," not individual notice to Lupyan.

[2] Prior to taking the FMLA leave that is the subject of this case, Budhun took approximately four weeks of FMLA leave in two separate segments between March 31, 2010 and May 7, 2010.

[3] The Third Circuit also refused to dismiss Budhun's FMLA retaliation claim on summary judgment on the grounds that (i) although Budhun may not have been formally "terminated" and continued to receive benefits from Reading, that did not mean that the actions that the company took short of termination were not "adverse employment actions," and (ii) the temporal proximity of her "termination" (which occurred only within a few days of Budhun having taken leave) was sufficient to show causation.

[4] Specifically, the plaintiffs alleged that the defendants did not compensate them for hours worked in excess of forty hours per week during meal breaks, at training programs, and outside of their scheduled shifts.

[5] With respect to the plaintiffs' "pure gap time claims" (straight time wages for unpaid work during pay periods without overtime), the Third Circuit "agree[d] with the clear weight of authority" that such claims "are not cognizable under the FLSA, which requires payment of minimum wages and overtime wages only." Given that the plaintiffs did not plausibly allege that they worked overtime in any given week, the Third Circuit did not resolve whether the plaintiffs' gap time claims might constitute claims for "overtime gap time."

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