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When it Comes to an FMLA Notice—the Post Office May Not Deliver For You in the Third Circuit

By Mark T. Phillis and Barbara Rittinger Rigo

The U.S. Court of Appeals for the Third Circuit recently 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 (FMLA). The ruling could now require 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.* (Case No. 13-1843 Aug. 5, 2014), the court reversed an order granting summary judgment to Corinthian Colleges on a plaintiff's FMLA interference claim simply because she denied ever receiving the FMLA notice in the mail. While in some ways case-specific, this ruling will have a significant impact on the communications employers within the Third Circuit have with employees regarding their FMLA rights.

The Facts of the Case and the Trial Court's Rulings

The plaintiff worked as an instructor for Corinthian Colleges Inc. (CCI). In December 2007, she requested a personal leave of absence due to depression. Her manager suggested that she apply for short-term disability, and the plaintiff provided a DOL "Certification of Health Provider" form to her employer in mid-December. Based on this form, CCI determined that she was eligible for FMLA leave.

The plaintiff met with CCI officials and she was instructed to check the FMLA box on her Request for Leave Form. The employee's rights under the FMLA were not discussed at this meeting, and she was not given the required FMLA designation form and notice of her rights under the FMLA.[1] Instead, CCI claimed it mailed her a letter later that afternoon advising her that her leave was designated as FMLA leave and explaining her rights under the FMLA. The plaintiff denied ever receiving that letter. She did not notify CCI that she would be able to return to work, with restrictions, until two weeks after her 12 weeks of FMLA leave had expired. 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 18 weeks after her leave began, CCI informed her that, due to low student enrollment and her failure to return to work following her 12 weeks of FMLA-protected leave, her employment was being terminated. The plaintiff then sued CCI, alleging that its failure to give her notice had interfered with her FMLA rights.

1 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 takes FMLA leave. *See* 29 C.F.R. § 825.300.

The trial court originally denied summary judgment on that claim, noting there was a question of fact regarding whether the plaintiff had received the required FMLA notice. CCI then submitted an Amended Motion for Summary judgment raising "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 provided affidavits regarding the timing and method of the mailing the plaintiff claimed to have never received. Upon review of this information, the trial court granted summary judgment relying upon "the Mailbox Rule."

The Ruling: Employers Must Prove They Provided FMLA Notices

Overruling the trial court, the Third Circuit determined that "the Mailbox Rule" did not create a conclusive presumption of the plaintiff's receipt of the FMLA notice, but rather was only a rebuttable "inference of fact." The plaintiff's claim that she never received the FMLA designation letter overcame that inference for the purposes of summary judgment.

Taking specific aim at the company raising this presumption of receipt with what the court characterized "self-serving affidavits" four years after the termination, the court took issue with the fact that the FMLA letter was sent only "regular mail" with no certified letter receipt, tracking number, or signature. Since there was no direct evidence of receipt or non-receipt, the court determined that it was unfair to make the plaintiff "prove a negative." As such, the court found that, where only ordinary mail is used to send an FMLA notice, requiring more than the sworn statement of the plaintiff to dispute receipt would elevate the weak legal presumption intended by the Mailbox Rule to a conclusive presumption:

> 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 the plaintiff'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 interference claim and remanded for determination of whether she received notice that her leave fell under the FMLA.

In its ruling, the Third Circuit also concluded that the plaintiff had presented sufficient evidence to show that she may have been prejudiced by CCI's alleged failure to provide her with her notice of her rights under the FMLA. The court relied primarily on the plaintiff's assertion that she would have structured her leave differently had she known she only had 12 weeks of protected leave. It also noted that the note her psychiatrist provided after she was out for 14 weeks did not clearly state that she was unable to return to work then or after 12 weeks, just that she would benefit from certain restrictions on her work.

This part of the ruling also is troubling for employers, as generally courts have required that a plaintiff demonstrate that she has been harmed by her employer's failure to provide notice of her entitlement to FMLA leave. Here, as with its ruling on the Mailbox Rule, the Third Circuit stated that a simple statement to the contrary by a plaintiff is sufficient 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 Third Circuit to loosen the requirement that an employee must show prejudice from not being informed of her FMLA rights to bring a claim will remain to be seen.

What This Ruling Means for Employers

The *Lupyan* ruling is likely going to require many employers operating in the Third Circuit[2] to change their normal FMLA procedures if they traditionally use regular mail to send FMLA notices. Ignoring 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 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 this new precedent, 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.

2 The Third Circuit includes Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

To counter this new presumption, all employers who have to send out FMLA notices should make the extra effort to do so in a traceable manner. 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 electronic means with electronic receipt that an employer could use to prove delivery.

Mark T. Phillis is a Shareholder in Littler's Pittsburgh office and Barbara Rittinger Rigo is a Shareholder in the Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Phillis at mphillis@littler.com, or Ms. Rigo at brigo@littler.com.