Volume 60
Issue 6 *Tolle Lege, Volume 60*

Article 5

3-16-2015

# The Third Circuit Lays Another Trap for Unsuspecting Employers: Lupyan v. Corinthian Colleges Inc.

Keely Jac Collins

VILLANOVA LAW REVIEW ONLINE: TOLLE LEGE CITE: 60 VILL. L. REV. TOLLE LEGE 47 (2015)

# THE THIRD CIRCUIT LAYS ANOTHER TRAP FOR UNSUSPECTING EMPLOYERS: *LUPYAN v. CORINTHIAN COLLEGES INC.*

KEELY JAC COLLINS, ESQUIRE*

## I. INTRODUCTION

One of the primary tenets of statutory construction is to effect the object of the statute and to promote justice.[1] Likewise, when applying the Pennsylvania Rules of Civil Procedure, the Legislature instructs courts to "disregard any error or defect of procedure which does not affect the substantial rights of the parties."[2] However, in *Lupyan v. Corinthian Colleges Inc.*,[3] the Third Circuit Court of Appeals, in a matter of first impression, decided to effectively shift the focus of the Family Medical Leave Act (FMLA) to strict procedural compliance, as opposed to substantive rights. Practically speaking, *Lupyan* compels employers and/or their insurance carriers to settle cases simply on procedural deficiencies, where the plaintiff was otherwise fully appraised of and given his or her full FMLA leave entitlement.

Part II of this Article will provide an overview of the rights afforded by the FMLA, relevant to the Third Circuit Court's decision in *Lupyan*. Part III contains an overview of the relevant facts and procedural history of *Lupyan* necessary to gain a better understanding of the Third Circuit's holding and its impact on FMLA litigation. Part IV explains the practical impact of *Lupyan*. Finally, Part V concludes with practical guidelines for employees to prepare for post-*Lupyan* FMLA litigation.

## II. BACKGROUND

Simply stated, the intent of the FMLA is "to allow employees to balance their work and family life by taking reasonable unpaid leave . . . ."[4] Giving a nod to the challenges of the workplace, the FMLA regulations explain that the FMLA was intended to "accomplish these purposes in a manner that accommodates the legitimate interests of employers . . . ."[5] Moreover, "[t]he FMLA is both intended and expected to benefit employers as well as their employees" by adding a measure of stability in the family that will increase workplace productivity and "encourage the development of high-performance organizations."[6] Accordingly, there can be no legitimate denial that, at least on a fundamental level, the intent of the FMLA was predicated on a concern for

* Employment Attorney, King, Spry, Herman, Freund & Faul, LLC, Bethlehem, Pennsylvania. With many thanks to my mentor, John Freund, a former member of the *Villanova Law Review*, for his generous support, guidance, and inspiration.

1. *See* 1 PA. CONS. STAT. ANN. § 1928(c) (West 2014).
2. PA. R. CIV. P. 126.
3. 761 F.3d 314 (3d Cir. 2014).
4. 29 C.F.R. § 825.101(a) (2013).
5. *Id.*
6. *Id.* § 825.101(c).

employees' work/life balance, with the end of encouraging business growth.

Designed to achieve these goals, the FMLA offers a twelve week unpaid leave of absence, during any twelve-month period, to eligible employees.[7] The FMLA imposes a legal duty on employers to inform their employees of the conditions they must meet to be eligible for FMLA leave.[8] Employers must also inform employees of their eligibility to take FMLA leave.[9] A notice of FMLA designation must contain certain content, specified in the FMLA regulations, and the employer must provide it to the employee within five business days of the date of the request for leave, or within five days of the date that the employer receives sufficient information to determine FMLA eligibility.[10]

Notwithstanding the above, the key right given to employees by the FMLA is to be reinstated to the same, or equivalent, position upon return from FMLA leave—or, stated in another way, the key obligation imposed on employers is to reinstate eligible employees.[11] If, however, at the conclusion of twelve weeks of leave, the employee "is unable to perform an essential function of the position because of a physical or mental condition," the employee has no right to reinstatement.[12] To that end, the FMLA explicitly allows employers to require all similarly situated employees, as a condition of reinstatement, to obtain and produce a fitness-for-duty certification from their health care providers, certifying that the employee is able to perform the functions of the position.[13]

The FMLA provides a remedial scheme for employees who were obstructed from exercising their FMLA rights.[14] According to the United States Supreme Court, an employee may recover for procedural violations of the FMLA only when the employee can demonstrate a "real impairment of [the employee's] rights and resulting prejudice."[15]

In *Lupyan*, however, although the record contained no evidence that Lupyan was actually prejudiced, the Third Circuit declined to affirm the district court's award of summary judgment in favor of the employer, reasoning that the employer could not establish strict compliance with the FMLA's procedural requirements.

---

7. *See* 29 U.S.C. § 2612(a)(1) (2012).
8. *See id.* § 2619.
9. *See* 29 C.F.R. §§ 825.110(d), 825.219(a), 825.300.
10. *See id.* § 825.300(b)(1).
11. *See id.* §§ 825.214–825.215.
12. *See id.* § 825.216(c). It is important to note, however, that an employer may have some obligation under the Americans with Disabilities Act (ADA) to provide a "reasonable accommodation." *See generally* 42 U.S.C. § 12112 (2012). However, the FMLA, unlike the ADA, only provides employees with twelve weeks of leave time.
13. *See* 29 C.F.R. § 825.312(a).
14. *See* 29 U.S.C. § 2617.
15. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 90 (2002).

## III. FACTUAL AND PROCEDURAL BACKGROUND OF *LUPYAN*

Lisa Lupyan, an instructor with the Applied Science Management program of Corinthian Colleges Inc. (CCI), was informed of an employee's right to FMLA leave from the time of hire, as evidenced by her signature on the acknowledgement form to CCI's employee handbook that explained employees' FMLA rights.[16] Noticing that Lupyan appeared depressed, her supervisor suggested, in December 2007, that Lupyan take a personal leave of absence.[17] Lupyan met with her supervisor, who instructed her to initial a box marked "Family Medical Leave" on her request for leave form.[18] During the meeting, Lupyan provided her supervisor with a U.S. Department of Labor Certification of Health Care Provider form, dated December 17, 2007, certifying her medical condition as panic attacks and extreme anxiety.[19] Although Lupyan claimed that she never received an FMLA-designation notice from CCI, CCI claimed that it sent Lupyan a Notification Letter dated December 18, 2007, informing her that her leave was designated as FMLA qualifying.[20]

Lupyan's FMLA leave officially began on or about December 4, 2007, thus her twelve-week leave period expired on or about February 26, 2008.[21] However, on March 13, 2008, about fourteen weeks after her leave began, Lupyan's physician advised that she could return to work only for limited teaching responsibilities "with certain restrictions," including "minimal student contact . . . ."[22] It was not until April 9, 2008 that Lupyan was medically cleared to return to full duty.[23] On April 9, 2008, Lupyan was terminated because student enrollment was low and because she had not returned to work after her FMLA leave period expired.[24]

In the United States District Court for the Western District of Pennsylvania, Lupyan asserted a claim of Interference with Rights under the FMLA, alleging that CCI obstructed her from obtaining benefits under the FMLA. Specifically, Lupyan argued that CCI interfered with her right to reinstatement by not following the proper procedures to apprise Lupyan that her extended leave was designated as FMLA-qualifying; thus, Lupyan did not return to work within the timeframe allowed by the FMLA.[25] After the conclusion of discovery, the district court granted CCI summary judgment on the interference claim. While the district court concluded that CCI "submitted insufficient evidence to create a presumption that the Notification Letter was

16. *See* Lupyan v. Corinthian Colls. Inc., 761 F.3d 314, 316, 319 (3d Cir. 2014).
17. *See id.* at 316.
18. *See id.* at 317.
19. *See id.* at 316–17; *see also* Lupyan v. Corinthian Colls. Inc., No. 2:09CV1403, 2011 WL 4017960, at *5 (W.D. Pa. Sept. 8, 2011).
20. *See Lupyan*, 761 F.3d at 316–17.
21. *See id.* at 323 n.5.
22. *Id.* at 317, 324.
23. *See id.* at 317.
24. *See id.*
25. *See* Lupyan v. Corinthian Colls. Inc., No. 2:09CV1403, 2011 WL 4017960, at *5 (W.D. Pa. Sept. 8, 2011).

sent to Lupyan," the court found, based upon Lupyan's discussions with management and completion of Department of Labor FMLA forms, "more than adequate evidence that Lupyan had notice that she was on FMLA leave."[26] Accordingly, the district court granted summary judgment to CCI on Lupyan's claim of Interference with Rights under the FMLA.

On appeal to the Third Circuit, Lupyan asserted that she never received notice from CCI designating her leave time as FMLA-eligible, notwithstanding the employer's claim that notice was sent. Unlike the district court, the Third Circuit took a more formalistic approach. Instead of considering the totality of the evidence in determining whether Lupyan received the required notifications, the Third Circuit conducted an extensive analysis of the parties' burdens of proof with respect to the mailbox rule.[27] Ultimately, the court concluded that Lupyan's representation that she did not receive the letter was enough to create an issue of material fact for a fact finder to consider.[28]

## IV. EVALUATION AND ANALYSIS

Even though the record reflected that Lupyan knew or should have known that she was on FMLA leave, the Third Circuit rejected the employer's evidence of actual knowledge in favor of adhering to procedure that was not required by federal courts. As noted by the Third Circuit, the FMLA regulations do not specifically require an employer to prove that written notice was received by the employee, nor does United States Supreme Court jurisprudence allow employees to recover for their employers' procedural violations of the FMLA, absent a showing of "prejudice".[29] In contrast with the Third Circuit's formalistic approach, the Second Circuit Court of Appeals has held that, considering all of the various FMLA notice requirements, "an employee can generally assume that she is protected by the FMLA unless informed otherwise."[30] In the absence of specific laws or regulations, however, the Third Circuit has extrapolated a rigorous FMLA notice requirement, where only written notice with a receipt confirmation can prove that notice was provided, even where the conduct of the parties indicates otherwise.

---

26. *Id.* at *6.

27. *See Lupyan*, 761 F.3d at 319–24.

28. *See id.* at 323.

29. *See id.* at 318 (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 82 (2002)). *See generally* 29 C.F.R. § 825.300 (2013).

30. Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 726 (2d Cir. 2001). The Second Circuit stated:

> In the present case, the FMLA imposes a legal duty upon the employer to inform its employees of the conditions that they must meet in order to be covered by the FMLA. *See* 29 U.S.C. § 2619. Moreover, an employer must notify an employee who plans to take medical leave whether her proposed leave is covered by the FMLA before the employee takes the leave. 29 C.F.R. § 825.110(d); *see also* 29 C.F.R. § 825.219(a) (employer must, prior to employee taking leave, notify employee that employee is ineligible for FMLA protection because she is a "key employee"). Read together, these provisions indicate that an employee can generally assume that she is protected by the FMLA unless informed otherwise.

*Id.* 725–26 (footnote omitted).

Notably, even if the notice requirements were not strictly satisfied, Lupyan had no right to reinstatement, thus she could not demonstrate "prejudice." Even after fourteen weeks of leave, Lupyan's health care provider could not certify Lupyan to return to full duty. The CCI, therefore, had no obligation to reinstate Lupyan following the FMLA-leave period.[31] Because Lupyan had no right to reinstatement, she could not demonstrate prejudice by any potential lapse on the part of her employer.

Moreover, the Third Circuit's decision departed from the FMLA's legislative intent, i.e., to strengthen businesses by strengthening the family bonds of employees in the workforce. Imposing onerous procedural requirements on businesses, even while all of the substantive requirements of the FMLA have been satisfied, will only serve to create confusion in the implementation of the FMLA and fear of liability, without any real substantive benefit to employees.

## V. CONCLUSION

Perhaps the most unsettling aspect of *Lupyan* was the court's focus on the employer's compliance with procedural notice requirements, without a showing of prejudice to the employee. For employers, this holding provides even more reason to be fully prepared for litigation, even when the employee cannot return to work and has exhausted all FMLA-protected rights. Following *Lupyan*, it goes without saying that all FMLA notifications must be written, with receipt acknowledged by the employee, even where it is clear that the employee understands that the leave time is FMLA-qualifying. The best way to provide written notice is to meet in person with the employee and have him or her sign a statement of acknowledgement in person, thus eliminating the possibility of employee or mail errors creating liability. Alternatively, if the employee is already out on FMLA leave at the time the determination of eligibility has been made, a solution may be to send written notices via email, with a return receipt requested.

Regardless of how employers and their insurance carriers decide to manage the increased risk in an ever-growing area of liability, *Lupyan* is a call to be mindful that, however noble the Legislature's intention, FMLA implementation is a Sisyphean task for employers. Whenever the FMLA requirements appear to be settled, the unwary employer may be trapped by a new requirement, most of which inure to the benefit of employees.

31. Notwithstanding potential obligations under other laws, such as the ADA, the FMLA does not require employers to provide accommodations for employees to perform their job. *See* 29 C.F.R. § 825.216(c). Here, Lupyan's health care provider indicated that Lupyan could only handle limited contact with students. *See Lupyan*, 761 F.3d at 324. Undeniably, contact with students is a core function of the position of an instructor.