**Employment Law**

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# 3rd Circuit: Working 'Comp Time' Counts Toward FMLA Eligibility

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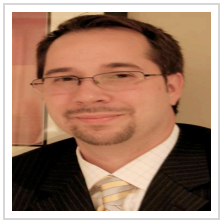
The Legal Intelligencer | October 30, 2009

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The 3rd U.S. Circuit Court of Appeals recently rendered a decision explaining when an employee is eligible for leave under the Family and Medical Leave Act, when an FMLA retaliation claim can be brought and when the "association" prong of the Americans with Disabilities Act applies. In *Erdman v. Nationwide Insurance Co.*, the plaintiff was terminated shortly after an application for FMLA leave but before that leave was taken. The plaintiff alleged that the termination was in retaliation for her planned use of FMLA and because she had been using FMLA for taking care of a family member with a disability, according to the opinion.

Under the FMLA, an employee who has worked a minimum of 1,250 hours in the previous 12 months may take an unpaid leave to care for oneself or a member of his or her family. Clarifying how an employee can meet this requirement, the 3rd Circuit explained that the hours that count toward the requisite number of hours are those to which the employer has actual or constructive notice. Thus, if the employer has reason to know that an employee is putting in additional hours at home, those hours shall count toward the required total. The plaintiff in *Erdman* was able to include the hours that she worked at home toward the 1,250 total — but only up until the date when a supervisor admonished her from doing so. Once the employee has been instructed not to work at home, it is not included in the FMLA count, according to the 3rd Circuit.

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The plaintiff in *Erdman* presented a policy argument that would create a presumption of additional hours worked if an employee is highly productive. The court conceded that such constructive notice is conceivable, but it did not accept that argument in this case.

The plaintiff in *Erdman* was working hours at home for "comp time," the opinion said. The "comp time" was essentially putting in hours from home that could count toward vacation time later. The court reasoned that an employer could be on constructive notice if an employee has increased productivity. But, "every hour of 'comp' time is effectively exchanged for an hour of paid vacation at some point in the future," so is dissimilar to an increased productivity level or working overtime. The employee "could work no more than her scheduled hours in the long run." Therefore, even if the employee was effectively working ahead, the same amount of work would be performed in the long run nonetheless and this cannot put the employer on constructive notice of an alleged increase in productivity.

This decision explains a number of things about the court's interpretation of the FMLA. First, employers cannot simply plead ignorance to hours worked to get out of permitting FMLA leave. To meet the 1,250-hour requirement, the court should consider the hours to which the employer was on actual and constructive notice. Second, however,

the employee cannot necessarily use hours toward this total if those hours were not allowed. So if the employee has already worked 1,250 hours but the employer is not on notice of the "comp" hours or the employer does not approve of the practice, the FMLA time requirement is not met.

An additional point made about the FMLA by the 3rd Circuit may seem obvious to many practitioners, but the employer argued against it, thus it is worth pointing out. To assert a claim for FMLA retaliation, the employee does not have to have taken an FMLA leave. The issue arose in *Erdman* because the plaintiff had submitted a request for leave but was terminated before the time for her leave came to pass. She asserted a claim for retaliation, but the employer argued that it could not have retaliated since no leave was actually taken before the time of termination. However, the cause of action survives because the retaliation can be due to the request for a leave, in other words the assertion of one's rights to take an FMLA leave. This, of course, is the necessary application of FMLA law because had the court agreed with the employer in *Erdman,* an employer could terminate any employee who makes an FMLA request and not be held accountable for this "retaliation" if the leave has not yet begun.

*Erdman* also presented an issue under the ADA. The plaintiff alleged that she was terminated because of her known association with an individual who is disabled; in this case her daughter who was born with Down syndrome. The "association" provision under the ADA is not often litigated so the court's decision as to this matter is of note. Unfortunately, it is not entirely clear from the decision where the lines are drawn.

The court explained the law as follows: "there is a material distinction between firing an employee because of a relative's disability and firing an employee because of the need to take time off to care for the relative." Thus, the plaintiff has to show that she was fired not because of the need to miss work, but because of the need to miss work because of the "association" with someone who has a disability (i.e., to care for that person). The court views the "association" provision to allow charges of discrimination against employers who have unfounded and prejudicial presumptions about a certain condition. Here, the employer was well aware that the plaintiff's daughter had a disability, and it was aware of the fact that this affected plaintiff's ability to perform her job, to some extent, because of the need for vacation time and FMLA time to attend to her daughter's needs.

The court quickly disposed of this argument with little discussion, stating that there is insufficient evidence to suggest that this was the reason for the plaintiff's termination. The only reason it gave for arriving at this conclusion is the fact that the plaintiff's employer had known of the plaintiff's situation for years. The court reasoned that since the employer's perception of the employee's daughter's condition was not based on a stereotype or unfounded assumptions, the association provision does not apply. Thus, the claim was actionable under the FMLA but not the ADA.

This analysis of the ADA charge is a bit troubling, as it seems to assume that the employer lacks any prejudice or discriminatory pretext if the plaintiff has not suffered an adverse action in the past. Because the plaintiff had made her daughter's disability known to her employer, and the employer took no adverse action against her for several years, the court presumed that the employer did not violate the ADA. The court even stated that the "association" provision applies if an employee would not have been fired but for the need for the FMLA to care for someone with a disability — but did not seem to fully consider whether that happened here. •

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