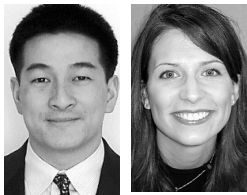


Guidance still awaited on FMLA leave remedy

What remedy is available to an employee on leave when his employer fails to provide the required notice informing him of his Family and Medical Leave Act (FMLA) rights and designating leave as FMLA leave? The Department of Labor's FMLA regulations had answered this question definitively, stating any leave taken before an employer provides the notice cannot be counted against an employee's 12 weeks of FMLA protected leave.



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However, the Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, rejected the penalty and struck it from the regulations. While acknowledging there may be circumstances when an employee is prejudiced by lack of appropriate notice, the question of what remedy is available was left open. The 3rd U.S. Circuit Court of Appeals, in *Conoshenti v. Public Service Electric and Gas*, 364 F.3d 135, was presented the question, but did not provide clear guidance.

The facts of *Conoshenti* are relatively straightforward. Richard Conoshenti had been employed by PSE&G as a mechanic. In April and May 1999, PSE&G accused Conoshenti of keeping inaccurate time records. Although Conoshenti denied this, the issue was resolved when he agreed to enter into a "last chance agreement" (LCA) with PSE&G. It provided that Conoshenti would be immediately discharged for violating any of the agreement's enumerated obligations, including missing a day of work.

On Dec. 4, 1999, Conoshenti was involved in an automobile accident that resulted in hospitalization. Two days after the accident, Conoshenti informed his employer of the seriousness of his injuries and that his doctor advised him he would be out of work at least two weeks. On Dec. 16, he met with an orthopedic surgeon who scheduled an operation in early January. On Dec. 17, Conoshenti sent PSE&G a form completed by the surgeon, advising that Conoshenti would not be able to return to work until April 2000 (longer than the 12 weeks protected by FMLA). After

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receiving the letter, PSE&G began taking administrative steps to terminate Conoshenti's employment for violating the LCA.

He returned to work April 17 and one hour after arriving, was fired. At no point during his absence was Conoshenti advised he was entitled to 12 weeks' FMLA leave or that it would be considered FMLA leave as required by federal regulations.

After his discharge, Conoshenti filed a complaint alleging interference with his rights under FMLA, wrongful termination in violation of FMLA and other claims not addressed here. He argued PSE&G's failure to advise him of his FMLA rights interfered with his rights under the statute. He indicated that if PSE&G had advised him FMLA provided only 12 weeks' protected leave, he would have structured his treatments within that protected period. Conoshenti alleged that because of PSE&G's failure to provide the FMLA notice, he took more leave than was protected and therefore his termination was improper. The district court rejected those arguments in granting PSE&G summary judgment on those issues, and the 3rd Circuit reversed in part.

Although the precise issue was not raised in *Ragsdale*, the 3rd Circuit looked to it for guidance. In *Ragsdale*, the Supreme Court determined the Department of Labor had overreached its authority in 29 C.F.R. §825.770(a), which says that until an employer informs an employee that leave has been designated FMLA leave, any leave taken cannot be counted against an employee's 12-week entitlement.

After taking 30 weeks' medical leave under various company sick-leave policies, Tracy Ragsdale did not return to work and was terminated. At no point did her employer advise her the absence counted as FMLA leave. The language of the regulation supported the plaintiff's argument that because the required FMLA notice had not been provided, none of her 30 weeks should have diminished the 12 weeks Ragsdale was allowed under FMLA. The Supreme Court determined the regulation wrongfully created an irrebuttable presumption that an employee's rights are impaired by an employer's failure to advise the employee of her rights under FMLA and struck that portion of the regulation. The justices noted Ragsdale was not in any way prejudiced by the employer's failure to give the required notice. The record established she could not have returned to work earlier even if she had been properly informed of her FMLA rights.

In arguing in support of the regulation, Ragsdale offered the example of a cancer patient unaware of her right to take intermittent leave. Without notice of her entitlement, the patient might take all 12 weeks at once, saving no leave for future emergencies or treatment. In that case, Ragsdale argued, the employer's failure to give notice would restrict or impair the patient's exercise of her rights to take intermittent leave. The court stated that while the plaintiff asserted a "reasonable" argument, it did not establish that

an employee should *always* be entitled to an additional 12 weeks of leave as provided in the regulation.

Supports position

In applying *Ragsdale* to *Conoshenti*, the 3rd Circuit agreed Ragsdale's hypothetical supported the position that an employer's failure to advise an employee of his FMLA rights could create a viable cause of action. Thus, the court held, Conoshenti had presented a feasible claim by alleging his employer's failure to advise him of FMLA entitlement impeded his rights under the statute. As PSE&G "never asserted that Conoshenti could not meet his burden of proving that he could have structured his leave differently," summary judgment to PSE&G was inappropriate.

On remand, Conoshenti has the opportunity to demonstrate he would have structured his leave differently had he been informed of his FMLA rights. The remedy available to Conoshenti for his employer's interference was not addressed.

Here comes the twist. The second part of Conoshenti's argument was that he was wrongfully terminated in retaliation for taking FMLA leave. The 3rd Circuit's decision on his first claim might lead one to believe Conoshenti would have had an easy victory on this point, but the 3rd Circuit upheld summary judgment on the wrongful-termination claim.

Looking to 29 C.F.R. §825.220(c), which prohibits an employer from discriminating against an employee for using FMLA leave, the court established a three-part test to determine FMLA discrimination: (1) the employee took FMLA leave; (2) the person suffered an adverse employment decision; and (3) there was a causal connection between the adverse decision and FMLA leave. In *Conoshenti*, the first two prongs were undisputed, and the court held there was sufficient direct evidence the FMLA leave was a factor in the termination to shift the burden to the employer under *Price Waterhouse v. Hopkins*, 490 U.S. 228, to demonstrate it would have terminated the plaintiff even if it had not considered the leave.

In resolving that third question, the court found PSE&G was entitled to summary judgment in light of the LCA's language, under which missing a day of work was immediate grounds for termination. The court held the plaintiff was subject to termination the very first workday he was both absent from work and no longer protected by FMLA.

Contradiction

The 3rd Circuit's decision on the wrongful discharge claim under FMLA appears to contradict its holding on the claim of failure to provide notice. In the first part of its opinion, the court explains Conoshenti could have been prejudiced by his employer's failure to provide notice of his rights under FMLA. The reason summary judgment was denied on that claim was the possibility Conoshenti could have structured his leave to comply with the 12-week limits imposed by FMLA had PSE&G supplied the required notice.

However, in deciding Conoshenti's wrongful termination claim, the court concluded his leave was not protected by FMLA. One way to justify the rulings is that Conoshenti has a viable claim for interference with his FMLA rights, but additional FMLA leave is not one of the remedies available to him. The 3rd Circuit could have been swayed by the final sentence of the majority's opinion in *Ragsdale* that reads, "The FMLA guaranteed Ms. Ragsdale 12 — not 42 — weeks of leave in 1996."

The *Conoshenti* opinion leaves open the question of what remedies are available to the plaintiff on remand and to employees in general who are not provided notice from their employers designating their absence as FMLA leave. Does the second holding of *Conoshenti* preclude the plaintiff from arguing at the trial level that PSE&G's interference with his rights caused his termination? If so, what damages are available for this purported interference with FMLA rights? Conoshenti's petition for rehearing *en banc* was denied, and no other court has had the occasion to consider this issue. It is hoped the Supreme Court will take the opportunity to do just that in the months to come.