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Reliance on the "Mailbox Rule" Is Not Enough for Employer To Show It Sent Its Employee FMLA Notice

By **Bethany C. McCurdy**

"Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

Since the founding of the country, Americans have relied on the Post Office (now known as the United States Postal Service) to efficiently and effectively deliver mail throughout the country. This reliance has not been considered misplaced by courts, as evidenced by the legal principle called the "mailbox rule." Established by the Supreme Court in 1874, the rule, quite simply, stands for the proposition that if a letter is mailed, then it is presumed to have been received by the intended recipient. But does that rule still hold sway in an era of instant electronic communication and where senders have the ability to track delivery down to the minute?

A recent case in the United States Court of Appeals for the Third Circuit (covering Delaware, New Jersey, Pennsylvania, and the Virgin Islands) examined the "mailbox rule" in the context of an employer who claimed to have sent paperwork for the federal Family and Medical Leave Act ("FMLA") and an employee who denied receipt. In that case, [*Lupyan v. Corinthian Colleges, Inc.*](#), No. 13-1843 (3d Cir. 2014), the court held that the presumption of receipt may be rebutted solely by the word of the intended recipient.

Lisa Lupyán worked for Corinthian Colleges as a science instructor. A few years after she was hired, Ms. Lupyán began to experience symptoms of depression and requested a personal leave of absence. Her supervisor suggested she apply for short-term disability ("STD") coverage instead of taking a personal leave. Ms. Lupyán then submitted to Corinthian a completed Department of Labor Certification of Health Care Provider form ("Certification") in conjunction with her application for STD. Upon receipt of the completed form, Corinthian's human resources department determined Ms. Lupyán was eligible for FMLA leave.

Shortly thereafter, on December 19, 2007, Ms. Lupyán met with Corinthian's Supervisor of Administration, who instructed Ms. Lupyán to check the "Family Medical Leave" box on the leave of absence request form. The projected date of Ms. Lupyán's return to work was set as April 1, 2008, as that was the date stated on the Certification. Ms. Lupyán's FMLA rights and responsibilities were not discussed at the meeting. According to Corinthian, later that same day it mailed Ms. Lupyán a letter detailing her rights under the FMLA and informing her that her leave of absence was designated as FMLA leave (the "Letter"). Presumably the Letter also included information that if Ms. Lupyán failed to return to work at the expiration of her FMLA entitlement, she would no longer be entitled to reinstatement.

In March 2008, Ms. Lupyán informed Corinthian that she had been released to return to work with some restrictions. On April 1, 2008, Ms. Lupyán's projected return-to-work date, Corinthian informed her she could not return to work if she had any restrictions. After some additional communication, Ms. Lupyán presented a full release to return to work without restrictions. Nonetheless, on April 9, 2008, Ms. Lupyán learned her employment with Corinthian was terminated. The school claimed it let Ms. Lupyán go due to lower student enrollment and because she failed to return to work following the expiration of her 12 weeks of leave as provided under the FMLA. When she learned of her termination, Ms. Lupyán claimed this was also the first she had learned the company considered her to have been on FMLA leave.

Ms. Lupyán then sued, claiming in part that Corinthian interfered with her FMLA rights when it failed to give her notice of those rights. In defense, Corinthian claimed it had provided Ms. Lupyán with notice through its employee handbook, as well as by the Letter it sent informing her that her leave of absence was designated as FMLA.

The district court initially granted summary judgment in favor of the school, but then reversed itself as it determined there was a factual dispute as to whether Corinthian had actually informed Ms. Lupyán of her FMLA rights. Corinthian then presented two affidavits

from employees who swore that, four years earlier, the Letter has been properly mailed to Ms. Lupyán. This satisfied the court and, relying on the presumption of delivery under the "mailbox rule," it again entered summary judgment for Corinthian, which Ms. Lupyán appealed.

In considering the appeal, the Third Circuit evaluated whether the affidavits presented by Corinthian were sufficient to conclude that the Letter had been received by Ms. Lupyán under the "mailbox rule." The court noted that while the "mailbox rule" is "not a conclusive presumption of law," it is a rebuttable "inference of fact founded on the probability that the officers of the government will do their duty and the usual course of business."

The strength of that presumption, however, differs depending on the manner an item was sent. Thus, if a letter is sent by certified mail, there is a "strong presumption" of receipt as there is actual evidence the letter was delivered. But in cases like Ms. Lupyán's, where the letter was sent via regular U.S. mail, the presumption is "weaker" because there is no receipt or other proof of delivery. While other evidence, such as a sworn statement from someone with first-hand knowledge of mailing customs can help show proof of delivery, that is not a certainty. Here, for example, Corinthian provided what the court called "self-serving affidavits" signed almost four years after the fact, and with the lack of other corroborating evidence, the court held the presumption of receipt was "very weak." Thus, Ms. Lupyán's assertion (itself self-serving) that she had not received the Letter was deemed enough to rebut the presumption of receipt and send the issue to a jury.

So what can employers take away from this case? The first is perhaps the court's own observation that the "mailbox rule" was formed far before current methods of delivery and tracking were conceived and that in the current age of "computerized communications and handheld devices," it is "not expecting too much to require businesses...to use some form of mailing that includes a verifiable receipt when mailing something as important as a legally mandated notice." Thus blind reliance on the "mailbox rule" may not be enough for an employer to establish that important notices were received by employees.

In situations where employers may later need to prove actual receipt of documents by employees, such as with an FMLA notice or other legally mandated document, it may be prudent for companies to consistently utilize some form of tracking that shows both delivery and receipt of the document (such as FedEx, UPS, or certified mail with a signed receipt). As the court in *Lupyán* stated, the minor cost and time involved with tracking delivery would be minimal in comparison to having to otherwise establish that an item was sent and received. Any confirmations of receipt should be saved like any

other business record related to the employee. Employers not wishing to use tracking should review their regular mailing practices to determine what type of "business practices" they have in place regarding mailings, such as whether logs of mailings or copies of postmarked stamped envelopes are kept in the regular course of business. There is not a "one size fits all" answer, and companies should assess their own business needs, personnel, and practices to determine what is best for them.

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