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Third Circuit Sets Return-to-Work Standard Under the FMLA

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In [*Budhun v. Reading Hospital and Medical Center*](#), -- F.3d -- (2014), the Third Circuit Court of Appeals (covering Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) held that an employer's duty to reinstate an employee returning from leave under the Family and Medical Leave Act ("FMLA") is triggered by the employee's certification of fitness to return to work without restrictions. The facts of the opinion summarized below provide several important lessons for employers to consider when handling employee requests for leave under the FMLA.

Vanessa Budhun worked for Reading Hospital and Medical Center as a credentialing assistant. Her written job description included requirements that she generate and maintain records and demonstrate "efficiency and accuracy in the credentialing" of network healthcare providers. Budhun estimated that she was required to type approximately sixty percent of the time.

On July 30, 2010, Budhun broke a bone in her right hand. After she arrived at work with a metal splint on her hand, a Reading human resources representative advised Budhun that she had an injury that prevented her from working at full duty and provided her FMLA leave forms. Budhun left work and sought medical treatment. Her middle, ring, and pinky fingers were taped together. Budhun advised her doctor that her job required typing, but told him she felt she could still type using her left hand and her right thumb and index fingers.

Budhun provided part of her FMLA paperwork to Reading on August 12, 2010, including a doctor's note indicating that she could return to work on August 16th and that there were "no restrictions in splint." On August 16th, Budhun returned to work and gave Reading a form authorizing it to contact her medical providers. Budhun indicated that, while she still wore the splint, she was able to type, albeit slower than usual. The Reading representative told Budhun that if she could not type at full speed, then she was not considered to be at full duty. Budhun was advised to obtain a note from her doctor stating she was out-of-work until she was able to perform at the "same capacity" as she did before her injury (*i.e.*, have full use of all ten fingers). The Reading representative added, "It seems that your physician was incorrect in stating that you could work unrestricted. If you were truly unrestricted in your abilities, you would have full use of all your digits."

Budhun returned to her doctor, who faxed Reading a completed FMLA leave certification form, which indicated that Budhun was unable to perform "any of his/her job functions" and placed her out of work until August 16th. However, on the final page of the fax, Budhun's doctor placed her out of work until September 8, 2010. On August 17th, Reading approved the FMLA leave from August 2 through September 8.

On September 8, Budhun advised Reading that her doctor would release her to work as soon as she could move her fingers without problems. Because Budhun's FMLA leave expired on September 8th, Reading requested a doctor's note, and Budhun's doctor forwarded a note indicating that Budhun would be out of work until November 9th. Reading extended Budhun's FMLA leave through September 23rd, the date at which her twelve weeks of allotted FMLA leave was exhausted, as Budhun had used part of her FMLA leave previously, and approved Budhun for non-FMLA leave through November 9th.

In a September 15, 2010, meeting between various Reading representatives, it was decided that if Budhun did not return at the expiration of her FMLA leave on September 23rd, her position would be offered to someone else. Budhun did not return, and her position was offered to another employee. Four days later, Budhun was advised that she was replaced, that due to prior written discipline for tardiness she was ineligible to transfer to another position, and that if she was released to work prior to finding another position at the hospital, she would be terminated. When Budhun did not contact Reading at the expiration of her leave, Reading considered her to have voluntarily resigned.

On November 19, 2010, Budhun sued Reading alleging interference and retaliation claims under the FMLA. The district court granted summary judgment to Reading, and Budhun appealed.

With regard to Budhun's FMLA interference claim, the Third Circuit held that Budhun had submitted enough evidence for a jury to find that Reading interfered with her right to be restored to her position on August 16, 2010, when the Reading representative told her she needed to be able to use all ten fingers before she could be reinstated. The court observed that Budhun's "fitness-for-duty" certification clearly stated that she could return to work with "no restrictions." Citing to the FMLA regulations, the court instructed: "An employer may require that this certification address the employee's ability to perform the essential functions of her job, but only if the employer provides a list of essential functions to the employee at the time that the employer notices the employee that she is eligible for FMLA leave."

Since Reading did not provide a list of essential job functions to Budhun, her doctor's fitness-for-duty certification was based solely upon the information provided by Budhun. And while her doctor provided conflicting return-to-work dates, the court explained that the doctor did so only after the Reading representative both told Budhun she could not return to work until she had use of all ten fingers and questioned her doctor's assessment. Budhun authorized Reading to contact her doctor for any clarifications, but Reading did not do so. The Third Circuit held that the evidence was sufficient to permit a reasonable jury to conclude that Budhun attempted to invoke her right to return to work and that Reading interfered with that right.

In reaching this decision, the Third Circuit noted the congruence of its decision with the Sixth and Seventh Circuits, which similarly held that an employer's duty to reinstate an employee under the FMLA is triggered upon the employee's submission of a statement from her health care provider that she may return to work without restrictions.

Reading's alternative argument that it could not have violated the FMLA because it had no duty to restore her to her position because she was unable to perform the essential functions of her position was rejected because Reading had not provided Budhun with a list of essential job functions at the time she requested leave. Noting that the Reading representative "unilaterally determined, over email, that Budhun could not perform an essential function because she had use of only seven fingers," the Third Circuit reminded employers that the FMLA regulations place the onus on an employee's healthcare provider, and not the employer, to certify whether the employee is unable to perform any essential functions of her job. As Budhun had testified that she was able to complete her essential functions utilizing seven fingers, albeit at a slower pace, the court found a reasonable jury could conclude that she could perform her essential functions.

This case serves as an important reminder to employers who require that a "fitness-for-duty" certification address the employee's ability to perform the essential functions of the job should provide the employee with an accurate list of essential functions at the time the employer notices the employee that he or she is eligible for FMLA leave. Also, if an employee provides their employer with an authorization to contact his or her doctor, the employer should also consider providing the doctor with the list of the employee's essential job functions so that the doctor can properly consider those functions in certifying the employee's fitness to return to work. Finally, although the FMLA does not require an employer to return an employee to work if that employee remains unable to perform an "essential function" of the position at the expiration of the FMLA leave, employers should consider whether an employee would be entitled to reasonable accommodation under the Americans with Disabilities Act.

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