

CASE ANALYSIS: ERDMAN V. NATIONWIDE INS. Co., 582 F.3D 500 (3D CIR. 2009)

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This case, which principally dealt with the question of whether an employee accumulated sufficient hours to qualify for FMLA leave, presented questions of first impression to the Third Circuit court.

Plaintiff Brenda Erdman asked her employer, Nationwide, to allow her to work on a part-time basis so that she could care for her daughter, who was born with Down Syndrome. As a part-time employee, Erdman would often work extra hours at home, and her original supervisor allowed her to use the extra hours as “comp time.” When Erdman’s supervisor was replaced with another individual, however, the new supervisor admonished Erdman for working “unapproved” overtime. Soon thereafter, Erdman was informed that her part-time position was being eliminated, but that she could return to full-time status.

When Erdman accepted the full-time position, she asked whether Nationwide would honor her previously-approved vacation request for the month of August, which Erdman typically took to prepare her daughter for school. Nationwide informed Erdman that it was unlikely she would be allowed to take vacation in August, which prompted Erdman to submit an FMLA leave request instead.

Erdman submitted paperwork on April 14, 2003 requesting FMLA leave from July 7 to August 29. Subsequently, on May 9, 2003, Nationwide terminated Erdman’s employment after she used profanity during a phone call that was monitored for quality-control purposes.

Erdman filed suit, claiming that Nationwide’s motives for terminating her were pretext (the phone call in which Erdman used profanity was a personal, not business, call), and that she was actually fired for requesting FMLA leave.

The District Court granted summary judgment in favor of Nationwide, holding that Erdman could not establish a cause of action for interference or retaliation under the FMLA because she had not accumulated the 1,250 hours necessary to qualify as an eligible employee under the statute. Erdman then appealed to the Third Circuit, which reversed.

The Third Circuit held that a genuine issue of material fact precluded summary judgment in this case, as the District Court failed to include the “comp time” hours Erdman worked from home in its calculation toward the 1,250 hour requirement. With the 118.5 hours from home included in the calculation, Erdman worked 1,298.25 hours during the relevant period. The Court held that Nationwide had constructive notice that Erdman was working these hours from home based on certain email exchanges between her and her supervisor, and thus she was an eligible employee

for purposes of the FMLA.

The Court also held, contrary to Nationwide's assertions, that if Erdman was eligible for FMLA leave, she did not actually have to take the leave to be able to recover on a retaliation theory. Rather, the Court held that it was sufficient that Erdman had requested the leave for her FMLA retaliation claim to rise. To that end, the Court noted, "it would be patently absurd if an employer who wished to punish an employee for taking FMLA leave could avoid liability simply by firing the employee before the leave begins." 582 F.3d at 508.

Finally, the Court, following the lead of the Seventh Circuit, held that a Department of Labor regulation that expanded FMLA leave eligibility beyond the statutory language was invalid. Specifically, the Court pointed to the "remedial eligibility" provision set forth in 29 C.F.R. § 825.110(d), which states, "[i]f the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible." Erdman had utilized this regulation to argue that she was eligible for FMLA leave regardless of how many hours she worked because Nationwide had failed to notify her of her eligibility. However, the Court adopted the analysis of *Dormeyer v. Comerica Bank*, 223 F.3d 579 (7th Cir. 2000), which held that the FMLA regulations could not be inconsistent with the Act, and the language of the Act is clear as it pertains to eligibility. Thus, the "remedial eligibility" regulation is invalid.

This case is a significant one for three main reasons. First, it makes it clear that if an employer receives actual or constructive notice that an employee is putting in extra time away from the office, the time will be applied toward the 1,250 hour eligibility requirement under the FMLA. Second, the Third Circuit decisively held, for the first time, that the FMLA prohibits retaliation for an employee's invocation of his or her right to take leave. To have a valid cause of action, the employee does not need to have actually taken the leave. Finally, the Erdman case added the Third Circuit to the list of circuits who have held that a Department of Labor regulation is invalid because it expanded FMLA leave eligibility beyond the statutory language