**[Cite as *Ewing v. Univ. of Akron*, 2008-Ohio-2439.]**

# Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

BEVERLY EWING

Plaintiff

v.

THE UNIVERSITY OF AKRON

Defendant

**[Cite as *Ewing v. Univ. of Akron*, 2008-Ohio-2439.]**

Case No. 2005-03181

Judge Joseph T. Clark

DECISION

**{¶1}** Plaintiff brought this action against defendant, University of Akron alleging violations of the Family Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq. and promissory estoppel. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

**{¶2}** Plaintiff was employed by Kelly Temporary Services in 1997 when she was first assigned to work at defendant's campus. After successfully completing several assignments with defendant, plaintiff was hired as a full-time temporary classified employee "effective, September 13, 1999 and ending on or before June 30, 2000." (Defendant's Exhibit B.) Plaintiff was hired as a word processing specialist in the dean's office of the College of Business Administration (CBA). The position was temporary inasmuch as plaintiff had replaced another employee, Marge Massey, who had taken disability leave. The parties agree that defendant was required to hold the position open for Massey for a period of five years from the date of her disability leave.

**{¶3}** Plaintiff's supervisor in the CBA was James Divoky, assistant dean and director of graduate programs in the CBA. Divoky reported to James T. Strong, defendant's CBA associate dean. Plaintiff received a grade of "satisfactory" on her 120-day probationary review and it was recommended that she be retained in her position. Plaintiff's performance was reviewed in June 2000 and it was agreed that her contract would be renewed though June 2001 with a job title of administrative assistant.

**{¶4}** Plaintiff became ill in January 2001 and began using sick leave. When her sick leave ran out she began using leave without pay. According to plaintiff, Divoky encouraged plaintiff to apply for FMLA leave. On January 11, 2001, plaintiff requested leave under the FMLA due to the serious health conditions of pneumonia, bronchitis, and an ear infection. In an "employer response" dated January 18, 2007, defendant granted plaintiff's leave request effective January 4, 2001, through February 26, 2001. (Defendant's Exhibit H.) The employer response states "[i]f this leave is extended beyond February 26, 2001, a certificate of Physician or Practitioner form must be filled out and returned to this office." Id.

**{¶5}** On February 19, 2001, plaintiff submitted a certificate from her physician wherein her "Probable * * * return to work date" is listed as "six months 06/04/2001." Plaintiff's leave request was approved on March 14, 2001, in an employer response that

states: "You will be required to present a return to work certificate prior to returning to work." (Defendant's Exhibit J.)

**{¶6}** On May 14, 2001, plaintiff's physician completed another certificate wherein he listed plaintiff's probable return date as September 10, 2001. Although this leave request was never approved, plaintiff did not return to work. In June 2001, defendant elected not to renew plaintiff's contract for the upcoming year and her employment with defendant ended effective June 30, 2001. Plaintiff learned that she was no longer employed by defendant in July 2001 when she visited her physician and was told that she was no longer covered under defendant's health insurance program. When plaintiff contacted defendant, Strong told her that her employment had been terminated.

**{¶7}** Plaintiff alleges that she was wrongfully terminated from her position in violation of the FMLA. Defendant argues that plaintiff had exhausted her FMLA leave well prior to the end of her one-year terminable contract; that she was not on FMLA leave when her contract ended; and that her non-renewal violated none of plaintiff's rights under the FMLA.

**{¶8}** The FMLA allows an eligible employee to take up to 12 weeks of unpaid leave from work for a qualifying medical or family reason.[1] To prevail on a claim for interference with FMLA benefits a plaintiff must establish that "(1) [she] is an 'eligible employee; (2) the defendant is an 'employer'; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of [her] intention to take leave; and (5) the employer denied the employee FMLA benefits to which [she] was

---

[1]29 U.S.C. §2612 states, in part:

"Leave requirement (a) In general. (1) Entitlement to leave. Subject to section 103 [29 USCS § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

"* * * (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee."

entitled." (Citations omitted.) *Cavin v. Honda of Am. Mfg.* (C.A.6, 2003), 346 F.3d 713, 719.

**{¶9}** In *Covucci v. Service Merchandise Co., Inc*. (C.A.6, 1999), 178 F.3d 1294, the Sixth Circuit Court of Appeals affirmed a summary judgment in favor of the employer on an FMLA interference claim where the evidence demonstrated that the employee had exhausted FMLA leave and had taken additional time off from work prior to being terminated. Id.

**{¶10}** In *Ragsdale v. Wolverine World Wide, Inc.* (2002), 535 U.S. 81, the United States Supreme Court struck down a federal regulation that would have required an employer to provide more than 12 weeks of FMLA leave where the employer had not specifically designated an employee's leave as such leave and had subsequently granted the employee additional time off. In so doing, the court stated that "[t]he challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice." Id. at 90. In ruling that plaintiff had proven neither impairment nor prejudice, the *Ragsdale* court noted that the employee had been awarded more than 30 consecutive weeks of leave and that she had not yet been cleared by her physician to return to work at the time her employment was terminated.

**{¶11}** At the time of her discharge, plaintiff had used all of her available sick time, she had taken more than12 additional weeks of unpaid leave, and she had not yet been cleared by her physician to return to work. In fact, her physician had certified that plaintiff would not be able to return to work until September 2001. Plaintiff's request for additional leave was not approved and her one-year renewable contract expired at the end of June 2001. Under such circumstances, defendant's decision not to renew plaintiff's contract for another year did not interfere with any of plaintiff's rights under the FMLA. Indeed, there is no allegation in this case that defendant failed to comply with the notice requirements of the FMLA. Consequently, plaintiff knew or should have

known that she was entitled to no more than 12 weeks of FMLA leave in a 52-week period.

**{¶12}** As an alternative theory, plaintiff argues that defendant should be estopped to deny that she was using FMLA leave when her employment was terminated inasmuch as defendant's conduct in continuing to grant unpaid leave led plaintiff to believe that defendant would approve such leave beyond June 30, 2001. Defendant's unpaid leave policy provides in relevant part:

**{¶13}** "(D) Leave without pay.

**{¶14}** "(1) Under the Family and Medical Leave Act of 1993 (FMLA), up to 12 weeks of leave without pay during any 12 month period are provided to eligible employees for certain family and medical reasons. Employees are eligible if they have been employed by the university for at least one year and for 1,250 hours (.6 FTE) over the previous 12 months.

**{¶15}** "Leave without pay will be granted for any of the following reasons:

**{¶16}** "Birth of a child or placement for adoption or foster care

**{¶17}** "Serious health condition of employee

**{¶18}** "Serious health condition of a child, spouse or parent

**{¶19}** "Subject to the provisions of the applicable policies, paid vacation leave or sick leave may be substituted for leave without pay.

**{¶20}** "Leave may be denied if the employee fails to provide at least 30 days advanced notice when the leave is foreseeable or medical certifications to support a request for leave because of a serious health condition (including requested second or third opinions at the university's expense) and fitness for duty to return to work reports.

**{¶21}** "Group health benefits will be continued for the duration of FMLA leave. Upon return, the employees will be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

**{¶22}** "*Nothing in this sections [sic] shall be deemed to create any additional benefits, rights, or entitlements to employees beyond those required by the provisions of FMLA or applicable law of the State of Ohio*.

**{¶23}** "(2) An employee may be granted approved leave of absence without pay for military service, parental leave, convalescence (if sick leave is not applicable or exhausted), certain personal reasons, and/or training. *The leave of absence must be approved in advance by the supervisor* and must be accompanied by acceptable written justification. Such request shall state the reason for and the dates of the leave. Length of leave of absence can vary for different reasons, but normally extends to no more than six months." (Emphasis added.)

**{¶24}** Although an employer's right to terminate an employee who has exhausted all of her FMLA leave is not unfettered, under the circumstances presented herein, it is simply not reasonable for plaintiff to believe either that she was still exercising her rights under the FMLA in June 2001 or that she was entitled to continuing employer-sponsored unpaid leave. She had already taken more than 12 weeks of unpaid leave and her most recent leave request was not approved.

**{¶25}** Plaintiff's claim that she would have returned to work had she known that she was no longer entitled to FMLA benefits rings hollow when one considers the fact that plaintiff submitted a leave request on May 14, 2001, seeking additional leave through September 2001. Similarly, plaintiff's claims that she would have continued to work in spite of her illnesses and that she would never have taken FMLA leave had it not been suggested by Divoky also lack credibility in light of plaintiff's two subsequent requests for unpaid leave in February 2001 and again in May 2001. In short, the court finds that defendant was under no legal obligation to continue to employ plaintiff beyond June 30, 2001, and that the principles of equity do not work in plaintiff's favor.

**{¶26}** For the foregoing reasons, the court finds that plaintiff has failed to prove either a claim for interference with her FMLA rights or an estoppel. Accordingly, judgment shall be rendered in favor of defendant.

**[Cite as *Ewing v. Univ. of Akron*, 2008-Ohio-2439.]**

# Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

BEVERLY EWING

Plaintiff

v.

THE UNIVERSITY OF AKRON

Defendant

Case No. 2005-03181

Judge Joseph T. Clark

JUDGMENT ENTRY

**[Cite as *Ewing v. Univ. of Akron*, 2008-Ohio-2439.]**

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
JOSEPH T. CLARK
Judge

cc:

| | |
|---|---|
| Michael T. Conway<br>180 Aster Place<br>Brunswick, Ohio 44212 | Velda K. Hofacker Carr<br>Assistant Attorney General<br>150 East Gay Street, 23rd Floor<br>Columbus, Ohio 43215-3130 |

LP/cmd
Filed April 28, 2008
To S.C. reporter May 21, 2008