

RAWLE'S REPORTS

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PENNSYLVANIA APPELLATE

Third Circuit Affirms District Court Decision in FMLA Case

Rawle & Henderson LLP recently obtained a favorable order from the United States Court of Appeals for the Third Circuit affirming a District Court summary judgment for our client in a Family Medical Leave Act case.

In this matter, the employee was employed by Rawle & Henderson LLP's client, an EMS organization, as a paramedic and training director. On June 9, 2013, while on vacation, she was injured in a mountain bike accident and suffered a dislocated hip and a concussion. She requested and was granted leave under the Family Medical Leave Act (FMLA) to recuperate from her injuries. Her leave was scheduled to run from June 12, 2013, to July 29, 2013.



Fred B. Buck

In November 2011, 20 months before her accident, without our client's knowledge, the employee set up a side business which provided training services such as CPR certification classes similar to those provided by our client. When our client learned that the employee had set up a competing business without its knowledge, she was required to sign a non-competition agreement. The agreement provided, among other things, that employee would not offer training programs or Automated External Defibrillation sales to the client's customers within a 75-mile radius of the client's headquarters.

Unbeknownst to our client, employee began violating the non-competition agreement six days after it was signed. In early July 2015, while the employee was on FMLA leave, it was reported to our client that she had conducted CPR training through her company at Pennsylvania State University and had used our client's CPR certification cards in the training session. That was a violation of the non-competition agreement.

In March 2012, 16 months before the accident, our client sustained water damage in its facility and submitted a property damage claim to its insurance carrier. Among the damaged items

was a collection of CPR training manikins. The employee was responsible for identifying damaged items in the training department and preparing a list of those items. The list was submitted to the insurer in support of its first-party claim. During that process, the employee untruthfully told our client's executive director that she had given the manikins to a friend in Maryland who used them for target practice at his shooting range and that they had ultimately been destroyed. In reality, she had taken the manikins home, stored them there, and planned to use them in her competing business.

On July 10, 2013, faced with this information, our client's general counsel sent a letter to the employee requesting that she explain "(1) how and where [the damaged manikins] were disposed of, and [identify] any witnesses to the disposition of the items and (2) inform me as to whether [her company] conducted a CPR training program at Penn State University in February of 2013." The employee was given 10 days to respond to the inquiry. On July 21, 2013, one day after that deadline, the employee sent a letter stating only that she intended to retain counsel. She did not address any of the inquiries in the letter. Because of her failure to respond to the letter in any meaningful way, her employment was terminated while she was on FMLA leave.

The employee brought suit in the United States District Court for the Middle District of Pennsylvania alleging that our client had "interfered" with her FMLA leave in violation of 29 U.S.C. § 2615(a)(1) and had retaliated against her for

taking FMLA leave in violation of 29 U.S.C. § 2615(a)(2). The retaliation claim was later withdrawn.

The district court entered summary judgment in favor of our client on the grounds that the employee's termination was unrelated to her exercise of FMLA rights and, therefore, there was no "interference" with her FMLA rights in violation of the Act.

In an opinion and order dated May 24, 2019, the United States Court of Appeals for the Third Circuit affirmed. The court held that there were no disputed issues of fact as to the reasons for the employee's termination. She was terminated because she did not respond to the letter requesting information about her violation of the non-competition agreement and her failure to dispose of the water-damaged manikins. The court held that "the FMLA does not protect an employee from discipline for any reason while she is on leave—rather . . . it protects her only from discharge because she requests or takes FMLA leave."

On appeal, the employee attempted to circumvent this principle by arguing that the demand for an explanatory letter was a "performance requirement" that she could not meet, and that our client knew she could not meet, due to her closed head injury. The Court of Appeals rejected this argument holding that "[client's] one-time, discrete inquiry which was unrelated to her exercise of FMLA rights does not constitute FMLA interference."

Fred B. Buck, Chair of the Firm's Professional Liability and Casualty Sections, has been an active litigator and trial lawyer for over 35 years. He has represented clients in high exposure cases in many diverse areas of the law, including general negligence, civil rights, product liability, professional liability, commercial motor vehicle, and construction site accidents. He has tried many jury and nonjury cases in the Courts of Common Pleas of Philadelphia, Berks, Bucks, Delaware, Lackawanna, Lehigh, Monroe, Montgomery, Pike and York Counties as well as in the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania. He has argued appeals in the Pennsylvania Appellate Courts and in the United States Court of Appeals for the Third Circuit.

Fred earned an A.B., *cum laude*, from Georgetown University and a J.D. from Temple University School of Law.

Fred is a Fellow of the American College of Trial Lawyers and an advocate-level member of the American Board of Trial Advocates. He has taught as an adjunct professor of law at the Villanova University School of Law. Fred is rated AV Preeminent by Martindale-Hubbell and has been selected as a 2019 Pennsylvania Super Lawyer.

Fred can be reached directly at (215) 575-4317 • fbuck@rawle.com

PENNSYLVANIA

WORKERS' COMPENSATION

Favorable Order in Case Involving Termination Petition

Rawle & Henderson LLP recently obtained a favorable Opinion and Order from the Commonwealth Court of Pennsylvania which denied and dismissed a Claimant's Petition for Review challenging a Workers' Compensation Judge's Decision which granted a Petition to Terminate compensation benefits and denied a Review Petition to expand the description of work injury.

The Commonwealth Court's seven-page Opinion concluded that the Workers' Compensation Judge did not commit any error of law in granting Employer's Termination Petition which was based upon the credible and persuasive testimony of its medical expert, Dr. Steven Valentino, that Claimant was fully recovered from the work injury at the time of the independent medical examination.

On Appeal, Claimant had argued that Dr. Valentino's testimony was incompetent as a matter of law. In rejecting this appellate argument, the Commonwealth Court focused on Dr. Valentino's testimony, noting that he based his opinion on his expertise as a practicing Board-

Certified Orthopedic Surgeon and Fellowship-Trained Spine Surgeon, his thorough review of the numerous medical records and diagnostic studies and also on his review of surveillance video of Claimant. The Commonwealth Court relied heavily on the two surveillance CD-ROMs which were viewed by Dr. Valentino and showed Claimant performing activities of daily living including driving, walking, shopping, and carrying grocery bags and packages without any visible sign of impairment or difficulty.

As a result, the Commonwealth Court concluded that Dr. Valentino's opinion was competent, credible and persuasive to support his full recovery medical opinion which formed the basis of the Workers' Compensation Judge's Decision granting the Termination Petition.



Zachary M. Rubinich

Zachary M. Rubinich focuses his practice on the defense of insurance carriers, self-insured entities and third-party administrators against workers' compensation claims in Pennsylvania. Based on his extensive experience, the Pennsylvania Bar Association Workers' Compensation Law Section has certified him as Specialist in the practice of workers' compensation law. Zach has handled all aspects of litigation before workers' compensation judges, the Workers' Compensation Appeal Board, the Commonwealth Court and the Pennsylvania Supreme Court. He routinely counsels employers, insurance carriers and third party administrators on claims management, workplace safety, return-to-work programs, employment practices and risk management. Zach has been appointed the Chair of the American Bar Association's Tort Trial and Insurance Practice (TIPS) Workers' Compensation and Employers' Liability Law Committee for 2018-2019. He served as Vice-Chair of the ABA TIPS Workers' Compensation and Employers' Liability Law Committee for 2015-2016, 2016-2017 and 2017-2018. In addition, Zach was appointed as Vice-Chair of the 2017-2018 American Bar Association Standing Committee for Diversity and Inclusion. Zach has been rated AV Preeminent by Martindale-Hubbell for the seventh consecutive year in 2019. He has been selected as a **2019 Pennsylvania Super Lawyer** by *Super Lawyers*. He was selected as a **Pennsylvania Rising Star** by *Super Lawyers* from 2010 to 2014.

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LONG ISLAND



Rolando C. Delacruz

Rolando C. Delacruz has joined our **Long Island** office as an associate. He focuses his practice on medical professional liability, employment relations, product liability, casualty, premises liability and insurance coverage. Rolando earned his J.D. from The John Marshall Law School in Chicago, IL, in 2014. While attending law school, he was a law clerk for the Law Office of the Cook County Public Defender in Chicago in the Summer of 2012. He placed first in the 1L Mock Trial Competition in March 2012. In addition, Rolando was a member of the law school's Trial Advocacy and Dispute Resolution Honors Council in the Fall of 2012 and served as Associate Barrister of the Trial Advocacy and Dispute Resolution Honors Board in the Spring of 2013. He earned his B.A. in Philosophy from the University of Texas – Pan American in 2010. He was on the Dean's List, Second Honors, in the Spring of 2010 and the Fall of 2008. While he attended UTPA, Rolando was an intern for Texas Rio Grand Legal Aid from August to December 2010. He served as President of the Mock Trial Organization and Captain of the Mock Trial Competition Team. He won the All Region Attorney Award at the American Mock Trial Association Regional Tournament in February 2011. Rolando is admitted to practice in New York, Illinois, and the U.S. District Court for the Eastern District of New York. Prior to joining Rawle & Henderson LLP, Rolando was an attorney with a labor, employment and benefits litigation law firm on Long Island.

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HARRISBURG



Patrick F. Coleman

Patrick F. Coleman has joined the **Harrisburg** office of Rawle & Henderson LLP as an associate. He concentrates his law practice on the defense of commercial motor vehicle companies and their insurers and product liability. Patrick earned his J.D. from Campbell University School of Law in Raleigh, North Carolina, in 2017. While in law school, he worked as a student attorney for Campbell University's Community Law Clinic. In addition, he served as a court intern for the Philadelphia Court of Common Pleas. Patrick earned a B.S. degree in Accounting from Florida Institute of Technology in 2014. Patrick is admitted to practice in Pennsylvania. Prior to joining Rawle & Henderson LLP, he was an attorney in the Philadelphia office of a midsize civil litigation defense law firm.

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PHILADELPHIA



Kevin G. Gallagher

Kevin G. Gallagher has joined the **Philadelphia** office of Rawle & Henderson LLP as an associate. He concentrates his law practice in the areas of commercial motor vehicle defense, insurance coverage, employment relations, and maritime law. Kevin earned his J.D. from Temple University James E. Beasley School of Law in 2018 and graduated with a Certificate in Trial Advocacy and Litigation. Kevin also received the Lenard Sigal Memorial Award for Excellence in Criminal Law Studies. While attending law school, Kevin worked as a summer associate and law clerk for a Philadelphia maritime law firm specializing in maritime insurance defense. Additionally, Kevin served as a legal intern for the Philadelphia District Attorney's Office and the Delaware County District Attorney's office. Kevin earned his B.A. in Political Science and Communications & Rhetoric, *cum laude*, from the University of Pittsburgh in 2015. While attending the University of Pittsburgh, Kevin hosted his own radio show on the school's local radio station WPTS 92.1. Kevin is admitted to practice in Pennsylvania and New Jersey. Prior to joining Rawle & Henderson LLP, he served as a judicial law clerk for the Honorable Steven C. Tolliver in the Montgomery County Court of Common Pleas.

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