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Submitted by:

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After entering into a general release of claims as part of resolving her EEOC charge of discrimination, the plaintiff filed suit against her former employer under the FMLA. The defendant moved for summary judgment on the grounds that plaintiff's lawsuit was barred by the settlement agreement. The defendant cited to the 2009 Department of Labor regulation providing that the prohibition on prospective FMLA rights "does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court." 29 C.F.R. § 825.220(d).

The plaintiff opposed summary judgment on two grounds. First, that Section 220(d), which was promulgated in January 2009 and more than a year after she signed the settlement agreement, did not apply retroactively to bar her claims. The court rejected the plaintiff's argument and found that Section 220(d) did apply retroactively. Second, the plaintiff contended that Section 220(d) was invalid on policy grounds because it thwarted the policy the FMLA was designed to effectuate. The court rejected this argument as well.

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The court denied the defendants' motion for summary judgment on the grounds that the plaintiff had presented enough evidence to raise an issue of fact as to whether GGH and CFG should be considered an integrated enterprise for FMLA coverage purposes. In so ruling, the court first acknowledged that the following four factors should be considered when evaluating whether apparently separate entities should be treated as a single employer under the FMLA: (1) whether there is interrelation of operations; (2) whether there is common ownership; (3) whether there is centralized control of labor relations and personnel; and (4) whether there is common management, common directors and common boards. However, the court also emphasized that the plaintiff was not required to satisfy all four factors to establish that GGH and CFG were an integrated enterprise. Rather, the third prong, control of labor relations, was the most critical factor in the analysis. In concluding that summary judgment was inappropriate, the court found it significant that GHH and CFG were consolidated under one human resources department, which processed leaves of absence and employee terminations for both entities.

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***Finnerty v. Radioshack Corp.*, 2010 WL 3069608, 110 Fair Emp. Prac. Cas. (BNA) 12, 16 Wage & Hour Cas.2d (BNA) 836 (6th Cir. Aug. 5, 2010)**

The plaintiff originally filed suit against her former employer for discrimination under the FMLA and one year later added the successor employer, Radioshack, as a defendant because the original defendant ceased operations and dissolved. The trial court granted summary judgment for the successor-employer defendant finding that laches prevented the inclusion of the successor. The plaintiff appealed and the appellate court affirmed. In an unpublished opinion, the Sixth Circuit held that the plaintiff was aware of the sale of assets at the time it occurred and even asked questions related to the sale during discovery. Thus, the plaintiff was aware of the successor liability issue at the time of sale. The court found that the added defendant would have extreme difficulty finding witnesses, documents and seeking indemnification from the seller. Therefore, laches was appropriate because of the undue delay in amending the complaint and the resulting prejudice to the successor.

***Sullivan v. Dollar Tree Stores, Inc.*, 2010 WL 3733576, 16 Wage & Hour Cas.2d (BNA) 1185 (9th Cir. Sept. 27, 2010)**

In *Sullivan,* the district court granted summary judgment in favor of the employer and the Ninth Circuit affirmed. On appeal, the primary issue before the court was whether the plaintiff's new employer was a successor in interest under the FMLA.

The general focus of an inquiry into whether an employer is a successor in interest for FMLA purposes is whether the new business is "essentially the same" as the old business. The inquiry turns on the facts related to the new and old employers, as well as the nature of the legal obligations at issue. The court balanced eight different factors, including whether there was (1) substantial continuity of the same business operation, (2) use of the same physical facilities, (3) continuity of the work force, (4) similarity of jobs and working conditions, (5) similarity of supervisory personnel, (6) similarity in machinery, equipment, and production methods, (7) similarity of products or services, and (8) ability of the predecessor to provide relief. Balancing the interests of both parties and the federal policy goals of the FMLA, the court concluded that the defendant was not a successor in interest. The defendant merely purchased the lease of its predecessor, Factory 2-U, and did not rehire most of its employees. Although its business operation was similar to Factory 2-U, the defendant (1) did not purchase Factory 2-U's inventory, (2) required Factory 2-U employees to apply for jobs, (3) closed for weeks to renovate, (4) brought in new inventory and staff, and (5) used an entirely different pricing structure. Thus, the district court found the defendant was not a successor in interest to Factory 2-U under the FMLA. Because the plaintiff had not worked for the defendant for at least 12 months, she was ineligible for FMLA leave

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***Bosse v. Baltimore County*, 692 F. Supp. 2d 574 (D. Md. 2010)**

The plaintiff worked for Baltimore County as a corrections officer. During the course of his employment, the plaintiff took intermittent FMLA leave both to care for his son and for his own medical needs. The plaintiff filed suit against the defendant as well as two individual supervisors, alleging, in part, FMLA interference and retaliation. The parties filed cross motions for summary judgment and the court granted the defendants' motion in part while denying the plaintiff's motion.

First, the court considered whether the individual defendants could be liable for violating the FMLA. The court noted that there is a split among the circuits and among the district courts within the Fourth Circuit on this issue. The court adopted the reasoning of *Sadowski v. U.S. Postal Serv.*, 643 F. Supp. 2d 749 (D. Md. 2009) and found that, under the rules of statutory construction, allowing individual liability for public employees under the FMLA would render certain provisions of the statute superfluous. As such, the court concluded that public employees may not be individually liable under the FMLA and granted summary judgment as to the individual defendants.

The court then considered whether the plaintiff's claims were barred by the applicable statute of limitations. The plaintiff argued that the defendant's violation of the FMLA was willful, and thus the three-year statute of limitations applied. The court held that a reasonable jury could conclude that, in criticizing the plaintiff's use of leave and discouraging him from taking leave, the defendant acted willfully. The court allowed the plaintiff to proceed with his claims which fell within the three-year period prior to the date he filed suit.

Regarding the interference claim, the court found that the plaintiff had produced sufficient evidence to survive summary judgment because he presented evidence that the defendant repeatedly denied his requests for FMLA leave or required additional documentation that exceeded the documentation required for non-FMLA leave. The court also noted that the plaintiff had presented evidence that his leave may have been improperly coded in the defendant's payroll system.

The plaintiff also claimed that he was retaliated against under the FMLA because he was denied a promotion. The court found that the plaintiff could state a *prima facie* case of retaliation because he presented evidence suggesting he did not receive a promotion because he frequently took leave, much of which fell under the FMLA. The court found that the defendant articulated a legitimate reason for not promoting the plaintiff, namely, that the plaintiff lacked experience and certain knowledge required for the job. The court then concluded that the plaintiff offered evidence of pretext because those who were promoted had better attendance than the plaintiff and the plaintiff was criticized for taking leave. The court found that a reasonable jury could decide that the plaintiff's leave, including FMLA leave, played a role in the decision not to promote him.

***Saavedra v. Lowe's Home Centers, Inc.*, 2010 WL 3656008, 16 Wage & Hour Cas.2d (BNA) 1061 (D.N.M. Sept. 2, 2010)**

The plaintiffs, husband and wife who were former employees of Lowe's, alleged FMLA violations against both Lowe's and an individual manager. The wife had been on approved FMLA leave when the manager defendant changed the plaintiff's leave status from FMLA to personal leave. Upon her return from leave, the manager terminated her because her doctor included the wrong date on the release form. The husband plaintiff was also terminated shortly thereafter for taking time off to assist his wife while she was on FMLA leave.

The manager moved to dismiss the FMLA claims against her, arguing that she was not an employer under the FMLA. The court granted in part and denied in part this motion. The court dismissed the husband's FMLA claims against the manager defendant for failure to plead facts showing he was under the manager's supervisory control. At the hearing, the plaintiffs' lawyer conceded that the husband worked at a different Lowe's location, that there was no employment relationship, and stated that he would not contest dismissal of the claim.

The court, however, denied the manager's motion to dismiss the wife's FMLA claims against her, holding that the FMLA provides for individual liability. The court agreed with the Sixth, Eighth and Eleventh Circuits, as well as several district courts in the Tenth Circuit, in holding that the plain language of the FMLA confers individual liability over individuals acting on an employer's behalf. The court noted that the FLSA's "economic reality" test should be used to determine whether an individual is an "employer" for FMLA purposes. Applying the four-prong test laid out in *Baker v. Flint Engineering & Construction Co.,* 137 F.3d 1436 (10th Cir. 1998), the court stated that the wife, by pleading the manager had authority of hiring and firing and other work conditions, had sufficiently pleaded that she was an employer under the FMLA.

Lastly, the court held that the FMLA does not provide for punitive damages, and dismissed both plaintiffs' claims for punitive damages. It reasoned that Congress intentionally limited remedies in the language of the statute.

***Jones v. Sternheimer*, 2010 WL 2711305 (4th Cir. July 6, 2010)**

The plaintiff appealed the district court's order denying his motion to proceed in forma pauperis and instructing the clerk not to file his complaint, in which he sought relief against his individual supervisors under the FMLA. The Fourth Circuit vacated the district court's ruling, granting the plaintiff leave to proceed in forma pauperis and remanding the case because supervisory liability under the FMLA is an open question in that circuit.

The court opined that the question of FMLA supervisory liability would be properly raised in a 12(b)(6) motion to dismiss, not upon a *sua sponte* finding that the plaintiff's claim was wholly frivolous.

Summarized Elsewhere:

***Brown v. Lieutenant Governor's Office on Aging*, 697 F. Supp. 2d 632 (D.S.C. 2010)**

***Emmons v. City University of New York*, 715 F. Supp. 2d 394 (E.D.N.Y. 2010)**

CHAPTER 3. ELIGIBILITY OF EMPLOYEES FOR LEAVE

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***Roberts v. Unitrin Specialty Lines Ins. Co.*, 2010 WL 5186773 (5th Cir. Dec. 21, 2010)**

In an unpublished opinion, the Fifth Circuit affirmed dismissal of the plaintiff's claim that she was denied FMLA leave and that she was retaliated against because she took FMLA leave. The court stated that the first time the plaintiff requested leave she had only been employed for 11 months and was not eligible. The second time that the plaintiff requested leave she had worked for the defendant for 12 months, but because she had already been on leave for approximately 20 weeks, she was not entitled to additional leave. The plaintiff's retaliation claim failed because she could not show she was entitled to FMLA leave.

***Thornburg v. Frac Tech Services, Ltd.*, 709 F. Supp. 2d 1166 (E.D. Okla. 2010)**

In *Thornburg*, the plaintiff alleged his employer violated the FMLA when it terminated his employment because he was not able to get a medical release. The question in this case was whether the plaintiff was eligible for leave under the FMLA. The plaintiff's first day of work was March 21, 2007 and he stopped working on March 4, 2008 due to his medical condition. The defendant terminated the plaintiff on May 7, 2008.

The court noted that whether an employee is eligible for protected leave is determined on the day his leave commences. Using that standard, the plaintiff was not eligible for protected leave. The court noted that in 2009 the Department of Labor "clarified" that standard by adding that an employee may be on non-FMLA leave when he becomes eligible for protected leave and any portion of the leave taken for an FMLA-qualifying reason after the employee becomes eligible constitutes FMLA leave. The court went on to note that the "clarification" actually resulted in a change in FMLA interpretation by some courts, which only considered FMLA eligibility at the outset of the employee's leave. Such changes in administrative rules do not apply retroactively unless the language of the change expressly requires retroactive application. The court concluded that the plaintiff was not eligible for FMLA based on the defendant's interpretation of the then-existing authority.

Summarized Elsewhere:

***Sullivan v. Dollar Tree Stores, Inc.*, 2010 WL 3733576, 16 Wage & Hour Cas.2d (BNA) 1185 (9th Cir. Sept. 27, 2010)**

IV. MEASURING 1,250 HOURS OF SERVICE DURING THE PREVIOUS 12 MONTHS

***Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 15 Wage & Hour Cas.2d (BNA) 1888 (7th Cir. 2010)**

In *Bailey*, the court rejected the plaintiff's argument that her FMLA leave during the preceding 12-months should have tolled the 12-month period for determining whether she worked the requisite 1,250 hours in 12 months for FMLA eligibility. The plaintiff argued that the 56 days of FMLA leave she took during the 12 months preceding her leave request should have been excluded and she should have been able to add the 56 days prior to the preceding 12 months in order to determine her FMLA eligibility. It was undisputed that she would have worked 1,250 hours if her FMLA leave tolled the 12-month period. The court found no basis for this interpretation of the FMLA and refused to dilute the statutory requirement by incorporating days outside the 12-month period.

The plaintiff also challenged the employer's "no fault" attendance policy because she was discharged when she exceeded the allowed number of points under the policy. Under this policy, employees accrued "points" for unapproved absences. Points were "forgiven" after 12 months, but an employee could not accrue time towards that 12 months for purposes of point forgiveness while on FMLA leave. In other words, the 12-month period for point forgiveness was tolled while an employee was on FMLA leave.

The plaintiff challenged the employer's policy and the court held that point forgiveness under a no-fault attendance policy is an employment benefit that, like seniority, accrues only as a result of working. The plaintiff was not, therefore, entitled to accrue point forgiveness while she was on FMLA leave. Thus, the Seventh Circuit affirmed summary judgment for the employer.

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***Gleaton v. Monumental Life Ins. Co.*, 719 F. Supp. 2d 623 (D.S.C. 2010)**

In *Gleaton*, an insurance agent sued her employer for retaliation because she was fired soon after she announced her plan to begin FMLA leave. The plaintiff had only worked for the defendant for approximately eleven months when she was placed on a performance enhancement plan. Soon after, she claimed that she became seriously ill. She informed the defendant that she would need to take FMLA leave as soon as she became eligible for FMLA leave following her

first-year anniversary with the company. The defendant discharged her a few days before she reached her first-year anniversary.

The defendant moved to dismiss plaintiff's claim. The defendant argued that employees who are ineligible for leave under the FMLA have no FMLA rights prior to their one-year anniversary. The defendant also argued that under the Fourth Circuit's ruling in *Babcock v. BellSouth Advertising and Publ'g Corp.*, 348 F.3d 73 (4th Cir. 2003), employees who are ineligible for FMLA leave cannot establish either interference or retaliation claims when their employer denies their request for FMLA leave or takes adverse action against them. The defendant claimed that otherwise employees can "reserve" FMLA leave before they became eligible for it, giving them more rights than that intended by Congress.

The district court disagreed. The court distinguished *Babcock* because it included only an interference claim under 29 U.S.C. § 2615(a)(1) and not a retaliation claim under § 2615(a)(2). The court noted a split throughout the courts on the issue: some district courts have held that an employee cannot bring a retaliation claim under the FMLA unless the employee was eligible for the leave at the time it was requested; however, other district courts and the Sixth Circuit have held the opposite, concluding that an employee can bring a retaliation claim under the FMLA even if the employee was employed for less than twelve months, so long as the requested leave would begin after the employee became eligible for FMLA leave. These courts based their decisions on § 2612(e) of the Act, which requires an "employee" (not an "eligible employee,") to give an employer 30 days notice of foreseeable leave. The courts reasoned that, because the statute requires employees to give notice of future leave before they become eligible employees, it must also protect them from retaliation once they have given notice, so long as the requested leave occurs after they have become eligible employees. The court in *Gleaton* adopted the latter view, finding that a viable retaliation claim in this instance was "more consistent with the goals of FMLA" and "provide[d] the more equitable result." Accordingly, the court denied the defendant's motion to dismiss.

***Hearst v Progressive Foam Technologies, Inc.*, 682 F. Supp. 2d 955 (E.D. Ark. 2010)**

The plaintiff filed suit against the defendant for FMLA interference and retaliation. Prior to his one year anniversary with the defendant, the plaintiff suffered a non-work related injury, which led to his request for leave. Upon his one year anniversary, the defendant informed the plaintiff that he was eligible for FMLA leave and that his previously-requested leave would be retroactively counted against his FMLA entitlement. Subsequently, the plaintiff's physician, on three different occasions, notified the defendant of changes in the plaintiff's expected return-to work date. The defendant then requested the plaintiff to inform it of his status and specific return-to-work date. After the plaintiff failed to do so and did not return to work, the defendant terminated his employment for job abandonment.

The plaintiff challenged the employer's charging him with FMLA leave prior to his entitlement to that leave. The district court rejected the plaintiff's argument. Emphasizing that the Eighth Circuit has not clearly stated the rule of law on such facts, the court found that, as long as the defendant's more generous leave policies meet the FMLA's minimum requirements,

the leave taken by the plaintiff prior to becoming an eligible employee may be counted against the plaintiff's 12-week entitlement under the Act.

Regarding plaintiff's termination, the court found that the defendant's policies, requiring the plaintiff to report periodically and inform them of his return-to-work date, were permissible under the FMLA. Since the plaintiff did not comply with such policies, the defendant could terminate plaintiff's employment without violating the FMLA.

The court also addressed the plaintiff's allegation that the defendant interfered with his rights by forcing him to take FMLA leave when he did not need it. The court reasoned that an allegation of interference under such circumstances only applies when an employer forces an employee to take leave when the employee does not have a serious health condition that precludes him from work. Because the plaintiff had a serious health condition, defendant's motion for summary judgment was granted.

Summarized Elsewhere:

***Collins-Pearcy v. Mediterranean Shipping Co. (USA) Inc.*, 698 F. Supp. 2d 730 (S.D. Tex. 2010)**

***Mott v. Office Depot, Inc.* 2010 WL 2990913 (9th Cir. July 30, 2010)**

***Murphy v. Fedex National LTL, Inc.*, 618 F.3d 893, 16 Wage & Hour Cas.2d (BNA) 952 (8th Cir. 2010)**

CHAPTER 4. ENTITLEMENT OF EMPLOYEES TO LEAVE

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***Tayag v. Lahey Clinic Hosp., Inc.*, 677 F. Supp. 2d 446 (D. Mass. 2010), *aff'd* --- F.3d ----, 2011 WL 241968 (1st Cir. Jan. 27, 2011)**

The plaintiff alleged that she took leave to go to the Philippines with her husband to participate in faith healing activities and argued that this conduct was protected leave under the FMLA. In granting the defendant's motion for summary judgment, the court found that the plaintiff never informed the defendant that she intended to take leave to travel to the Philippines to participate in faith health activities, and instead gave multiple, inconsistent reasons for taking the leave, including to help her husband recover from heart surgery. As a result, she was not entitled to leave. The court further found that even if attendance at such faith health activities was protected conduct under the FMLA, almost half of the plaintiff's trip with her husband was spent on vacation-type activities, including visiting friends and family. Thus, the court held she was not entitled to leave under the FMLA, which "does not permit employees to take time off to take a vacation with a seriously ill spouse, even if caring for the spouse is an 'incidental consequence' of taking him on vacation." Because she took unapproved leave, the court held that the defendant did not interfere with her rights or retaliate against her when it terminated her employment.

D. Inability to Work Because of an Employee's Own Serious Health Condition

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III. SERIOUS HEALTH CONDITION

A. Overview

***Barker v. R.T.G. Furniture Corp.*, 375 Fed. Appx. 966 (11th Cir. 2010)**

In an unpublished opinion, the Eleventh Circuit affirmed the district court decision granting summary judgment to the defendant on the grounds that the plaintiff failed to provide any evidence that he suffered from a serious health condition under the FMLA.

The plaintiff suffered from anxiety for which he sought and received treatment. Occasionally, the plaintiff's anxiety resulted in short breaks from work. However, the plaintiff never alleged that he was unable to perform the functions of his position. In fact, the plaintiff testified that he always performed his job well and his doctor testified that he never advised the plaintiff to stop working. Therefore, there was insufficient evidence to show that the plaintiff suffered from a serious health condition.

Since both interference and retaliation claims require a plaintiff to establish the existence of a serious health condition, the appellate court ruled that the district court did not err in granting the defendant's motion for summary judgment.

***Hoang v. Wells Fargo Bank, N.A.*, 2010 WL 2640057 (D. Or. June 29, 2010)**

After taking reduced work schedule leave under the FMLA, the plaintiff requested additional time off for a vacation several months later. The plaintiff's manager subsequently told the plaintiff she could not take the time off as she already had exhausted all her paid time off and the employer was not approving anyone to take unpaid time off. The plaintiff later presented a note from her doctor requesting time off from work for medical treatment for the same time period as the plaintiff's previously requested vacation. Based on the note, the defendant permitted the leave subject to being approved under the medical leave policy. Ultimately, the defendant deemed the leave unapproved because the plaintiff failed to return the medial

certification forms. As a result, the plaintiff's employment was terminated for taking the unapproved leave of absence and for a code of ethics violation. The defendant maintained that when the plaintiff's vacation request was denied, she took the time off under the guise of a medical leave, which could not have been true given the failure to return the medical certification forms.

The plaintiff filed a lawsuit claiming, among other causes of action, that the defendant interfered with her rights under the FMLA. The court granted the defendant's motion for summary judgment, holding that the plaintiff's claim failed because she could not prove that she was unable to perform any of the functions of her job when she took time off for the vacation/medical leave. No health care provider found that the plaintiff was unable to work or unable to perform any of the essential functions of her job. Further, the plaintiff testified that she would have gone to work if she had not taken the vacation/medical leave. Thus, the plaintiff did not have a serious health condition and was not entitled to FMLA leave.

Summarized Elsewhere:

***Gunzburger v. Lamberti*, 367 Fed. Appx. 80 (11th Cir. 2010)**

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Summarized Elsewhere:

***Gipson v. Vought Aircraft Indus., Inc.*, 2010 WL 2776842, 16 Wage & Hour Cas.2d 583 (6th Cir. July 13, 2010)**

1. Incapacity for More Than Three Consecutive Calendar Days and Continuing Treatment by Health Care Provider

***Branham v. Gannett Satellite Information Network, Inc.*, 619 F.3d 563, 16 Wage & Hour Cas.2d (BNA) 1040 (6th Cir. 2010)**

The plaintiff brought a claim for interference and retaliation based on her termination for absenteeism. The plaintiff's physician released her to return to work on November 14, 2006, but plaintiff contended that she was too ill to return to work. She failed to report to work and her employer discharged for failing to follow the company attendance policy. A termination letter was mailed to her on November 28, 2006. That same day, the plaintiff faxed an additional medical certification form, prepared by a nurse practitioner at her primary care physician's office, indicating that she had been ill since May of 2006 and would not be able to return until January 2007.

The district court granted summary judgment in favor of the defendant, holding that the plaintiff had failed to show that she was entitled to leave. The Sixth Circuit reversed, finding that the conflicting medical certifications created a triable issue of fact as to whether the plaintiff had a serious health condition entitling her to leave, since the evidence conflicted regarding

whether she was incapacitated more than three consecutive days and whether she had two treatment visits. Second, the court held that the defendant had failed to give the plaintiff written notice that she was required to submit a medical certification, which precluded summary judgment. Indeed, the employer's statement that the plaintiff should sign a short-term disability form to "see if she qualified for anything," without ever referencing the FMLA or medical certification forms was insufficient to trigger the plaintiff's duty to provide such a certification.

a. Incapacity for More Than Three Calendar Days

***Mercado v. Manny's T.V. & Appliance, Inc.*, 928 N.E.2d 979 (Mass. App. 2010)**

Following his termination, the plaintiff sued his former employer for, among other things, violating his FMLA rights. The plaintiff, an appliance installer, injured his knee during at work on a Wednesday and sought treatment immediately. He obtained a note from a physician's assistant indicating that he should not work until the following Monday. When the plaintiff informed one of his managers of the injury and note, the manager instructed him to come to work the following day (Thursday) and bring the note so they could discuss it. When the plaintiff arrived at work on Thursday, a different manager sent him out to work on appliance installations. The plaintiff worked a full day on Thursday and also worked a full day on Friday, with his installation partner handling "the big lifting." The plaintiff did not object to working on Thursday or Friday. The following Monday, the defendant terminated the plaintiff after he swore at his supervisor.

The Massachusetts Court of Appeals affirmed a directed verdict for the defendant on all of the plaintiff's claims. As to the FMLA claim, the court concluded that the plaintiff had no cause of action unless the evidence would allow a reasonable jury to find that the plaintiff was incapacitated for more than three consecutive days. Here, the plaintiff had testified that he worked the two days following his injury even though the physician's assistant had recommended that he remain off work. Because of this, the plaintiff could not show that he was unable to work as required under the FMLA.

***Schaar v. Lehigh Valley Health Services, Inc.*, 598 F.3d 156, 15 Wage & Hour Cas.2d (BNA) 1677 (3d Cir. 2010)**

The plaintiff presented evidence from her doctor that illness prevented her from working on two consecutive days and further testified that she was sick for two additional days. The Third Circuit found this evidence was sufficient to create a material issue of disputed fact regarding whether the plaintiff had a serious health condition. Consequently, the court remanded the case for further proceedings.

Relying on the FMLA's language and Department of Labor regulations, the Third Circuit found that lay testimony, by itself, is insufficient to create a genuine issue of material fact regarding whether the employee was incapacitated due to a serious health condition. However, the court held that the plaintiff could satisfy her burden by providing a combination of expert and lay testimony, with the expert testimony establishing the causal connection between the incapacitation and the serious health condition. The court held that some medical evidence is necessary to show that the incapacitation is a direct result of a serious health condition. The

court reasoned that such a requirement does not place an undue burden on employees because they must present medical evidence to establish their inability to perform the functions of their position.

***Taylor v. Autozoners, LLC*, 706 F. Supp. 2d 843 (W.D. Tenn. 2010)**

The court granted summary judgment in favor of the defendant, finding that the plaintiff failed to establish that she suffered from a serious health condition under the FMLA and therefore failed to establish a *prima facie* case of interference or retaliation under the statute.

The plaintiff argued that, due to her back condition, she was incapacitated for more than three days and her condition involved continuing treatment by a health care provider or, alternatively, that she was incapacitated due to a chronic condition. As the district court pointed out, courts in the Sixth Circuit have interpreted incapacity to mean unable to work. Because there were only two days where a physician recommended that she not work, the plaintiff was never unable to work for more than three consecutive days. Further, there was no evidence that her back injury would continue to cause her pain or require continuing treatment, which is a required showing for a chronic condition. In fact, at the plaintiff's last doctor visit, the physician released her to return to work without any restrictions. Thus, the plaintiff failed to show she suffered from a serious health condition, and, as a result, she failed to establish a *prima facie* case of interference or retaliation under the FMLA.

b. Continuing Treatment

Summarized Elsewhere:

***Andrews v. CSX Transportation, Inc.*, 2010 WL 3069484 (M.D. Fla. Aug. 2, 2010)**

c. Treatment by Health Care Provider

2. Pregnancy or Prenatal Care

3. Chronic Serious Health Condition

Summarized Elsewhere:

***Reinwald v. The Huntington Nat. Bank*, 684 F. Supp. 2d 975 (S.D. Ohio 2010)**

***Taylor v. Autozoners, LLC*, 706 F. Supp. 2d 843 (W.D. Tenn. 2010)**

4. Permanent or Long-Term Incapacity

5. Multiple Treatments

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments

2. Treatment for Substance Abuse

***Seegert v. Monson Trucking, Inc.*, 2010 WL 2132883, 15 Wage & Hour Cas.2d (BNA) 1305 (D. Minn. May 27, 2010)**

The plaintiff worked as a truck driver for Monson Trucking, Inc. and filed suit claiming the employer had interfered with his FMLA rights by terminating him the day after his application for FMLA leave. The plaintiff enrolled in a treatment facility for alcoholism on January 28, 2009. Prior to checking in, the plaintiff informed the defendant of his absence. On approximately January 29, 2009, the defendant sent the plaintiff a letter informing him that he was terminated because he was not available for work.

The defendant filed a motion for summary judgment, arguing the plaintiff was not able to perform the essential functions of his job because of his condition. In denying the motion, the court said there was a genuine issue of material fact as to whether the plaintiff could perform the essential functions of his job after the exhaustion of his FMLA leave. The court referenced the Eighth Circuit explanation that "the leave time under the FMLA structure is an opportunity for the employee to treat or attend to the condition rendering [him] unable to perform [his] job." *Spangler v. Fed'l Home Loan Bank of Des Moines*, 278 F. 3d 847 (8th Cir. 2002). Where the facts have to be viewed in the light most favorable to the plaintiff and the plaintiff believed he would have been able to successfully complete alcohol treatment, there is a fact question as to whether the plaintiff could perform the essential functions of his job at the conclusion of his FMLA leave.

In addition, the defendant contended that the plaintiff did not provide adequate notice of need for FMLA leave. In this instance, the plaintiff needed to provide the defendant with as much notice as practicable of the intention to use FMLA leave. The defendant argued that the plaintiff knew he needed to enter treatment as early as mid-December, when he admitted that drinking was becoming a serious issue. The plaintiff contended, however, that as soon as he completed detox and learned he needed treatment, he contacted the employer immediately on January 28, 2009. In addition, the plaintiff asserted his mother contacted the employer on January 26, 2009 to inform the employer of his absence. Accordingly, the court ruled there was a genuine issue of material fact as to appropriate notice.

It is also of note that a claim for promissory estoppel under state law survived summary judgment. The claim was based on the plaintiff's contention that an employee in the personnel department informed the plaintiff prior to him enrolling in treatment that he would not be terminated because of his absence.

3. "Minor" Illnesses

4. Mental Illness

CHAPTER 5. LENGTH AND SCHEDULING OF LEAVE

I. OVERVIEW

II. LENGTH OF LEAVE

A. General

B. Measuring the 12-Month Period

***Highlands Hosp. Corp. v. Preece*, 2010 WL 569745 (Ky. App. Feb. 19, 2010)**

The plaintiff contended that the defendant interfered with the amount of leave to which she was entitled. The defendant used the "rolling method" to calculate the twelve-month period applicable to plaintiff's FMLA leave. According to the defendant, applying this method, the plaintiff had used her entire twelve weeks of FMLA leave. Although the FMLA itself does not require notification of the calculation method chosen by the employer, courts have imposed an obligation on employers to inform employees of the method selected to calculate leave. The court determined that the defendant's failure to inform the plaintiff of the calculation method required that the employer use "the option that provides the most beneficial outcome for the employee." The plaintiff was also required to demonstrate that she was prejudice by the defendant's violation. The court determined that the plaintiff proved that she was prejudiced by defendant's violations of FMLA because if her FMLA leave was calculated in a calendar year, plaintiff would not have utilized her entire twelve weeks. Accordingly, she was terminated in violation of the FMLA.

In regard to liquidated damages, the court held that doubling the jury's award requires a finding that the defendant acted in bad faith and that it did not have objectively reasonable grounds for its act or omission. The court determined that there was sufficient evidence to demonstrate that (1) the plaintiff was misled by the defendant as to the calculation of her FMLA leave, (2) her FMLA application was backdated, and (3) the defendant did not accurately track plaintiff's leave. Based on the evidence, the court found that defendant acted in bad faith and awarded liquidated damages.

The court held that front pay is appropriate when reinstatement is not feasible, such as where neither party seeks reinstatement. The court affirmed the award of one-year of front pay, since the lower court based the award on its findings that (1) neither of the parties had expressed an interest or willingness to continue the employment relationship, (2) the plaintiff attempted to mitigate her damages by seeking employment, and (3) the award was directly related to plaintiff's wages and benefits.

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care

2. Spouses Employed by the Same Employer

D. Effect of Offer of Alternative Position

E. Required Use of Leave

Summarized Elsewhere:

***Hearst v Progressive Foam Technologies, Inc.*, 682 F. Supp. 2d 955 (E.D. Ark. 2010)**

***Kronenberg v. Baker & McKenzie, LLP*, 692 F. Supp. 2d. 994 (N.D. Ill. 2010)**

***Schrieber v. Federal Express Corp.*, 698 F. Supp. 2d 1266 (N.D. Okla. 2010)**

III. INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES

A. Entitlement to Take Intermittent Leaves or Leaves on a Reduced Schedule

Summarized Elsewhere:

***Kronenberg v. Baker & McKenzie, LLP*, 692 F. Supp. 2d. 994 (N.D. Ill. 2010)**

***Schrieber v. Federal Express Corp.*, 698 F. Supp. 2d 1266 (N.D. Okla. 2010)**

B. Eligibility for and Scheduling of Intermittent Leaves and Leaves on a Reduced Schedule

C. Measuring Use of Intermittent Leaves and Leaves on a Reduced Schedule

Summarized Elsewhere:

***Murray v. AT&T Mobility, LLC*, 374 Fed. Appx. 667, 16 Wage & Hour Cas.2d (BNA) 270 (7th Cir. 2010)**

D. Transferring an Employee to an Alternative Position to Accommodate Intermittent Leave or Leave on a Reduced Schedule

1. Standards for Transfer
2. Equivalent Pay and Benefits
3. Limitations on Transfer

E. Making Pay Adjustments

1. FLSA-Exempt Employees Paid on a Salary Basis
2. FLSA-Nonexempt Employees Paid on a Fluctuating Workweek Basis
3. Exception Limited to FMLA Leave

IV. SPECIAL PROVISIONS FOR INSTRUCTIONAL EMPLOYEES OF SCHOOLS

A. Coverage

B. Duration of Leaves in Covered Schools

C. Leaves Near the End of an Academic Term

CHAPTER 6. NOTICE AND INFORMATION REQUIREMENTS

I. OVERVIEW

II. EMPLOYER'S POSTING AND OTHER GENERAL INFORMATION REQUIREMENTS

A. Posting Requirements

B. Other General Written Notice

C. Consequences of Employer Failure to Comply With General Information Requirements

III. NOTICE BY EMPLOYEE OF NEED FOR LEAVE

A. Timing of the Notice and Leave

Summarized Elsewhere:

***Brown v. Automotive Components Holdings LLC*, 622 F. 3d 685, 16 Wage & Hour Cas.2d (BNA) 1025 (7th Cir. 2010)**

***Seegert v. Monson Trucking, Inc.*, 2010 WL 2132883, 15 Wage & Hour Cas.2d 1305 (D. Minn. May 27, 2010)**

1. Foreseeable Leave

    a. Need for Leave Foreseeable for 30 or More Days

    b. Need for Leave Foreseeable for Less Than 30 Days

2. Unforeseeable Leave

***Hayduk v. City of Johnstown*, 2010 WL 2650248, 16 Wage & Hour Cas.2d (BNA) 631 (3d Cir. July 2, 2010)**

In an unpublished opinion, the Third Circuit affirmed the jury's verdict that the plaintiff failed to provide sufficient notice to the defendants of his need for FMLA leave. The court reasoned that under the "rather amorphous standards" of FMLA regulations, the jury could have found that a message on the city manager's voicemail from the plaintiff's girlfriend regarding the plaintiff's hospitalization did not convey sufficient information to the defendants to put it on notice of plaintiff's need for FMLA leave. Alternatively, the jury could have reasoned that the plaintiff did not give notice "as soon as practicable under the facts and circumstances of the particular case" because the plaintiff failed to personally notify the defendants until four days after the accident and three days after being released from the hospital. 29 C.F.R. § 825.303(a).

Summarized Elsewhere:

***Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576, 16 Wage & Hour Cas.2d (BNA) 705 (5th Cir. 2010)**

B. Manner of Providing Notice

***Schaar v. Lehigh Valley Health Services, Inc.*, 2010 WL 3069602 (E.D. Pa. Aug. 4, 2010)**

In *Schaar*, the plaintiff presented evidence from her doctor that she was ill and that her illness prevented her from working on two consecutive days. The plaintiff notified her supervisor of the absence by taping a doctor's note on the supervisor's door. The plaintiff testified that she had been sick for an additional two days and was not well enough to go to work or get out of bed. Upon the plaintiff's return to work, the supervisor notified her that she could be fired for a no-call/no-show. The plaintiff never told anyone that she wanted her absence to be designated as FMLA leave. However, she testified that if someone had told her that FMLA leave was an option, she would have designated it as such. Five days after her return to work, the plaintiff was terminated.

The court found that even though the plaintiff did not cite to the FMLA or provide the exact dates or direction of the leave requested, a genuine issue of material fact existed as to whether the plaintiff provided a reasonable, adequate notification that she may need FMLA leave. The court said that if an employer is uncertain whether leave qualifies under the FMLA, it should make a preliminary designation, notify the employee, and request such additional information from the employee as may be necessary to confirm the employee's entitlement. Therefore, the defendant's motion for summary judgment on the basis of FMLA ineligibility was denied.

Regarding the plaintiff's retaliation claim, the court found that plaintiff presented sufficient information to create a fact issue that the defendant's reasons for termination were merely pretextual. The defendant asserted that the plaintiff was terminated due to her poor work performance, but one of the reasons listed on the discharge notification was her absence from work.

The court also held that interference includes failure to advise an employee of rights under the FMLA. Therefore, the plaintiff's claim that she was not informed of her right to take the FMLA leave was sufficient to defeat the defendant's summary judgment motion.

C. Content of Notice

***Andrews v. CSX Transportation, Inc.*, 2010 WL 3069484 (M.D. Fla. Aug. 2, 2010)**

In *Andrews*, the plaintiff was terminated for excessive absenteeism in accordance with his former employer's policy. The plaintiff alleged that he suffered from a serious health condition under the FMLA and that the defendant failed to inform him of his FMLA rights, resulting in his violation of the absenteeism policy. The plaintiff had been previously disciplined for excessive

absenteeism prior to the absences that resulted in his termination. Regarding the absences resulting in termination, the plaintiff contended that a note from his doctor advising of treatment for an unspecified medical condition and indicating that he was cleared to work satisfied his initial FMLA notice requirement. However, the court ruled that this notice was deficient, noting that (i) being sick, (ii) a period of absence, and (iii) a doctor's note failing to state a medical reason are not enough to trigger an employer's FMLA notice obligations.

The court also found that the plaintiff did not have a serious health condition, because none of his absences required "continuing treatment by a health care provider." 29 C.F.R. § 825.114(c).

The plaintiffs also alleged claims of interference and retaliation. Although the court was skeptical about the merit of the plaintiff's interference claim, it deferred ruling on the defendant's summary judgment motion as to this claim because the plaintiff needed to show only that the he was entitled to and denied a right under the FMLA, not that the employer intended to deny any rights. The court granted the defendant's motion as to the retaliation claim because the plaintiff failed to provide sufficient proof to permit a reasonable fact-finder to conclude that the reason given by the defendant for discharging the plaintiff, excessive absenteeism, was pretext.

***Brown v. Kansas City Freightliner Sales, Inc.*, 617 F.3d 995, 16 Wage & Hour Cas.2d (BNA) 801 (8th Cir. 2010)**

The plaintiff sued his former employer for failure to reinstate and wrongful discharge in violation of the FMLA. While employed as a service technician for the defendant, the plaintiff suffered a back injury in both June 2007 and August 2007. After each injury, the plaintiff completed an injury incident report, visited a doctor, and was promptly released to work. The second injury resulted in some activity restrictions, which were released on September 21, 2007. On September 26, the plaintiff verbally informed his supervisor that he had hurt his back again. Though he requested to go home, he did not submit a written injury report and refused medical treatment. The plaintiff was thereafter absent through October 2, calling in each day without providing any other information and not seeking medical treatment during this time. The plaintiff had previously exhausted his available sick and vacation leave, and was thus terminated when he returned to work on October 3, 2007. The plaintiff was subsequently diagnosed with injury to his cervical spine, for which he later underwent surgery.

Both the plaintiff and defendant filed motions for summary judgment. The district court granted summary judgment in favor of the defendant on the grounds that the plaintiff did not suffer from a serious health condition and failed to provide adequate notice under the FMLA. On appeal, the Eighth Circuit found the issue of notice dispositive and thus did not address whether plaintiff suffered a serious health condition. Specifically, the court held that while plaintiff had "ample opportunity" to notify his employer that his condition was more serious than his prior back injuries (which required little time off work), the plaintiff did not fill out a written injury report, refused medical attention and provided no other information when he called in sick. As such, the court held that the plaintiff did not properly notify the defendant of his reason or need for FMLA leave. The court further noted that the record lacked any evidence connecting the plaintiff's prior back injuries to the lumbar region to his subsequent injury to the cervical

spine. Accordingly, the court affirmed the district court's grant of summary judgment for the defendant.

***Gipson v. Vought Aircraft Indus., Inc.*, 2010 WL 2776842, 16 Wage & Hour Cas.2d 583 (6th Cir. July 13, 2010)**

In *Gipson*, a plant maintenance worker sued his employer for FMLA interference and retaliation. Over a year before filing suit, the plaintiff underwent triple-bypass heart surgery for which he took FMLA leave. At the end of his leave, he returned to work uneventfully. Months after he retuned to work, he was involved in a disagreement with his supervisor concerning personal effects that the plaintiff had left in the company's office lobby. The supervisor repeatedly instructed the plaintiff to remove the effects, eventually giving him a loud, direct order to do so. The plaintiff refused to comply and the continued confrontation allegedly had an effect on the plaintiff's health. The plaintiff told company representatives, among other things, that he was in pain and he needed to go home to get his medication. Before the company allowed the plaintiff to go home, it terminated his employment for his refusal to follow a direct order.

The Sixth Circuit upheld the district court's decision to grant summary judgment to the employer and found that there was no evidence of FMLA interference or retaliation because the plaintiff failed to give the employer sufficient notice to invoke his FMLA rights. Though the plaintiff made a number of statements and requests concerning his health, the court found that he did not reasonably inform his employer that he was presently suffering from a condition that required inpatient care or continuing treatment by a healthcare provider. The court also found that the plaintiff's earlier heart procedure was insufficient to give the employer sufficient notice because the employer had no notice that the plaintiff had ongoing heart problems for which he was receiving continuing treatment. The court further found that there was no causal connection between any attempt by the plaintiff to exercise his FMLA rights and his termination because the plaintiff flatly disobeyed the direct orders of his supervisor and he would have been terminated regardless of his FMLA related actions.

***Wilson v. Noble Drilling Services, Inc.*, 2010 WL 5298018 (5th Cir. Dec. 23, 2010)**

The plaintiff sued his former employer under the FMLA, alleging the defendant discharged him because he sought FMLA leave to care for his soon-to-be-born baby. The defendant terminated the plaintiff one month after learning of the upcoming birth, which the plaintiff contended to be retaliation. The district court granted summary judgment to the employer and, in an unpublished opinion, the Fifth Circuit affirmed.

The court explained the plaintiff could not establish a prima facie case of FMLA retaliation because he could not show he engaged in protected activity. The plaintiff only told his employer that he "might" need to take leave to care for the baby after his wife gave birth, and that there was a "possibility" that he would need to take leave. The court held the plaintiff did not satisfy his notice obligations under the FMLA, explaining that his comments "were not sufficient 'to make the employer aware that [he] need[ed] FMLA-qualifying leave,'" and he did

not make his employer "aware of the 'anticipated timing and duration' of any leave." 29 C.F.R. § 825.302(c).

Further, the court held that even if the plaintiff could establish a prima facie case, his FMLA claim still failed because the defendant articulated a legitimate, nondiscriminatory reason for his discharge. The defendant contended that the plaintiff violated its "chain-of-command protocol" in complaining about his raise, which the plaintiff could not establish was pretext. The court rejected the plaintiff's arguments that the defendant's reason had to be pretextual because he was discharged just a month after he allegedly requested leave and he had just received a promotion and raise. The court found the recent promotion and raise were not inconsistent with the reason for discharge, and noted "suspicious timing alone is insufficient to establish pretext."

Summarized Elsewhere:

***Crawford v. City of Tampa*, 2010 WL 3766627, 16 Wage & Hour Cas.2d (BNA) 1359 (11th Cir. Sept. 28, 2010)**

***Hayduk v. City of Johnstown*, 2010 WL 2650248, 16 Wage & Hour Cas.2d (BNA) 631 (3d Cir. July 2, 2010)**

***Kinney v. Holiday Companies*, 2010 WL 3937426 (9th Cir. Oct. 5, 2010)**

***Kobus v. College of St. Scholastica, Inc.*, 608 F.3d 1034, 16 Wage & Hour Cas.2d (BNA) 353 (8th Cir. 2010)**

***Schaar v. Lehigh Valley Health Services, Inc.*, 2010 WL 3069602 (E.D. Pa. Aug. 4, 2010)**

D. Change of Circumstances

***Brown v. Automotive Components Holdings LLC*, 622 F. 3d 685, 16 Wage & Hour Cas.2d (BNA) 1025 (7th Cir. 2010)**

In *Brown,* the plaintiff asserted that her employer improperly terminated her during an FMLA-protected absence. The defendant contended it terminated the plaintiff because she was absent after her previously-approved leave expired and she failed to make a timely request for extension of the leave. The district court entered summary judgment for the employer and the Seventh Circuit affirmed.

The court held the plaintiff failed to provide timely notice of her need to extend her previously-approved FMLA leave. Because she did not provide proper notice, the plaintiff was unable to establish a prima facie case of FMLA interference. The plaintiff asserted that she provided timely notice when she telephoned the company two days after her leave expired. She contended this was timely because it was the day after she had an appointment with her doctor regarding her leave. The court held, however, that the plaintiff should have provided notice within two days of learning she was scheduled for that appointment. Furthermore, the plaintiff did not show that it was impracticable or infeasible to provide such notice within that time

period. The fact that the plaintiff may have subjectively believed it was more practical to wait until she saw the doctor to notify the employer of her need for extended leave was irrelevant.

E. Consequences of Employee Failure to Comply With Notice of Need for Leave Requirements

Summarized Elsewhere:

***Brown v. Automotive Components Holdings, LLC*, 622 F. 3d 685, 16 Wage & Hour Cas.2d (BNA) 1025 (7th Cir. 2010)**

***Tayag v. Lahey Clinic Hosp., Inc.*, 677 F. Supp. 2d 446 (D. Mass. 2010), *aff'd* --- F.3d ----, 2011 WL 241968 (1st Cir. Jan. 27, 2011)**

IV. EMPLOYER RESPONSE TO EMPLOYEE NOTICE

A. Designation of Leave as FMLA Leave

B. Individual Notice to Employee Concerning FMLA Leave

***Gude v. Rockford Center, Inc.*, 699 F. Supp. 2d 671 (D. Del. 2010)**

The court held that the plaintiff could not establish a claim of FMLA interference based on her contention in her complaint that the defendants "never approached [her] about taking time off under the FMLA." In granting the defendant's motion for summary judgment, the court noted that the plaintiff never requested leave and declined to fill out an FMLA-request form when provided with one. The court also noted that the plaintiff was advised of the FMLA when she was hired and that the FMLA was discussed with her on at least two occasions during her employment. The court found that, even if the plaintiff was not given individualized notice, such notice was not required under these circumstances. Moreover, despite her repeated absences, plaintiff's employment continued. Thus, the plaintiff could not show injury and was not prejudiced by any actions or inaction by the employer.

***Kobus v. College of St. Scholastica, Inc.*, 608 F.3d 1034, 16 Wage & Hour Cas.2d (BNA) 353 (8th Cir. 2010)**

In *Kobus*, the plaintiff disclosed to his supervisor that he was suffering from anxiety and stress, but did not disclose that he was taking the drug Paxil or that he had been diagnosed with depression. Over a year later, in November 2006, the plaintiff told his supervisor that he may need to take some time off to deal with stress and anxiety, but again did not mention depression or antidepressant medication. After the meeting, the supervisor gave the plaintiff a form titled, "Request for Family Medical Leave" and told the plaintiff that he could apply for FMLA leave if he had a serious health condition. The plaintiff then told his supervisor that he didn't need any leave, including FMLA leave.

In late November 2006, the plaintiff was issued a written warning for excessive absenteeism. The plaintiff was then absent from January 15 to 18, 2007, even though he had no sick or vacation time available. Each day, the plaintiff left a message informing his supervisor that he was experiencing headaches and neck pain. On January 18, 2007, the plaintiff called his supervisor and asked for "mental health leave" because family problems were causing "these knots in my neck and pains in my head." The plaintiff testified that during the call, his supervisor raised FMLA leave and told the plaintiff that he would have to get a form signed by his doctor. The plaintiff responded that he didn't have a doctor and asked if there was "any other way [he] could go?" After the conversation, the supervisor spoke with human resources and it was determined that the leave of absence would not be granted. When the plaintiff was informed his leave of absence request was denied, he submitted his resignation.

The plaintiff filed suit, alleging the defendant interfered with his FMLA rights by denying his leave. The Eighth Circuit affirmed summary judgment in favor of the defendant, finding that the defendant had made the plaintiff aware of the procedures necessary to obtain FMLA leave and the plaintiff had failed to avail himself of those procedures. The plaintiff also argued that the defendant interfered with his FMLA rights because the policy requiring the plaintiff to obtain a medical certification was ambiguous. The defendant's FMLA policy stated that a medical certification "may be" required, as opposed to "must" be submitted. The Eighth Circuit affirmed the district court's determination that no reasonable jury could find that the FMLA documents were ambiguous with regard to the certification requirement. The "Request for Family Medical Leave" form that the supervisor provided to the plaintiff directed an employee to fill out the document completely and instructed a physician to complete certain parts. In addition, the supervisor's statement to the plaintiff during their January 18, 2007 phone conversation was sufficient notice of the certification requirement. The court also determined that the plaintiff could have submitted the FMLA certification without a doctor's signature if the plaintiff was unclear as to the policy requirement.

Summarized Elsewhere:

***Andrews v. CSX Transportation, Inc.*, 2010 WL 3069484 (M.D. Fla. Aug. 2, 2010)**

***Dorsey v. Jacobson Holman, PLLC*, --- F. Supp. 2d ---, 2010 WL 5168782 (D.D.C. 2010)**

***Thompson v. CenturyTel of Central Ark., LLC*, 2010 WL 4907161 (8th Cir. Dec. 3, 2010)**

C. Notice of Ineligibility for Leave

***Parsons v. Principal Life Ins. Co.*, 686 F. Supp. 2d 906 (S.D. Iowa 2010)**

The plaintiff sued her employer for interfering with her FMLA leave rights and for retaliation. The plaintiff, who had worked for the defendant for nearly 30 years, was hospitalized on May 29, 2008, for having suicidal thoughts. That day, the plaintiff notified her supervisor that she would be unable to work for at least one week. On June 2, 2008, the plaintiff left another voice-mail for her supervisor saying that she would be absent for at least one month.

The defendant mailed the plaintiff an FMLA packet, which she completed and forwarded to her health care provider on June 8, 2008, for certification. On June 12, 2008, the defendant notified the plaintiff by letter that she needed to call in daily until her request for leave of absence was approved. She did not call in regarding her absences from work on June 12, 13, 17, 18, 19, or 20. On June 20, 2008, the defendant denied the plaintiff's FMLA request because the supplied medical information was insufficient to support a serious health condition. On June 24, 2008, the plaintiff asked the hospital to provide additional medical information to the defendant, which the defendant received the following day. The defendant notified the plaintiff in a letter dated June 24, 2008 that she was terminated effective June 16, 2008 for her failure to call in her absences.

In its motion for summary judgment, the defendant argued that because the initial certification was incomplete, the plaintiff was not entitled to the protections of FMLA and that they had correctly denied her request for leave. The court disagreed because the plaintiff did in fact provide certification, *albeit* incomplete, in a timely matter. Under 29 C.F.R. § 825.305(d), the employer who receives an incomplete certification must provide the employee with a reasonable opportunity to cure any deficiency. Thus, the employer's motion for summary judgment on the interference claim was denied.

The court also denied summary judgment for the defendant on the retaliation claim. While the court recognized that "[a]n employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work," the employer's policy also *"must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.*" 29 C.F.R. § 825.309(a). Thus, the court found that a reasonable jury could conclude that the employer's insistence that Plaintiff continue to call in on a daily basis, despite the plaintiff's unwavering reports that she would be unable to return to work prior to June 30, 2008, ran afoul of the requirement in § 825.309(a) that the employer "take into account all of the relevant facts and circumstances" in requiring periodic status reports.

D. Consequences of Employer Failure to Comply With Individualized Notice Requirements

1. Designation

2. Individual Notice

3. Notice of Ineligibility

V. MEDICAL CERTIFICATION AND OTHER VERIFICATION

A. Content of Medical Certification

***Gunzburger v. Lamberti*, 367 Fed. Appx. 80 (11th Cir. 2010)**

In an unpublished opinion, the Eleventh Circuit affirmed a grant of summary judgment in favor of the defendant. The plaintiff submitted an FMLA medical certification form to her employer on which her physician stated that she did not have a serious health condition that

made her eligible for FMLA. Based on that form, the employer denied the plaintiff's FMLA application. The plaintiff did not dispute the denial while she was employed but, after she was discharged, she brought an action against the employer, claiming interference with her FMLA rights. The plaintiff claimed the defendant should have classified her absence as FMLA leave despite the physician's statement. However, the court stated the defendant was legally obligated not to classify the absence as FMLA leave if the medical certification indicated the reason for the absence was not a qualifying condition.

Summarized Elsewhere:

***Verkade v. U. S. Postal Service*, 378 Fed. Appx. 567 (6th Cir. 2010)**

***Wisbey v. City of Lincoln*, 612 F.3d 667, 16 Wage & Hour Cas.2d (BNA) 493 (8th Cir. 2010)**

B. Initial Certification

C. Second and Third Opinions

D. Recertification

Summarized Elsewhere:

***Jackson v. Jernberg Industries, Inc.*, 677 F. Supp. 2d 1042 (N.D. Ill. 2010)**

E. Fitness-for-Duty Certification

***Wisbey v. City of Lincoln*, 612 F.3d 667, 16 Wage & Hour Cas.2d (BNA) 493 (8th Cir. 2010)**

The plaintiff worked for the City of Lincoln as an emergency dispatcher. After exhausting her available sick leave, the plaintiff submitted an FMLA intermittent leave application for depression and anxiety. The accompanying medical certification stated that the plaintiff was able to perform her essential job functions, but would need to take time off from work intermittently over the next six months or longer. The certification also did not provide any anticipated return to work date. Based on her medical certification, the defendant had the plaintiff undergo a fitness-for-duty examination and the defendant's physician found that the plaintiff was not fit for duty. The plaintiff was placed on administrative leave with pay and subsequently terminated based on the unfavorable fitness-for-duty determination. The plaintiff brought suit, contending that the defendant both interfered with her FMLA rights and unlawfully retaliated against her by terminating her.

The court rejected both plaintiff's FMLA interference and FMLA retaliation claims. As to the FMLA interference claim, the court ruled that the defendant did not interfere with the plaintiff's FMLA rights because it never denied any of the FMLA leave she requested. Moreover, the court ruled that the plaintiff did not even have a right to FMLA leave in the first place because her medical certification contained no time frame during which she required leave. The court noted that "the FMLA does not provide leave for leave's sake, but instead provides

leave with an expectation an employee will return to work after the leave's end." Because the plaintiff did not have a right to FMLA leave, the defendant could not have interfered with such a right. As to the FMLA retaliation claim, the court ruled that the plaintiff could not establish the requisite causal connection between her leave application and her termination. The court was quick to point out that mere coincidence of timing is insufficient to establish FMLA retaliation.

***Brownfield v. City of Yakima*, 612 F.3d 1140, 16 Wage & Hour Cas.2d (BNA) 713 (9th Cir. 2010)**

In September 2005, four incidents occurred where the plaintiff displayed emotionally volatile and unreasonable behavior. These incidents prompted his employer, the Yakima Police Department, to refer him for a Fitness for Duty Examination. During this examination, the plaintiff was diagnosed as suffering from a permanent mood disorder, which manifested itself in poor judgment, emotional volatility and irritability. Subsequently, the plaintiff was in an off-duty car accident, from which he suffered physical injuries. The plaintiff's doctor released him to work in February 2006 based solely on the plaintiff ability to perform his physical job duties; his doctor did not address the plaintiff's mental capacity to perform his job. The plaintiff obtained a second opinion on his mental fitness from another psychiatrist, who stated that his problems might be amenable to treatment. The defendant scheduled the plaintiff for a third opinion, but he did not cooperate and was terminated for being insubordinate and unfit for duty.

The district court granted summary judgment in favor of the defendant and the plaintiff appealed, arguing that the defendant violated the FMLA by requiring him to undergo a Fitness for Duty Examination after his physician released him to work in violation of FMLA regulations. The appellate court disagreed, stating that the fitness-for-duty certification from his doctor covered only the plaintiff's physical, not mental, health. As a result, the court held that the defendant did not violate the FMLA or retaliate against the plaintiff for taking FMLA leave by not reinstating him based on his physician's release.

Finally, the plaintiff claimed that the defendant violated the FMLA by transmitting the Fitness for Duty Examination report to his doctor. The plaintiff did not explain how this alleged violation harmed him. The court held that the FMLA's nondisclosure provision provides no relief unless the employee has been prejudiced by the violation, citing *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81 (2002).

Summarized Elsewhere:

***Sterling v. City of New Roads*, 2010 WL 2710782 (5th Cir. June 25, 2010)**

F. Certification of Continuation of Serious Health Condition

G. Other Verifications and Notices

1. Documentation of Family Relationships

2. Notice of Employee's Intent to Return to Work

3. Certification of Qualifying Exigency

Mott v. Office Depot, Inc. **2010 WL 2990913 (9th Cir. July 30, 2010)**

In an unpublished opinion, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendant on the plaintiff's claims of interference and retaliation under the FMLA and the Oregon counterpart to the FMLA, the OFLA.

Regarding plaintiff's retaliation claim, the court held that the defendant did not retaliate against plaintiff when she complained about not being able to return to work without a doctor's release. Since both the FMLA and OFLA allow employers to require such a form before employees return to work, the plaintiff did not engage in any protected activity by complaining about the employer's practice. In addition, the plaintiff's claim that she was disciplined in retaliation for taking FMLA leave failed because she was disciplined for attendance before her FMLA complaint; thus the discipline could not have been in retaliation for her complaint.

Regarding the interference claim, the court stated the defendant could not have interfered with the plaintiff's FMLA rights because she was not eligible for such rights either under the FMLA, as she had not worked for her employer for a year when she applied for FMLA leave, or under the OFLA, as she had not worked 25 hours per week for the three months prior to her leave. O.R.S. § 659A.156(1)(b).

Summarized Elsewhere:

Hearst v Progressive Foam Technologies, Inc.**, 682 F. Supp. 2d 955 (E.D. Ark. 2010)**

H. Consequences of Failure to Comply With or Utilize the Medical Certification or Fitness-for-Duty Procedures

1. Employee

Verkade v. U. S. Postal Service**, 378 Fed. Appx. 567 (6th Cir. 2010)**

In *Verkade*, the plaintiff, who suffered from Meniere's disease, was denied FMLA leave on several occasions because the medical certifications he submitted were deficient. In denying the plaintiff's requests, his employer relied on prior incomplete certifications submitted by the plaintiff. The defendant treated these prior incomplete certifications as negative certifications, or certifications that show the employee is not entitled to FMLA leave. The district court held that the defendant's reliance on these prior incomplete certifications was proper, and therefore, the denial of his FMLA leave requests(s) was proper.

In an unpublished opinion, the Sixth Circuit rejected the district court's determination that the defendant was entitled to rely on prior incomplete medical certifications as negative certifications to deny the employee's FMLA request. In so holding, the court stated that an incomplete medical certification is not the same as a negative certification. The court stated that incomplete certifications, unlike negative certifications, may not be relied on to deny an FMLA

leave request because the employer does not have sufficient information to make a determination as to whether the condition qualifies for FMLA leave. As such, the court held that denial of the employee's FMLA request on this ground was improper.

However, the Sixth Circuit affirmed the district court's dismissal on other grounds. The court found that the five days provided to the plaintiff to cure the deficiencies in his certifications was "reasonable" given the plaintiff's prior experience with submitting FMLA leave requests with similar deficiencies. Since the plaintiff failed to cure the deficiencies in his incomplete certifications within five days, the defendant's denial of his leave request was proper.

Verdake was decided under the FMLA regulations that were superseded by revised regulations that went into effect on January 16, 2009. Under the revised regulations, employers are required to provide employees with at least seven calendar days to cure identified deficiencies. *See* 29 C.F.R. 825.305(c).

***Sterling v. City of New Roads*, 2010 WL 2710782 (5th Cir. June 25, 2010)**

In an unpublished decision, the Fifth Circuit upheld the district court's grant of summary judgment in favor of the defendant. While on FMLA leave, the plaintiff failed to provide his employer with a certification that he was able to return to work and, as a result, was terminated. The district court granted the defendant's motion, stating the plaintiff's failure to provide the certification barred his action for reinstatement.

Summarized Elsewhere:

***Brownfield v. City of Yakima*, 612 F.3d 1140, 16 Wage & Hour Cas.2d (BNA) 713 (9th Cir. 2010)**

2. Employer

***Clark v. Macon County Greyhound Park, Inc.*, 2010 WL 2976492 (M.D. Ala. July 23, 2010)**

On June 14, 2007, a physician advised the plaintiff to take FMLA leave as a result of her bipolar disorder. The plaintiff met with her supervisor, reporting that she needed FMLA leave and provided a physician's note excusing her from work until July 16, 2007. The defendant gave the plaintiff two sets of forms: (1) an application for short term disability and (2) an application for FMLA leave. The plaintiff sent both forms to the insurance company but did not return the FMLA leave form to the defendant. Two weeks later, on July 2, 2007, the defendant terminated the plaintiff's employment for job abandonment because the defendant did not receive the plaintiff's FMLA paperwork. The plaintiff admitted that she did not deliver her FMLA paperwork to the defendant, claiming that she instead followed the employer's instructions to send all forms to the disability insurance company. In late September 2007, the plaintiff applied for Social Security Disability benefits, claiming that she had been unable to work since June 12, 2007 and Social Security benefits were approved in or about December 2007.

The plaintiff filed suit, claiming the defendant interfered with her FMLA rights by refusing to approve her FMLA leave and by refusing repeated requests for reinstatement. She

also claimed the defendant terminated her in retaliation for her protected activity in requesting FMLA leave.

The defendant moved for summary judgment on the FMLA interference and retaliation claims, stating the plaintiff never returned the FMLA forms and she was terminated pursuant to its job abandonment policies. The plaintiff responded that she fully complied with the instructions she received for completion and delivery of the forms. The court held that the defendant failed to present evidence that it told the plaintiff to return the FMLA forms to it, instead of to the insurance company as the employee claimed. Therefore, summary judgment was not appropriate. Similarly, the court denied summary judgment on the FMLA retaliation claim since the plaintiff presented evidence that the defendant gave her misleading directions and failed to inform her of the consequences of not returning the FMLA forms to the defendant within fifteen days. Accordingly, a genuine issue of material fact existed as to whether the defendant's proffered reason for her termination was pretextual.

The defendant also moved for summary judgment on the FMLA interference claim for failure to reinstate on the grounds that the plaintiff was unable to perform the essential functions of her job at the end of the twelve-weeks. The plaintiff admitted that she remained unable to return to work since she last worked in June 2007. The court found that the plaintiff was incapable of performing the essential functions of her former job at the expiration of her FMLA leave and granted the defendant's motion as to this claim.

***Summarized Elsewhere*:**

***Branham v. Gannett Satellite Information Network, Inc.*, 619 F.3d 563, 16 Wage & Hour Cas.2d (BNA) 1040 (6th Cir. 2010)**

***Parsons v. Principal Life Ins. Co.*, 686 F. Supp. 2d 906 (S.D. Iowa 2010)**

VI. RECORDKEEPING REQUIREMENTS

A. Basic Recordkeeping Requirements

B. What Records Must Be Kept

C. Department of Labor Review of FMLA Records

CHAPTER 7. PAY AND BENEFITS DURING LEAVE

I. OVERVIEW

II. PAY DURING LEAVE

A. Generally

B. When Substitution of Paid Leave Is Permitted

1. Generally

***Majewski v. Fischi*, 372 Fed. Appx. 300 (3d Cir. 2010)**

The plaintiff sued his former employer for, among other things, interference with his FMLA rights. The district court granted summary judgment in favor of the defendant and the Third Circuit affirmed. On appeal, the plaintiff complained that the defendant interfered with his FMLA rights because it did not *require* him to use his accrued, paid leave *prior* to the commencement of his FMLA leave while he was undergoing treatment for alcoholism. The Third Circuit pointed out that the FMLA does not require an employer to allow an eligible employee to use accrued, paid leave prior to the commencement of a twelve-week FMLA leave. Moreover, the court found that even if the plaintiff were permitted to utilize his accrued, paid leave, the leave would run *concurrently* with his unpaid FMLA leave. Thus, his use of paid leave would have no impact on his twelve-weeks of FMLA leave. Finally, the court noted that a last chance agreement the defendant proposed, requiring the plaintiff to report to work sober and continue outpatient treatment, did not interfere with the plaintiff's FMLA rights because the agreement had no impact on his ability to obtain FMLA benefits.

Summarized Elsewhere:

***Nuzzi v. St. George Community Consolidated School Dist. No. 258*, 688 F. Supp. 2d 815 (C.D. Ill. 2010)**

2. Types of Leave

a. Paid Vacation and Personal Leave

b. Paid Sick or Medical Leave

c. Paid Family Leave

d. Workers' Compensation or Temporary Disability Benefits

e. Compensatory Time

III. MAINTENANCE OF BENEFITS DURING LEAVE

A. Maintenance of Group Health Benefits

1. Generally

2. What Is a Group Health Plan

3. What Benefits Must Be Provided

4. Payment of Premiums

   a. Methods of Payment

      i. During Paid Leave

      ii. During Unpaid Leave

   b. Consequences of Failure to Pay

5. When the Obligation to Maintain Benefits Ceases

   a. Layoff or Termination of Employment

   b. Employee Notice of Intent Not to Return to Work

   c. Employee's Failure to Pay Premiums

   d. "Key Employees"

   e. Other Circumstances

6. Rules Applicable to Multiemployer Health Plans

B. Employer's Right to Recover Costs of Maintaining Group Health Benefits

1. When an Employer May Do So

***Grund v. American Trim, LLC*, 2010 WL 3611953 (Ala. Civ. App. Sept. 17, 2010)**

The plaintiff sought workers' compensation benefits in a state court proceeding filed against her employer, American Trim, LLC, alleging a shoulder injury was work-related. The defendant counterclaimed for reimbursement of insurance premiums it had paid on the plaintiff's behalf while she was on FMLA leave because the plaintiff did not pay her share of the premiums.

The trial court awarded the defendant a judgment for the amount it had paid as insurance premiums on the plaintiff's behalf. On appeal, the plaintiff argued that the defendant had failed to prove that she had breached a contract to repay the insurance premiums, but the Court of Civil

Appeals held that, irrespective of the contract issue, the defendant was entitled to reimbursement under the FMLA, and thus affirmed the judgment on that ground.

2. How an Employer May Do So

C. Continuation of Non-Health Benefits During Leave

1. Generally

2. Non-Health Benefits Continued at Employer's Expense

3. Non-Health Benefits Continued at Employee's Expense

4. Specific Non-Health Benefits

a. Pension and Other Retirement Plans

b. Lodging

c. Holiday Pay

d. Paid Leave

Summarized Elsewhere:

***Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 15 Wage & Hour Cas.2d (BNA) 1888 (7th Cir. 2010)**

***Harris v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 594 F.3d 476, 108 Fair Empl. Prac. Cas. (BNA) 925, 15 Wage & Hour Cas.2d (BNA) 1441 (6th Cir. 2010)**

***Murray v. AT&T Mobility LLC*, 374 Fed. Appx. 667, 16 Wage & Hour Cas.2d (BNA) 270 (7th Cir. 2010)**

CHAPTER 8. RESTORATION RIGHTS

I. OVERVIEW

II. RESTORATION TO THE SAME OR AN EQUIVALENT POSITION

A. General

B. Components of an Equivalent Position

1. Equivalent Pay

2. Equivalent Benefits

Summarized Elsewhere:

***Harris v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 594 F.3d 476, 108 Fair Empl. Prac. Cas. (BNA) 925, 15 Wage & Hour Cas.2d (BNA) 1441 (6th Cir. 2010)**

3. Equivalent Terms and Conditions of Employment

***Breeden v. Novartis Pharmaceuticals Corp.*, 684 F. Supp. 2d 58, 16 Wage & Hour Cas.2d (BNA) 309 (D.D.C. 2010)**

The plaintiff brought claims for interference and retaliation against her former employer. The plaintiff took maternity leave in 2005 and she claimed she was not reinstated to an equivalent position upon her return and that she was subsequently selected for layoff during a reorganization because of her taking leave. At the time the plaintiff notified the defendant that she was going to be taking maternity leave, the defendant was in the process of reorganizing its sales territories. There was some evidence that the defendant did not expect the plaintiff to return from leave as it assigned the new territories. When the plaintiff did return, she was assigned a new territory that was smaller in area than her prior territory. Despite the smaller territory, however, the plaintiff's compensation and ranking among the sales representatives increased. The plaintiff contended that the defendant failed to return her to an equivalent position because the new territory took less skill and effort, because she had diminished authority to offer discounts, and that her smaller territory resulted in diminished responsibility and status. The plaintiff also contended the defendant changed her territory in retaliation for her taking leave.

In granting the defendant summary judgment on the interference claim, the court held that the plaintiff had failed to establish a triable issue of fact as to whether her new territory was equivalent. As to skill, the court concluded that being successful in a smaller territory would require as much skill, if not more, than her old territory, contrary to her assertion. As to effort, the court concluded that the fact she had less overnight travel because of the change in territory, and occasionally took side projects, did not mean that her sales work in the new territory required any less effort. The court also noted she had failed to offer any quantifiable differences

in effort. As to authority, the court also found that while the plaintiff had lost the ability to offer discounts without higher approval and that certain support assistance had been removed, those changes were uniform across representatives after the realignment and would have occurred had she not gone on leave. Finally, as to her arguments regarding reduced responsibility and status, the court found that her arguments were based solely on the fact that she had a smaller territory, and that such intangible differences could not be considered in assessing equivalency.

The court denied the defendant's motion for summary judgment on the retaliation claim. Applying the *Burlington Northern* standard, the court found that the defendant's failure to assign plaintiff to a similar-sized territory, as promised, was a sufficient adverse action to raise a jury question. The court also found a sufficient temporal nexus and evidence of pretext since the defendant expected that the plaintiff would not return from leave.

***Kronenberg v. Baker & McKenzie, LLP*, 692 F. Supp. 2d. 994 (N.D. Ill. 2010)**

The plaintiff had a chronic degenerative spinal disk disease from which he suffered relatively minor symptoms until the symptoms worsened in the spring of 2006. At that time, the plaintiff asked his supervisor to meet with him to discuss medical leave or disability accommodation. The supervisor failed to respond to several requests of this nature. The plaintiff then gave the supervisor a formal request for FMLA leave and a request for a reduced work load for his disability. The FMLA leave was granted and the defendant promised in writing to restore the plaintiff to his position at the end of his leave, to find him an equivalent position, or to reconsider the plaintiff's request for accommodation if the circumstances required.

After the plaintiff's FMLA leave expired, he continued to make requests for accommodations in the form of a part-time position and reinstatement. The defendant told the plaintiff that no part-time positions were available and instead extended his leave. Eventually, the defendant informed the plaintiff that his employment would be terminated.

In his complaint, the plaintiff alleged that the defendant violated the FMLA when it placed the plaintiff on an indefinite general leave at the conclusion of his FMLA leave instead of reinstating him to his previous position. The defendant moved to dismiss because, in his complaint, the plaintiff stated he sought a new, part-time position because he could not return to work full-time. The district court granted the motion to dismiss, holding that the FMLA only requires employers to restore an employee to his or her previously held position or an equivalent position.

In response to the defendant's motion to dismiss, the plaintiff also argued that the defendant interfered with his FMLA leave because it forced him to take his FMLA leave on a full-time basis instead of on a part-time basis as requested. The plaintiff argued that the defendant was required to inform him of his right to intermittent leave. The court determined that the defendant was not required to notify the plaintiff of the right to take intermittent leave. The court noted that the plaintiff's complaint stated that he had "accepted" the grant of FMLA leave and deferral of the accommodation request, and that there was no further mention of reduced schedules until well after the FMLA leave expired. Accordingly, the court granted the defendant's motion to dismiss.

Summarized Elsewhere:

***Emmons v. City University of New York*, 715 F. Supp. 2d 394 (E.D.N.Y. 2010)**

***Lawson v. Plantation General Hosp.*, 704 F. Supp. 2d 1254, 108 Fair Empl. Prac. Cas. (BNA) 1673, (S.D. Fla. 2010)**

***McCully v. American Airlines, Inc.*, 695 F .Supp. 2d 1225 (N.D. Okla. 2010)**

III. CIRCUMSTANCES AFFECTING RESTORATION RIGHTS

A. Events Unrelated to the Leave

1. Burden of Proof

***Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236, 15 Wage & Hour Cas.2d (BNA) 1857 (11th Cir. 2010)**

Prior to going on FMLA leave, the plaintiff had been verbally warned and placed on a performance plan for deficiencies related to managing subordinates. On a few occasions, the plaintiff failed to meet deadlines for her performance plan and the plaintiff's manager allowed postponement of these deadlines until after the plaintiff's FMLA leave. While the plaintiff was on leave, her subordinates reported that morale had skyrocketed and that it would surely plummet again upon the plaintiff's return. Upon returning from leave, the plaintiff was demoted. The plaintiff then filed suit alleging FMLA interference and discrimination against the defendant. The district court granted summary judgment in favor of the defendant and the Eleventh Circuit affirmed.

As to the FMLA interference claim, the court affirmed judgment as a matter of law because the defendant demonstrated a legitimate reason for the plaintiff's demotion and plaintiff offered no evidence in rebuttal. The court rejected the plaintiff's argument that the defendant would never have discovered the extent of her performance deficiencies but for her FMLA leave. Looking to the purpose of the FMLA, the court held that proximate causation, not but-for causation, was necessary to prove FMLA interference and that the plaintiff's demotion was proximately caused by her performance rather than her FMLA leave.

The court also affirmed summary judgment for the defendant on plaintiff's FMLA discrimination claim on the ground that, despite plaintiff providing evidence of pretext, the record contained no evidence showing discriminatory animus.

2. Layoff

***Cutcher v Kmart Corp.*, 364 Fed. Appx. 183, 15 Wage & Hour Cas.2d (BNA) 1457 (6th Cir. 2010)**

In an unpublished opinion, the Sixth Circuit reversed the district court's grant of summary judgment in favor of the defendant. The plaintiff, a full-time hourly associate at the

defendant's Port Huron store, was discharged as part of a nation-wide reduction in force announced during the plaintiff's six-week FMLA leave. The reduction in force caused the Port Huron store to eliminate six full-time hourly associates pursuant to a set of company-issued guidelines that required store managers to score and rank each employee eligible for the reduction. Although the store managers testified during their depositions that they did not consider the plaintiff's leave of absence when assigning her a relatively low score, the comment section of the form they used stated: "Poor customer and associate relations. LOA." The plaintiff was discharged upon her return to active status because she was among the six lowest-scoring employees.

The plaintiff filed suit alleging interference with her FMLA rights and retaliation. The district court granted defendant's motion for summary judgment. On appeal, the Sixth Circuit reversed and remanded the matter, concluding that a genuine issue of fact existed as to whether the defendant would have discharged the plaintiff as part of the reduction in force even if she had not taken FMLA leave. Specifically, the Sixth Circuit held that "there is a disputed material fact as to whether 'LOA' was listed as a reason for [the plaintiff's] lower score" because both parties agreed that the comment section of the form was meant to identify the reasons for a low RIF appraisal score. Moreover, the Sixth Circuit concluded that a jury could find for the plaintiff because her score was significantly lower than, and inconsistent with, her annual appraisal scores from previous years and because "none of the asserted reasons for her lower RIF appraisal scores were documented."

As for the plaintiff's retaliation claim, the Sixth Circuit held that the "LOA" notation on the plaintiff's form created an inference of causation and thus established her *prima facie* case of retaliation. Further, the court concluded that the lack of documentation to corroborate the plaintiff's lower score, along with her documented favorable work history, was sufficient to create a factual dispute as to whether the defendant's stated reason for her termination was pretext.

***Seil v. Keystone Automotive, Inc.*, 678 F. Supp. 2d 643 (S.D. Ohio 2010)**

The plaintiff alleged he was terminated in retaliation for exercising his rights under the FMLA. The plaintiff began working for Keystone in December 2005. In October 2007, Keystone was acquired by LKQ, a competitor. In November 2007, the plaintiff learned he had fibrosing mediastinitis and applied for FMLA leave for a related surgery. The plaintiff's FMLA leave was approved beginning December 17, 2007. On February 15, 2008, the plaintiff notified his supervisor of his intention to return to work on February 18, 2008. When the Regional Manager learned that the plaintiff was returning, he discharged the plaintiff and provided assurances to human resources that the plaintiff's position would have been eliminated due to the acquisition regardless of his FMLA leave. In denying the defendants' motion for summary judgment, the court held there was sufficient evidence of pretext to submit the issue to a jury.

The court concluded a causal connection could exist between the exercise of the plaintiff's rights under the FMLA and the adverse employment action because of the timing of the discharge in conjunction with the following facts: (1) there were no documents memorializing a decision to discharge plaintiff prior to his return to work and (2) the plaintiff

was not notified of his termination until immediately after he announced he was going to return to work. Thus, the court found a prima facie case of retaliation.

While the court ruled that a reduction-in-force was a legitimate reason for terminating the plaintiff, the court continued to hold that a juror could find pretext because (1) the Regional Manager claimed Keystone was not satisfied with the plaintiff's performance, but the plaintiff had a recent excellent performance evaluation; (2) the defendant contended that the plaintiff cursed at a customer, but the plaintiff's performance evaluation noted he got along well with customers; and (3) the Regional Manager sought out the plaintiff's opinion about the performance of the new general manager. As a result, a triable issue of fact existed.

***Thompson v. UHHS Richmond Heights Hosp., Inc.*, 372 Fed. Appx. 620 (6th Cir. 2010)**

In *Thompson*, the plaintiff sued her former employer after she was terminated upon her return from FMLA leave. The defendant claimed that the plaintiff's position was eliminated. In an unpublished opinion, the Sixth Circuit held that the district court properly dismissed the plaintiff's FMLA claim on summary judgment because the record demonstrated that the plaintiff's position would have been eliminated regardless of whether she took protected leave.

3. Discharge Due to Performance Issues

4. Other

Summarized Elsewhere:

***Niles v. National Vendor Services, Inc.*, 2010 WL 3783426 (Ohio Ct. App. Sept. 28, 2010)**

B. No-Fault Attendance Policies

***Estrada v. Cypress SemiConductor, Inc.*, 616 F.3d 866, 16 Wage & Hour Cas.2d (BNA) 819 (8th Cir. 2010)**

The plaintiff claimed that her former employer interfered with her FMLA rights by discharging her for violating the defendant's attendance policy. The defendant had an attendance policy that provided for progressive discipline for various levels of absenteeism. Employees were assessed points for absences and received discipline based on the number of points they accumulated in a given period. An employee who earned five points in a six month period was subject to termination. Absences for FMLA leave did not accrue points. Nevertheless, after taking FMLA leave, the plaintiff was assessed an attendance point and received a disciplinary action. The plaintiff failed to contest the disciplinary action through the defendant's internal appeal process. The plaintiff also earned a total of 5.5 points in a six month period not including the point assessed for the FMLA leave and, therefore, was discharged.

The Eighth Circuit affirmed summary judgment in favor of the defendant, finding that the defendant had shown it would have discharged the plaintiff absent the FMLA leave, particularly considering the plaintiff could not rebut the defendant's assertion that plaintiff's 5.5 points resulted in her discharge. Thus, the defendant did not interfere with the plaintiff's FMLA rights.

Summarized Elsewhere:

***Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748, 15 Wage & Hour Cas.2d (BNA) 1888 (7th Cir. 2010)**

***Murray v. AT&T Mobility LLC*, 374 Fed. Appx. 667, 16 Wage & Hour Cas.2d (BNA) 270 (7th Cir. 2010)**

C. Employee Actions Related to the Leave

1. Other Employment

2. Other Activities During the Leave

3. Reports by Employee

***Maxwell v. Kelly Services, Inc.*, 2010 WL 2720730, 16 Wage & Hour Cas.2d (BNA) 1428 (D. Or. July 7, 2010)**

In *Maxwell*, the plaintiff, a former Kelly Services Temporary Staffing Supervisor, sued for, among other things, violation of the FMLA. The plaintiff alleged the defendant failed to return her to the same or an equivalent position after she returned from maternity leave. The defendant moved for summary judgment. Although it was undisputed that the defendant did not return the plaintiff to either her former position or an equivalent position, the defendant pointed to computer entries confirming that the plaintiff stated she was only available for a part-time position. The plaintiff, however, testified that she told a specific employee of the defendant that she was willing to work full-time. The defendant urged the court to disregard this testimony because it was "self-serving" and "conclusive." Distinguishing previous Oregon district court opinions, the court concluded that the plaintiff's testimony was "relevant, specific and based on her personal knowledge." Thus, the court found there was a fact issue on the plaintiff's FMLA claim and denied summary judgment.

4. Compliance With Employer Requests for Fitness-for-Duty Certifications

5. Fraud

***Casseus v. Verizon New York, Inc.*, 2010 WL 2736935, 16 Wage & Hour Cas.2d (BNA) 756 (E.D.N.Y. July 9, 2010)**

The plaintiff sued his former employer for, among other things, interference with his FMLA rights and retaliation for exercising those rights. The defendant granted the plaintiff FMLA leave to treat ulcers and wounds on his feet and ankles resulting from sickle cell anemia. The plaintiff was terminated after the defendant concluded that he had misrepresented his health status after it saw video footage of the plaintiff engaging in activities inconsistent with what the plaintiff and his physician had represented.

The parties cross moved for summary judgment on the FMLA claims. The defendant claimed that it had a good faith belief that the plaintiff misrepresented his health status which provides a complete defense to the FMLA interference claim. The court noted that the Second Circuit had not yet addressed (1) the "honest belief" defense, i.e., whether a perceived employee misrepresentation is a legitimate, non-discriminatory reason for its termination decision or (2) whether the *McDonnell Douglas* burden shifting approach should be applied not only to FMLA retaliation claims but also to FMLA interference claims.

The court denied both motions for summary judgment, finding genuine issues of material fact as to whether the defendant: (1) believed in good faith that the plaintiff materially misrepresented his health status; (2) interfered with the plaintiff's FMLA leave by overly scrutinizing him while on leave and terminating the leave based on a pretextual claim that he materially misrepresented his health status; and (3) claimed that the plaintiff misrepresented his health status in terminating the plaintiff as a pretext for retaliating against him for taking the FMLA leave.

D. Timing of Restoration

IV. INABILITY TO RETURN TO WORK WITHIN 12 WEEKS

***Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 2010 WL 2431821 (E.D. Pa. June 14, 2010)**

The plaintiff alleged he was terminated in retaliation for exercising his FMLA rights. The plaintiff requested and was granted FMLA leave; however, he was unable to return to work after his leave entitlement expired. The plaintiff requested that the defendant provide him with an additional three months of leave. The defendant denied the request for additional leave and terminated the plaintiff's employment, citing the need to maintain consistency in its application of the FMLA.

The plaintiff brought suit alleging both FMLA retaliation and interference, although he later abandoned his interference claim. The defendant filed for summary judgment, which was granted by the district court. The court found that, although the defendant considered the expiration of the plaintiff's FMLA leave in reaching the termination decision, that consideration alone does not support an inference of retaliation. The court noted that, "[w]henever an employee is terminated after the expiration of FMLA leave, it may be said that the employer has 'considered' that FMLA leave time has expired." However, the plaintiff must show retaliation, and the record did not support a finding that the employer held any animus toward the plaintiff specifically because he took FMLA leave.

***Diaz v.Transatlantic Bank*, 367 Fed. Appx. 93 (11th Cir. 2010)**

In an unpublished opinion, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant. The plaintiff was employed by the defendant as a bank teller. She suffered a knee injury that prevented her from climbing into the high chairs used by other bank tellers. The plaintiff took approved FMLA leave. Once her FMLA leave expired, the plaintiff's doctors indicated she could return to work in six to eight weeks with limitations,

but that she would not be cleared to return to work until she received an MRI. When she did not return to work after her FLMA leave ended, she was terminated.

The court rejected the plaintiff's arguments alleging both FMLA interference and retaliation. The court stated the defendant did not interfere with the plaintiff's FMLA rights because the plaintiff never provided defendant with a return to work authorization. Moreover, the defendant was under no obligation to extend the duration of her FMLA leave to accommodate scheduling of the MRI exam. The court also stated there was no evidence of retaliation because the plaintiff failed to provide anything in support of her argument that the defendant's stated reason for the termination was pretext.

***Dorsey v. Jacobson Holman, PLLC*, --- F. Supp. 2d ---, 2010 WL 5168782 (D.D.C. 2010)**

In *Dorsey*, the district court held that the employer was entitled to summary judgment on an employee's claim that her discharge was in retaliation for taking protected FMLA leave following surgery for her carpal tunnel syndrome, where the evidence established that the employee was unable to work following her exhaustion of FMLA leave. The Court found that the defendant was legally within its right to terminate plaintiff after she had exhausted her allowed leave. The court further found that the plaintiff had made it clear to the defendant that her pain was worse after her treatment, that she could not type, that she was permanently disabled, and that she was unable to work. The Court found that the plaintiff failed to provide any evidence that this legitimate, non-discriminatory reason for her discharge was pretextual.

The Court also granted the defendant summary judgment on plaintiff's claim that it interfered with her FMLA rights by failing to notify her of those rights, rejecting her argument that had she been so notified, she could have inquired about light duty, taken intermittent leave, or sought accommodation for her disability. Since the FMLA provides relief only for actual damages and prejudice to the employee, the Court held that notifying plaintiff of her FMLA right would not have changed the dispositive fact that she was unable to perform her job at any time during or after her leave.

Summarized Elsewhere:

***Clark v. Macon County Greyhound Park, Inc.*, 2010 WL 2976492 (M.D. Ala. July 23, 2010)**

***Degraw v. Exide Technologies*, 2010 WL 4025394 (D. Kan. Oct. 13, 2010)**

V. SPECIAL CATEGORIES OF EMPLOYEES

A. Employees of Schools

***Harris v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 594 F.3d 476, 108 Fair Empl. Prac. Cas. (BNA) 925, 15 Wage & Hour Cas.2d (BNA) 1441 (6th Cir. 2010)**

In *Harris*, a high school teacher and basketball coach claimed that his employer, the Metropolitan Government of Nashville and Davidson County, violated the FMLA by reducing his coaching stipend after he returned from FMLA leave. In October 2003, the plaintiff went on

FMLA leave and was unable to coach the basketball team during the leave. Under his contract with the defendant, the plaintiff was entitled to receive a 12 percent coaching supplement in addition to his salary. However, the coaching agreement provided that the plaintiff (1) had to complete the season to receive the full supplement, and (2) would have to pay back any unearned portion of the supplement. Nonetheless, the plaintiff continued to receive his full 12 percent coaching stipend while on FMLA leave.

When the plaintiff returned to work in January 2004 and resumed his coaching duties, his supplement was reduced to 6% to recoup overpayments made while he was out on leave. The plaintiff claimed that the defendant's failure to fully restore the 12% coaching supplement upon his reinstatement violated the FMLA's restoration provisions. The district court agreed and granted judgment as a matter of law to the plaintiff.

On appeal, the Sixth Circuit reversed the district court's decision, ruling that the reduction of the plaintiff's coaching stipend did not violate the FMLA because the coaching supplement was not an employment benefit of his teaching position, which was the job protected by the FMLA. Thus, the court determined that the defendant had properly reduced the plaintiff's coaching supplement to reflect the amount of compensation owed to him under his separate coaching contract. As an alternative ground for its decision, the court concluded that the plaintiff could not recover because he had not suffered any prejudice. Indeed, the plaintiff received *more* than half of the 12 percent coaching supplement despite coaching only half of the basketball season. According to the court, any reduction in the plaintiff's coaching supplement upon his return from leave was harmless.

B. Key Employees

1. Qualifications to Be Classified as a Key Employee

2. Standard for Denying Restoration

3. Required Notices to Key Employees

    a. Notice of Qualification

    b. Notice of Intent to Deny Restoration

    c. Employee Opportunity to Request Restoration

CHAPTER 9. INTERRELATIONSHIP WITH OTHER LAWS, EMPLOYER PRACTICES AND COLLECTIVE BARGAINING AGREEMENTS

I. OVERVIEW

II. INTERRELATIONSHIP WITH LAWS

A. General Principles

B. Federal Laws

1. Americans With Disabilities Act

a. General Principles

***Murray v. AT&T Mobility LLC*, 374 Fed. Appx. 667, 16 Wage & Hour Cas.2d (BNA) 270 (7th Cir. 2010)**

In *Murray*, the plaintiff was terminated when she exceeded the allowed number of points under her employer's no-fault attendance policy. Under that policy, an employee who accumulated 12 or more points during a rolling 12-month period could be terminated. This rolling 12-month period was extended for employees who were on a leave of absence. The plaintiff exhausted the time available to her under the FMLA after being on intermittent leave for several months. The defendant had approved intermittent FMLA leave so the plaintiff could work a part-time schedule to accommodate a disability. Once her FMLA balance was exhausted, the plaintiff continued working part-time and eventually accumulated 17.5 points under the no fault attendance policy. As a result of this point accumulation, the plaintiff was terminated.

In her suit, the plaintiff challenged the defendant's calculation of her FMLA leave time usage as well as its policy of extending the 12-month period under the no-fault attendance policy for employees on a leave of absence. The district court entered summary judgment in favor of the defendant and, in an unpublished opinion, the Seventh Circuit affirmed.

The court held that the defendant correctly charged the hours the plaintiff was absent from her full-time position due to working a part-time schedule against her FMLA balance. Although the plaintiff and defendant agreed to the part-time schedule as a reasonable accommodation under the ADA, the court explained that employers may charge such leave against an employee's FMLA balance. The court also rejected the plaintiff's argument that the defendant's policy of extending the rolling 12-month period under the no-fault attendance policy punished employees for taking FMLA leave. The court pointed to its recent decision in *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010) (summarized elsewhere), which held that absence forgiveness is a benefit that accrues as a result of working and employees, therefore, are not entitled to accrue that benefit while on FMLA leave.

b. Covered Employers and Eligible Employees

c. Qualifying Events

i. Serious Health Conditions and Disabilities

ii. Triggering Events for Leave of Absence Rights

d. Nature of Leave and Restoration Rights

i. Health Benefits

ii. Restoration

***Niles v. National Vendor Services, Inc.*, 2010 WL 3783426 (Ohio Ct. App. Sept. 28, 2010)**

The plaintiff took approved FMLA leave from his employer before being released to return to work subject to a permanent lifting restriction. Upon learning of this permanent restriction, the defendant discharged the plaintiff. In his complaint, the plaintiff argued that the defendant was required to return him to his former position or to an equivalent position. The trial court granted the defendant's motion for summary judgment because the plaintiff was unable to perform the essential functions of his position due to his physical condition and the court of appeals affirmed. Although the plaintiff testified that he could perform the functions of his position, this was insufficient evidence to survive a motion for summary judgment given all of the evidence to the contrary, including multiple witnesses who testified that lifting was an essential function of the job and the plaintiff's disability benefit application which stated he was unable to perform any work at all.

iii. Light Duty

e. Medical Inquiries and Records

f. Attendance Policies

2. COBRA

3. Fair Labor Standards Act

Summarized Elsewhere:

***Saavedra v. Lowe's Home Centers, Inc.*, 2010 WL 3656008, 16 Wage & Hour Cas.2d (BNA) 1061 (D.N.M. Sept. 2, 2010)**

4. 42 U.S.C. § 1983

***Webb v. County of Trinity*, 2010 WL 3210768 (E.D. Cal. Aug. 10, 2010)**

The plaintiff alleged that shortly after she returned from FMLA leave to care for her mother, her supervisor threatened her with the loss of a flex day if she sought additional leave. Approximately one month later, the plaintiff requested vacation time to provide further care for her mother. This request was denied and the plaintiff's supervisor purportedly criticized her for the vacation request in a subsequent performance evaluation. The plaintiff's mother

subsequently passed away and the plaintiff was only permitted to take one-and-a-half days off work, with the time coming from plaintiff's earned sick leave.

Instead of bringing her claim under the FMLA, she brought it under 42 U.S.C. § 1983 ("§ 1983"). Thus, the court examined whether the plaintiff could maintain a § 1983 substantive due process claim predicated on alleged violations of the FMLA. While recognizing that there did not appear to be any binding authority directly addressing the issue, the court nonetheless concluded that the plaintiff could not maintain a § 1983 claim to vindicate the rights provided by the FMLA. In reaching this decision, the court first acknowledged the presumption that § 1983 provides a mechanism for enforcing all federal statutory rights. However, the court also noted that a defendant may defeat this presumption by establishing that the statute in question provides a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.

Relying on *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 480-86 (M.D. Pa. 2008), the court concluded that § 1983 was not a proper vehicle for asserting violations of the FMLA given the FMLA's comprehensive enforcement scheme. Furthermore, the court found that the remedies permitted under the FMLA are more restrictive than those provided by § 1983 in that the FMLA does not permit the recovery of nominal, punitive, and non-economic damages. In light of these differences between the FMLA and § 1983, the court concluded that the FMLA's remedial scheme provides the exclusive means of recovery for violations of the Act.

5. Title VII of the Civil Rights Act

6. Uniformed Services Employment and Reemployment Rights Act

7. IRS Rules on Cafeteria Plans

8. ERISA

9. Government Contract Prevailing Wage Statutes

10. Railway Labor Act

11. NLRA and LMRA

C. State Laws

1. State Leave Laws

a. General Principles

b. Effect of Different Scope of Coverage

i. Employer Coverage

ii. Employee Eligibility

c. Measuring the Leave Period

d. Medical Certifications

e. Notice Requirements

f. Fitness-for-Duty Certification

g. Enforcement

h. Paid Family Leave Laws

2. Workers' Compensation Laws

a. General Principles

b. Job Restructuring and Light Duty

c. Requesting Medical Information

d. Recovery of Group Health Benefit Costs

3. Fair Employment Practices Laws

4. Disability Benefit Laws

5. Other State Law Claims

***Yon v. Principal Life Ins. Co.*, 605 F.3d 505, 16 Wage & Hour Cas.2d (BNA) 197 (8th Cir. 2010)**

The plaintiff, who worked as a sales counselor, was approved for FMLA leave in May 2003 to care for his father. In July 2003, the plaintiff received a written warning for failing to meet the defendant's sales expectations. This was not the plaintiff's first performance warning; to the contrary, the defendant had been counseling the plaintiff regarding his job performance since 1999. In November 2003, the plaintiff complained in writing to the Department of Labor that the July 2003 written warning violated his FMLA rights. The defendant continued to discipline the plaintiff throughout 2004 and his employment was subsequently terminated in February 2005.

The plaintiff filed suit under the FMLA, as well as under the FLSA, the Iowa Wage Payment Collection Act, and Iowa public policy grounds. The defendant's motion for summary judgment was granted and the plaintiff appealed only his Iowa public policy claim. In affirming summary judgment, the court recognized that Iowa law prohibited the employer from terminating the plaintiff because he complained about FMLA violations. The court, however, affirmed summary judgment and held that the plaintiff could not establish his claim that he was terminated in retaliation for complaining to the Department of Labor given that he had been disciplined on multiple occasions before he filed his complaint.

D. City Ordinances

Summarized Elsewhere:

***Seegert v. Monson Trucking, Inc.*, 2010 WL 2132883, 15 Wage & Hour Cas.2d 1305 (D. Minn. May 27, 2010)**

***Parsons v. Dept. of Youth Services*, 2010 WL 335016 (Ohio App. Jan. 15, 2010)**

III. INTERRELATIONSHIP WITH EMPLOYER PRACTICES

A. Providing Greater Benefits Than Required by the FMLA

Summarized Elsewhere:

***Hearst v Progressive Foam Technologies, Inc.*, 682 F. Supp. 2d 955 (E.D. Ark. 2010)**

B. Employer Policy Choices

1. Method for Determining the "12-Month Period"

2. Employee Notice of Need for Leave

***Buckman v. MCI World Com., Inc.*, 374 Fed. Appx. 719 (9th Cir. 2010)**

In an unpublished opinion, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the defendant. The plaintiff claimed that his employer terminated him in part because he took FMLA leave. The plaintiff's FMLA leave expired on April 16, 2004. The plaintiff conceded that on April 19, 2004, he called in 48 minutes after his shift began and did not present evidence that he was unable to call in before his shift. The defendant's attendance policy required employees to call in before their shift if they were going to be absent or tardy. The plaintiff had received eleven previous written warnings for violating this and other policies and was on final warning when he failed to call in.

The court noted that 29 C.F.R. § 825.302(d) states that an "employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." Here, the plaintiff failed to comply with the defendant's usual and customary notice and procedural requirements for requesting leave and could present no unusual circumstances that would excuse this nonperformance. Moreover, the court determined that the plaintiff's claim that the defendant should have been on "constructive notice" that he was on FMLA leave lacked merit because his FMLA leave had expired the previous Friday. For these reasons, the court upheld the lower court's grant of summary judgment.

***Jackson v. Jernberg Industries, Inc.*, 677 F. Supp. 2d 1042 (N.D. Ill. 2010)**

The plaintiff's employer had an attendance policy that required not just verbal notification of a medically necessary absence but also receipt of a written doctor's note. The defendant disciplined and then terminated the plaintiff's employment based on absences that the plaintiff verbally indicated were due to his FMLA-certified wrist condition, but for which he failed to provide individualized documentation.

The plaintiff filed a lawsuit claiming that the defendant interfered with his rights under the FMLA by requiring the submission of a doctor's note for each instance of intermittent absence. Both parties filed motions for summary judgment. The court denied the defendant's motion and granted the plaintiff's motion. While an employer cannot interfere with employees' FMLA rights, the court noted that an employee is required to explain why he needs FMLA leave and may be required to support his explanation with a health care provider's certification. However, the law protects employees against overzealous employers by limiting how and when an employer may demand certification. The court noted that an employer may require that an employee call in to verify that his absence is FMLA-related, may call the employee at home as means of verification, and may require that an employee submit a written personal certification attesting that an individual instance of leave was FMLA-related. The court found that requiring a doctor's note for each occurrence of intermittent FMLA leave constituted an impermissible recertification because the defendant's policy required action not just by the plaintiff but by the plaintiff's doctor as well.

***Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576, 16 Wage & Hour Cas.2d (BNA) 705 (5th Cir. 2010)**

The plaintiff was diagnosed with bipolar disorder and depression, conditions that caused her to be hospitalized. During the time she was hospitalized, the plaintiff's mother called the defendant multiple times to inform it that the plaintiff was unable to work. The plaintiff provided notice under the defendant's notice policy before returning to work, but this notice was several days late. The plaintiff was then terminated for failing to comply with the policy.

The district court granted the defendant's motion for summary judgment, which the Fifth Circuit reversed, holding that the plaintiff was not required to comply with the defendant's heightened internal notice requirements merely because she was aware of them. Instead, the plaintiff's failure to follow her employer's notice requirements were excusable because (1) the employer had actual notice that the employee sought FMLA leave resulting from phone calls made by the plaintiff's mother to the plaintiff's supervisor; (2) the plaintiff did not affirmatively refuse to comply but merely delayed in complying; and (3) persuasive reasons existed for straying from the defendant's procedures, such as the severity of the plaintiff's illness.

3. Substitution of Paid Leave

4. Reporting Requirements

***Thompson v. CenturyTel of Central Ark., LLC*, 2010 WL 4907161 (8th Cir. Dec. 3, 2010)**

In *Thompson*, the plaintiff was discharged after violating the defendant's call-in policy. This policy, which was included in the employee handbook, required employees to call their supervisor each day that they are absent. If an employee failed to provide proper notification under this policy three times within a 12-month period, they were discharged. Additionally, a department policy required employees to call their supervisor when they were absent. Employees not able to speak to their supervisor personally were required to leave a voicemail. The plaintiff's supervisor permitted employees to call in weekly once their FMLA leave had been approved. The plaintiff was discharged after she failed to comply with these policies, bringing her total violations in a twelve-month period to seven. After her discharge, her physician completed a certification that she had a serious health condition during the most recent period she failed to call-in.

The Eight Circuit affirmed the dismissal of the plaintiff's FMLA interference claim, concluding that her termination for repeated violation of the call-in policy was unrelated to her FMLA leave. The court also rejected the plaintiff's argument that the defendant was required to provide written notice of the call-in policy each time she requested leave. The court noted that the FMLA expressly states that employers are not required to provide a notice explaining whether the employer will require periodic reports and, in any event, the plaintiff acknowledged receiving the policies.

Summarized Elsewhere:

***Hearst v Progressive Foam Technologies, Inc.*, 682 F. Supp. 2d 955 (E.D. Ark. 2010)**

***Parsons v. Principal Life Ins. Co*., 686 F. Supp. 2d 906 (S.D. Iowa 2010)**

5. Fitness-for-Duty Certification

6. Substance Abuse

Summarized Elsewhere:

***Majewski v. Fischi*, 372 Fed. Appx. 300 (3d Cir. 2010)**

7. Collecting Employee Share of Group Health Premiums

8. Other Benefits

9. Other Employment During FMLA Leave

10. Restoration to an Equivalent Position for Employees of Educational Agencies

IV. INTERRELATIONSHIP WITH COLLECTIVE BARGAINING AGREEMENTS

A. General Principles

B. Fitness-for-Duty Certification

CHAPTER 10. INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. OVERVIEW

II. TYPES OF CLAIMS

A. Interference With Exercise of Rights

1. Prima Facie Case

***Marez v. Saint-Gobain Containers, Inc.*, 2010 WL 3719927 (E.D. Mo. Sept. 13, 2010)**

The plaintiff's first FMLA interference claim related to leave she took in July 2007 to undergo surgery. Although the plaintiff submitted medical information with an August 27, 2007 return to work date, she did not return on that date. The defendant's payroll department, however, mistakenly thought that she had returned and started paying her. On September 7, 2007, having still not received medical information extending plaintiff's leave, the defendant terminated the plaintiff. On September 10, 2007, the defendant received information from the plaintiff's physician indicating that her leave was extended and that she could return to work on September 13, 2007. Based on this information, the defendant reinstated the plaintiff.

The court found this termination decision was legitimate because the employer was entitled to rely on a medical certification until the employee provides contradictory medical information. Moreover, the court found no authority for the plaintiff's assertion that the defendant violated the FMLA by allegedly requiring her to pay back over-payments of wages she received due to an accounting error. Finally, to the extent that the defendant terminated the plaintiff while she was on FMLA leave and docked her pay, it was a mistake that the defendant acknowledged and corrected. Under these facts, the court concluded that the plaintiff failed to establish a prima facie case for this claim so granted summary judgment to the defendant.

The plaintiff's second FMLA interference claim involved her allegation that on January 28, 2008, she told a manager that she would need to take FMLA leave soon because her husband was having his toe amputated. According to the plaintiff, the manager reacted angrily and showed irritation. Two days later, the defendant terminated the plaintiff for failing to follow standard operating procedures, falsifying documentation and failing to improve her performance. Emphasizing that the plaintiff was discharged only two days after she allegedly informed the defendant about her upcoming need for FMLA leave and before the need for FMLA leave arose, the court found there were genuine issues of material fact as to this claim. To the extent that the defendant claimed that the plaintiff did not complete FMLA paperwork, the court easily rejected this argument, noting that based on her discharge, the plaintiff never had the opportunity to complete paperwork. Thus, the court denied summary judgment on this FMLA interference claim.

***McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 109 Fair Empl.Prac.Cas. (BNA) 1057, 159 Lab.Cas. P 35,784, 16 Wage & Hour Cas.2d (BNA) 503, 23 A.D. Cases 518, 41 NDLR P 109 (D.C. Cir. June 29, 2010)**

After plaintiff's FMLA leave expired in 2004, she contacted the defendants about her job status and stated she could no longer perform her job due to her ailments. The plaintiff requested to be transferred to another position, but her request was denied and her employment was terminated.

The plaintiff claimed the defendants interfered with her FMLA rights by misinforming her about the amount of leave available and by pressuring her not to take leave. The court held that, while the plaintiff must show prejudice from the FMLA interference, the plaintiff does not need to show she was denied any requested leave to survive summary judgment, reversing the district court's ruling. The court found that the plaintiff showed prejudice because she paid her sister to care for her husband instead of missing work allegedly because her HR manager told her it was "going to be a problem…to maintain [her] job" if she missed work to care for her husband. As a result, the court reversed the district court's award of summary judgment, finding the plaintiff's claims regarding misinformation and pressure to not take leave were sufficient to survive summary judgment.

The plaintiff also claimed that denying her transfer was unlawful retaliation for conduct protected by the FMLA. In support of her argument, she claimed that the Human Resources ("HR") manager said the firm had too many sick people and should hire younger, healthier people, and that another HR staff member told the plaintiff that she should just resign and save everybody the trouble. The court found that neither of these statements concerned the exercise or pursuit of protected rights or otherwise sufficiently suggested retaliatory animus or a pretext for discrimination and thus upheld summary judgment in favor of Defendants on the FMLA retaliation claim.

***Reinwald v. The Huntington Nat. Bank*, 684 F. Supp. 2d 975 (S.D. Ohio 2010)**

The plaintiff filed suit against her former employer alleging (1) interference with her FMLA rights because the defendant denied her request for FMLA leave and (2) retaliation because the defendant considered her absence a "no show, no call" and terminated her employment. The plaintiff claimed she was unable to work due to pain from an injection for endometriosis. The plaintiff claimed she called the defendant's absence hotline as required by employer policy. The defendant checked its call log and did not have any record of her call. Applying its policy of progressive discipline, the defendant terminated the plaintiff's employment for violating its policy. The court granted the defendant's motion for summary judgment as to both claims.

Regarding the interference claim, the court ruled that the plaintiff failed to present competent medical evidence that the injection she received would trigger severe pain, that the pain she suffered was the result of the injection, or that the pain was sufficiently severe to prevent her from working. As a result, the plaintiff failed to prove she had a serious health condition that entitled her to FMLA leave and the court rejected her interference claim.

As to the retaliation claim court adopted the "Honest Belief Doctrine." Under this doctrine, "an employer does not violate the FMLA by terminating an employee if the employer held an honest belief based on particularized facts that the employee abused that leave." The plaintiff argued that the doctrine should not apply because her cell phone records showed she called the absence hotline and therefore complied with the defendant's policy. The court rejected this argument because at the time of her termination, the bank offered the plaintiff the opportunity to provide proof that she called the hotline but she did not do so. Under the Honest Belief Doctrine, the termination decision does not have to be "optimal or that the employer left no stone unturned." Since the plaintiff failed to rebut the doctrine, summary judgment was appropriate.

***Roman v. Potter*, 604 F.3d 34, 109 Fair Empl. Prac. Cas. (BNA) 228 (1st Cir. 2010)**

The plaintiff alleged interference with her FMLA rights and retaliation for taking FMLA leave. The claims arose from the defendant's undisputed delay in approving the plaintiff's paid FMLA leave for a period of approximately four weeks in late November and early December 2005. In January 2006, the plaintiff received all of her withheld pay from the four-week period. The defendant stated the reason for the delay was confusion over how the plaintiff was supposed to provide notification of the need for leave. The plaintiff had previously used paper notification forms but had instead used electronic forms for the November/December 2005 leave. The plaintiff's supervisor mistakenly believed paper forms were required in order to continue pay. When the defendant's FMLA coordinator informed the plaintiff's supervisor that under a new system it was not necessary for employees to submit written forms, the plaintiff's leave was approved and she was reimbursed for her loss.

The First Circuit held that because the plaintiff already recovered her salary, she could not show damages as required to establish a prima facie case. The court further held that the plaintiff was not entitled to liquidated damages under the statute because the employer satisfactorily demonstrated that any delay in approving the plaintiff's paid leave was the result of a good faith mistake and, thus, not subject to liability. Accordingly, the court affirmed summary judgment for the defendants on the interference claim.

As to the retaliation claim, the First Circuit found that the defendant provided a legitimate explanation for the delay in approving the plaintiff's leave. The court further found there was no evidence that this misunderstanding was motivated by retaliation, especially in light of the fact that a new system was being implemented and the same mistake happened with other employees. The court found that the plaintiff provided no evidence that showed that the defendant's stated reason was a pretext. Accordingly, the court affirmed summary judgment for the defendants on the retaliation claim as well.

***Walters v. Pride Ambulance Co.*, 683 F. Supp. 2d 580 (W.D. Mich. 2010)**

In *Walters*, the plaintiff sued her former employer for, among other things, interfering with her rights under the FMLA. On August 6, 2008, the plaintiff submitted an FMLA certification form from her medical provider stating that she was unable to work and could not

return until August 25, 2008. After the plaintiff returned to work, her supervisor gave her a letter advising the plaintiff that her FMLA certification did not provide sufficient information for her absences to qualify as FMLA leave. The defendant requested that the plaintiff complete a medical authorization form permitting it to discuss the deficiencies in the certification form with her medical provider to determine whether her absences qualified for FMLA leave. The plaintiff never executed the authorization form.

Shortly thereafter, the plaintiff's supervisor provided her with another document that specifically identified the deficiencies in her initial FMLA certification form. This document also advised the plaintiff that the deficiencies would have to be rectified in order for her previous absences to be considered qualified FMLA leave. Although the plaintiff gave this document to her treating physician to be completed, she resigned from her position before the doctor provided the requested information.

The court granted the defendant's motion for summary judgment because the plaintiff failed to establish a *prima facie* case of FMLA interference. Specifically, the court held that the plaintiff failed to establish that the defendant interfered with her FMLA rights because her leave request was still being processed and under review at the time she resigned. In reaching this conclusion, the court determined that the defendant acted lawfully when it requested additional clarification about the plaintiff's FMLA request given the minimal amount of information contained in her initial FMLA certification. Because the defendant did not receive the additional information it requested until after the plaintiff's resignation, it could not have denied her request for leave under the FMLA.

Summarized Elsewhere:

***Andrews v. CSX Transportation, Inc.*, 2010 WL 3069484 (M.D. Fla. Aug. 2, 2010)**

***Barker v. R.T.G. Furniture Corp.*, 375 Fed. Appx. 966 (11th Cir. 2010)**

***Dorsey v. Jacobson Holman, PLLC*, --- F. Supp. 2d ---, 2010 WL 5168782 (D.D.C. 2010)**

***Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236, 15 Wage & Hour Cas.2d (BNA) 1857 (11th Cir. 2010)**

***Taylor v. Autozoners, LLC*, 706 F. Supp. 2d 843 (W.D. Tenn. 2010)**

2. Interference Claims

***Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 15 Wage & Hour Cas.2d (BNA) 1879 (11th Cir. 2010)**

In *Krutzig*, the plaintiff challenged her dismissal, claiming it was in retaliation for requesting FMLA leave. She also claimed that her employer interfered with her FMLA and ERISA rights. In June 2007, the plaintiff injured her foot but did not initially request leave as a result of the injury. In July 2007, the plaintiff received two written warnings and was placed on a thirty day performance improvement plan. On August 17, 2007, the plaintiff contacted a

human resources representative and requested FMLA leave for a scheduled foot surgery. After this meeting, the plaintiff faxed a form signed by her doctor to human resources and attempted to have her supervisor sign the FMLA paperwork, but she was never able to speak with the supervisor. That same day, the plaintiff met with a disgruntled customer. After meeting with the plaintiff, the customer lodged a complaint. The day after this complaint, August 18, 2009, the Director of Sales decided to terminate the plaintiff's employment due to her failure to make progress on her performance improvement plan and the recent customer complaint. At the time he made the decision to terminate the plaintiff's employment, the Director was not aware that the plaintiff had requested FMLA leave.

With regard to the interference claim, the Eleventh Circuit joined the Eighth, Tenth and Sixth Circuits in holding that the right to commence FMLA leave is not absolute and that an employer may dismiss an employee without allowing him or her to exercise FMLA rights if the employee would have been dismissed regardless of the request for FMLA leave.

With regard to the retaliation claim, the Eleventh Circuit affirmed summary judgment for the employer because there was no evidence management was aware of plaintiff's FMLA leave request at the time the termination decision was reached.

***McCully v. American Airlines, Inc.*, 695 F. Supp. 2d 1225 (N.D. Okla. 2010)**

The plaintiff alleged her former employer interfered with his FMLA rights and retaliated against her in violation of the FMLA. The plaintiff was diagnosed with Non-Hodgkin's Lymphoma in October 2005 and took FMLA leave from December 2005 to March 2006. Following that, she took unpaid sick leave until July 2006. She then returned to work and subsequently took intermittent FMLA leave from June 2007 to May 2008. The defendant never rejected any FMLA leave requests or prevented the plaintiff from taking time off related to her illness. In October 2008, the plaintiff noticed entries about her unscheduled absences in the computerized time and attendance system. She then looked at similar entries of three other employees and inquired about these entries to her boss, who was concerned about how the information was accessed. The defendant investigated the incident and then terminated the plaintiff's employment for inappropriately accessing other employees' information and for not cooperating in the investigation.

The plaintiff claimed the defendant interfered with her FMLA rights and retaliated against her by failing to offer her the same or equivalent job upon her return from FMLA leave in July 2006 since she was transferred to a different department, allowing discriminatory actions to be taken against her in the form of recording her unscheduled absences and her discharge. First, the court addressed whether any FMLA violation was willful and found it was not because the plaintiff presented no evidence of a willful violation, as her compensation, benefits, seniority and physical office never changed. It is sufficient, the court said, that the defendant reasonably believed the two positions in different departments were equivalent. Thus, the court found there was no willful violation and, consequently, her claim of interference based upon not being returned to the same or equivalent position was time-barred. The court also found no discriminatory action, because the plaintiff was granted all of the FMLA and non-FMLA leave she requested and the computerized recording of her absences did not interfere with any FMLA

right. Finally, the court found no interference with respect to the termination, as the plaintiff was not on FMLA leave, nor did she allege that she requested or was entitled to FMLA leave, at the time her employment was terminated.

Regarding the plaintiff's allegation that the failure to return her to an equivalent position was retaliation, the court found that the defendant's need for the plaintiff's job skills in a different area constituted a legitimate, nondiscriminatory reason for the change in department. The court also found that the defendant recording unscheduled absence information in the computerized time system was not a materially adverse action, as the plaintiff identified no way in which this action affected her salary, benefits, or working conditions. The information was also accurate, kept regarding all employees in her department, was never used against plaintiff, and was not a factor in her termination. Finally, the court found no retaliation in the plaintiff's termination since the defendant articulated legitimate, nondiscriminatory reasons for the action. The court granted summary judgment in favor of the defendant on all of the plaintiff's FMLA claims.

Summarized Elsewhere:

***Bosse v. Baltimore County*, 692 F. Supp. 2d 574 (D. Md. 2010)**

***Casseus v. Verizon New York, Inc.*, 2010 WL 2736935, 16 Wage & Hour Cas.2d (BNA) 756 (E.D.N.Y. July 9, 2010)**

***Degraw v. Exide Technologies*, 2010 WL 4025394 (D. Kan. Oct. 13, 2010)**

***Drew v. Plaza Construction Corp.*, 688 F. Supp. 2d 270 (S.D.N.Y. 2010)**

***Estrada v. Cypress SemiConductor, Inc.*, 616 F.3d 866, 16 Wage & Hour Cas.2d (BNA) 819 (8th Cir. 2010)**

***Goelzer v. Sheboygan County, Wis.*, 604 F. 3d 987, 16 Wage & Hour Cas.2d (BNA) 97 (7th Cir. 2010)**

***Gude v. Rockford Center, Inc.*, 699 F. Supp. 2d 671 (D. Del. 2010)**

***Kinsella v. American Airlines, Inc.*, 685 F. Supp. 2d 891 (N.D. Ill. 2010)**

***Majewski v. Fischi*, 372 Fed. Appx. 300 (3d Cir. 2010)**

***Marez v. Saint-Gobain Containers, Inc.*, 2010 WL 3719927 (E.D. Mo. Sept. 13, 2010)**

***Mott v. Office Depot, Inc.* 2010 WL 2990913 (9th Cir. July 30, 2010)**

***Nuzzi v. St. George Community Consolidated School Dist. No. 258*, 688 F. Supp. 2d 815 (C.D. Ill. 2010)**

***Schaar v. Lehigh Valley Health Services, Inc.*, 2010 WL 3069602 (E.D. Pa. Aug. 4, 2010)**

***Schrieber v. Federal Express Corp.*, 698 F. Supp. 2d 1266 (N.D. Okla. 2010)**

***Wisbey v. City of Lincoln*, 612 F.3d 667, 16 Wage & Hour Cas.2d (BNA) 493 (8th Cir. 2010)**

B. Other Claims

1. Discrimination Based on Opposition

2. Discrimination Based on Participation

III. ANALYTICAL FRAMEWORKS

A. Substantive Rights Cases

1. General

2. No Greater Rights Cases

B. Proscriptive Rights Cases

IV. APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK

A. Direct Evidence

***Goelzer v. Sheboygan County, Wis.*, 604 F. 3d 987, 16 Wage & Hour Cas.2d (BNA) 97 (7th Cir. 2010)**

The plaintiff in *Goelzer* contended that her termination, two weeks before a scheduled FMLA leave, interfered with her exercise of rights and was in retaliation for previous FMLA leaves. The defendant asserted that the plaintiff's supervisor terminated her because he had just been promoted to a position where he had legal authority to terminate her without going to the county board and he chose to exercise that authority by replacing her with someone who had a greater skill set. The district court entered summary judgment for the defendant but the Seventh Circuit reversed, finding there were genuine issues of material fact with regard to the defendant's reason for the plaintiff's discharge.

The court found the plaintiff presented sufficient direct evidence for a jury to find the defendant discharged and did not reinstate plaintiff because she had exercised her right to take FMLA leave. The court cited: (1) comments by the plaintiff's supervisor expressing frustration with her use of FMLA leave; (2) comments by the plaintiff's supervisor in her performance evaluations about her use of sick leave; (3) comments by the plaintiff's supervisor in her performance evaluations contrasting the plaintiff's past "excellent" attendance with her current leave usage; (4) statements by the supervisor that the plaintiff did not receive a larger merit increase because she took off too much time to care for her mother; (5) the plaintiff's consistent satisfactory performance ratings; (6) the absence of evidence in the performance reviews of the supervisor's alleged concern with plaintiff's deficient skill set; (7) the absence of evidence

establishing that the supervisor had taken any previous steps toward removing plaintiff from her position until shortly after her request for two more months of FMLA leave.

***Nuzzi v. St. George Community Consolidated School Dist. No. 258*, 688 F. Supp. 2d 815 (C.D. Ill. 2010)**

The plaintiff alleged that the defendant interfered with her FMLA leave and retaliated against her for taking leave. The court granted the defendant's motion for summary judgment on the interference claim because the plaintiff was given more than 12 weeks FMLA leave. The court disagreed with the plaintiff's interpretation of the FMLA that her 12 weeks of FMLA leave started only when her paid leave ended.

The court also dismissed the plaintiff's retaliation claim because there was neither direct nor indirect evidence to support her claim. The plaintiff relied only on the fact that she was on leave when the decision was made not to renew her contract. The court stated that this was not direct evidence of retaliation and further stated that suspicious timing alone rarely creates a triable issue. The court further concluded that the plaintiff had no indirect evidence of retaliation because the defendant offered many legitimate reasons for the non-renewal of her contract, including overpayment of wages and inappropriate expense reimbursement. Further, the plaintiff made no showing that she had met the defendant's legitimate expectations or that the reasons given for the non-renewal of her contract were pretextual.

B. Application of *McDonnell Douglas* to FMLA Claims

1. Prima Facie Case

Summarized Elsewhere:

***Barker v. R.T.G. Furniture Corporation*, 375 Fed. Appx. 966 (11th Cir. 2010)**

a. Exercise of Protected Right

***Kinsella v. American Airlines, Inc.*, 685 F. Supp. 2d 891 (N.D. Ill. 2010)**

The plaintiff filed claims under the FMLA alleging that her former employer discharged her in retaliation for exercising her FMLA rights and interfered with her substantive exercise of FMLA rights. The plaintiff had previously been authorized to take intermittent FMLA leave to care for her son, who had diabetes. A member of management had received complaints from the plaintiff's co-workers, alleging that the plaintiff abused the company's FMLA policy by taking off work simultaneously as her husband, who also worked for the defendant, on over twelve occasions in a five year period. The manager utilized a private investigator to watch the plaintiff during non-FMLA absences, and this investigator observed her performing ordinary household chores on days she called in sick. Following this investigation, the plaintiff's supervisor met with her to discuss possible abuse of sick time and the plaintiff admitted (1) she could not remember whether her children had attended school while she was out on sick leave, (2) she did not see a doctor during the leave in question, and (3) she hosted a party for her daughter's confirmation while out on sick leave. The defendant then discharged the plaintiff.

The court, in granting defendant's summary judgment motion on plaintiff's retaliation claim, held that the plaintiff could not create a genuine factual dispute where telephone records established that she never requested FMLA leave during the time period in question, despite her unsupported testimony to the contrary. The court also held that temporal proximity alone between an alleged FMLA request and the employee's discharge is not enough to establish a causal connection where the plaintiff admitted she was not treated unfairly by her supervisors and she could not point to any other similarly situated employees who engaged in similar conduct and were not terminated.

In regard to the plaintiff's interference claim, the court ruled in favor of the defendant, finding that the defendant had given the plaintiff FMLA leave on each occasion she requested it.

Summarized Elsewhere:

***McFadden v. Ballard Spahr Andrews & Ingersoll, LLP*, 611 F.3d 1, 109 Fair Empl.Prac.Cas. (BNA) 1057, 159 Lab.Cas. P 35,784, 16 Wage & Hour Cas.2d (BNA) 503, 23 A.D. Cases 518, 41 NDLR P 109 (D.C. Cir. June 29, 2010)**

b. Adverse Employment Action

***Foshee v. Ascension Health-IS, Inc.*, 2010 WL 2511384 (11th Cir. June 23, 2010)**

The plaintiff, a former employee of the defendant, brought an action claiming that she was retaliated against for taking leave under the FMLA and seeking relief in the form of, among other things, reinstatement or monetary damages. While working for defendant, plaintiff started having performance deficiencies and suffering from job-related stress. Plaintiff's stress became so severe that she requested FMLA leave. Before her leave began, defendant continued to address plaintiff's performance deficiencies through counseling sessions and requiring her to sign a "Behavior Agreement." Plaintiff then took FMLA leave and, after exhausting it, took a medical leave of absence. While on medical leave, defendant posted plaintiff's job, per its customary practice. Plaintiff believed that this posting meant that she had been discharged and submitted a resignation letter.

The district court granted summary judgment in the employer's favor because the plaintiff failed to establish that she was subjected to an adverse action. The employee appealed to the Eleventh Circuit. On appeal, the Eleventh Circuit considered whether plaintiff has been constructively discharged or otherwise subjected to an adverse action. The Eleventh Circuit stated that it need not decide whether *Burlington Northern*'s "materially adverse effect" standard applied to FMLA retaliation cases in lieu of the "adverse employment action" standard, because even if *Burlington Northern*'s broader standard applied, plaintiff still could not show that defendant's actions had a materially adverse effect on her.

The Eleventh Circuit held that the plaintiff had not been constructively discharged because a reasonable person would not have felt compelled to resign as a result of the company posting her position as available. As a result, her separation from employment was not an adverse action. Plaintiff also claimed that she was subjected to other adverse actions, including

her counseling sessions and the Behavior Agreement, as well as defendant's refusal to communicate with her about possible accommodations when she was on leave. The Eleventh Circuit held these allegations were not adverse actions. First, plaintiff failed to provide a copy of the Behavior Agreement and further held that there was no evidence that it was "anything more than the most petty and trivial of actions." Second, the refusal to discuss accommodations was not sufficiently material to constitute an adverse action. Plaintiff failed to show that her doctor would not release her to return to work until she discussed accommodations with her employer and defendant did not foreclose an attempt to accommodate her upon her return to work. Because defendant's actions, even when viewed collectively, did not amount to an adverse employment action, the judgment of the district court was affirmed.

***Lawson v. Plantation General Hosp.*, 704 F. Supp. 2d 1254, 108 Fair Empl. Prac. Cas. (BNA) 1673, (S.D. Fla. 2010)**

Less than one month after the plaintiff took FMLA leave for a sickle cell crisis that required her to be hospitalized and placed on bed rest, her employer involuntarily transferred her to another position. According to the plaintiff, the transfer constituted a demotion even though it did not affect her pay, benefits or schedule. Several months later, the plaintiff received a performance evaluation that indicated some areas of her performance needed improvement. The plaintiff was then terminated as part of a reduction in force. The plaintiff brought suit against the defendant, alleging that both her transfer and termination were in retaliation for her taking FMLA leave. The defendant filed a motion for summary judgment, which the court denied because fact issues precluded summary judgment.

The court held that there was a fact issue regarding whether the plaintiff's transfer constituted an adverse employment action. Reassignment of job duties, while not automatically actionable, depends instead upon the circumstances of the particular case and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. Although the plaintiff's pay, hours and benefits did not change, her work assignment was not the same.

The court held that the temporal proximity between the plaintiff's selection for transfer and FMLA leave was significant. The court further held that the decision to discharge plaintiff and the events that occurred between her transfer and termination created a fact issue regarding whether there was a causal connection between the plaintiff's FMLA leave and her selection for transfer and ultimate termination.

***Thomas v. Euro RSCG Life*, 2010 WL 3735282 (S.D.N.Y. Sept. 27, 2010)**

In *Thomas*, the plaintiff alleged she was discriminated and/or retaliated against by her employer because she took FMLA leave. Five months after returning from leave, the defendant began planning a company-wide reduction in force. The plaintiff was excluded from these discussions for a period of time because she was being considered for layoff. The defendant decided not to terminate the plaintiff but instead changed her position to report to another location at least one day a week. Thereafter, the plaintiff participated in the reduction in force discussions. In her complaint, the plaintiff alleged the change in her position was in retaliation

of her taking FMLA leave. She also alleged that she was discriminated against for taking FMLA leave by being considered for termination, being excluded from the reduction in force discussions, and by being passed over for a promotion that was instead given to a colleague who was not as well-qualified.

Ruling on the defendant's motion for summary judgment, the court held that the plaintiff failed to establish a prima facie case that the defendant discriminated against her for taking FMLA leave. The plaintiff temporarily being considered for termination is not an adverse action sufficient to show discrimination. While being excluded from the reduction in force discussions could be considered an adverse action, the defendant had a legitimate reason for the exclusion since the plaintiff herself was being considered for termination. The court further found that the plaintiff failed to present any evidence that this reason was pretext. Lastly, the plaintiff's claim regarding the defendant promoting a colleague instead of her failed because she did not produce evidence that her qualifications for the promotion were so superior to her colleague's that a reasonable fact-finder could find that the employer's decision not to promote the plaintiff was intentionally discriminatory.

Regarding the plaintiff's retaliation claim, the court noted that the decision to change her position was made just days after the plaintiff complained to her employer about discrimination. Later, it was decided that the plaintiff should spend at least two days a week at the new location instead of one. This decision was made shortly after the plaintiff filed an EEOC complaint. Given the timing of these decisions and conflicting testimony by the defendant's witnesses about why the plaintiff was partially assigned to the new location, the court denied summary judgment as to the plaintiff's retaliation claim.

Summarized Elsewhere:

***Breeden v. Novartis Pharmaceuticals Corp.*, 684 F. Supp. 2d 58, 16 Wage & Hour Cas.2d (BNA) 309 (D.D.C. 2010)**

***Mott v. Office Depot, Inc.* 2010 WL 2990913 (9th Cir. July 30, 2010)**

c. Causal Connection

***Breeden v. Novartis Pharmaceuticals Corp.*, 714 F. Supp. 2d 33 (D.D.C. 2010)**

In *Breeden*, the plaintiff won a jury verdict on her FMLA retaliation claim against her employer. The plaintiff took maternity leave in 2005 as a major reorganization was being implemented. She contended that after her return, she was not reinstated to her prior sales territory, or one of equivalent size, despite a commitment made by her direct supervisor that she would be made whole upon her return. The plaintiff argued that this commitment meant providing a similar-sized territory. Despite the smaller territory, the plaintiff's compensation actually increased in the new assignment. In 2008, a different management team and outside consultant implemented a second reorganization, unrelated to the 2005 realignment, which merged a number of territories. The plaintiff's territory was merged with another one and because hers was the smaller of the two, the defendant chose to lay her off rather than the other sales representative.

At trial, the jury rendered a verdict in the plaintiff's favor, finding a causal connection between the failure to assign her a similar sized district in 2005 and the 2008 layoff. The district court, however, overturned the jury verdict. The court held that the plaintiff had offered sufficient evidence of but-for causation, i.e., that the assignment of a larger region in 2005 may have allowed her to be chosen for retention in 2008. Despite that showing, the court found that was insufficient to establish that her termination was "by reason of" the prior leave. The court found that the plaintiff had failed to establish proximate cause, regardless of whether *ex ante* or *post-hoc* views of proximate cause were applied. The court found that no one anticipated, nor reasonably could have anticipated, in 2005 that the assignment to a smaller territory would have led to her layoff three years later. Further, because the planning and implementation of the 2008 reorganization was made by completely different people than the 2005 reorganization, there was no showing that her prior leave was connected to the 2008 reorganization, which was a substantial intervening cause.

***Lucke v. Multnomah County*, 365 Fed. Appx. 793 (9th Cir. 2010)**

The plaintiff claimed that her employer, Multnomah County, violated the FMLA when it terminated her employment. The district court entered judgment for the defendant and the plaintiff appealed. The Ninth Circuit affirmed the district court because no reasonable jury could have found that the defendant violated the FMLA as the evidence showed that the plaintiff had taken FMLA leave unabated for several years. Furthermore, the Ninth Circuit held that the district court did not err when it excluded the plaintiff's comparator evidence because the plaintiff, unlike the other employees, was a corrections employee who was not involved in law enforcement or management. Finally, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's retaliation claims because considerable time elapsed between when she filed her complaints of discrimination and the alleged discriminatory actions.

***Spencer v. Nat'l City Bank*, 2010 WL 3075081, 110 Fair. Emp. Prac. Cas. (BNA) 470, 16 Wage & Hour Cas.2d (BNA) 852 (S.D. Ohio Aug. 5, 2010)**

The plaintiff was hired by National City Bank in 2001 as a Customer Service Representative ("CSR"). The defendant's written policies required at least one surprise audit on each CSR's cash drawer on a quarterly basis. Branch Managers could conduct additional surprise audits at the Manager's discretion. The plaintiff received numerous corrective actions for cash drawer shortages.

On September 4, 2007, the plaintiff suffered what appeared to be a heart attack and was transported by ambulance to the hospital. She was diagnosed with hypertension and was released to, and did, return to work on September 17, 2007. FMLA time was applied to this leave period. On the day of her return, the plaintiff was audited. Her cash drawer was out of balance and she was given a written counseling two days later. The plaintiff was next audited on September 24, 2007, and her drawer was again out of balance. At that point, the defendant's Retail Audit Department instructed the Branch Manager to perform at least two surprise audits of plaintiff in the following month. These audits resulted in documentation of several allegations, including that she often had a negative attitude, was not in a good mood on a regular basis, and was allegedly whispering to coworkers. No other CSRs were similarly documented. On

November 30, 2007, the plaintiff's fourth probationary period ended and she then had additional instances of policy violations, as well as two drawer shortages in December 2007. The plaintiff was informed in January 2008 that she was going to be discharged and allegedly told that leaving the defendant would "improve [her] health". The plaintiff accepted an offer to resign in lieu of termination effective February 1, 2008.

The plaintiff filed suit, alleging, among other things, retaliation for taking FMLA leave. The defendant argued the plaintiff failed to demonstrate any causal connection, arguing that the four month gap between the FMLA leave and termination was not sufficient temporal proximity. The court found that the plaintiff's evidence that she was audited on the day she returned from FMLA leave, was subjected to substantial scrutiny after she took leave, and was subjected to additional documentation as compared to others was sufficient evidence of causation to create an inference of retaliatory motive. The court therefore denied the defendant's motion for summary judgment.

Summarized Elsewhere:

***Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 2010 WL 2431821 (E.D. Pa. June 14, 2010)**

***Bosse v. Baltimore County*, 692 F. Supp. 2d 574 (D. Md. 2010)**

***Cutcher v Kmart Corp.*, 364 Fed. Appx. 183, 15 Wage & Hour Cas.2d (BNA) 1457 (6th Cir. 2010)**

***Gipson v. Vought Aircraft Indus., Inc.*, 2010 WL 2776842, 16 Wage & Hour Cas.2d 583 (6th Cir. July 13, 2010)**

***Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 15 Wage & Hour Cas.2d (BNA) 1879 (11th Cir. 2010)**

i. Temporal Proximity

Summarized Elsewhere:

***Grubb v. YSK Corp.*, 16 Wage & Hour Cas.2d 1648 (6th Cir. 2010)**

***Kinsella v. American Airlines, Inc.*, 685 F. Supp. 2d 891 (N.D. Ill. 2010)**

***Lawson v. Plantation General Hosp.*, 704 F. Supp. 2d 1254, 108 Fair Empl. Prac. Cas. (BNA) 1673 (S.D. Fla. 2010)**

***Moss v. City of Abbeville*, 2010 WL 2851195 (D.S.C. Jul. 15, 2010)**

***Wisbey v. City of Lincoln*, 612 F.3d 667, 16 Wage & Hour Cas.2d (BNA) 493 (8th Cir. 2010)**

ii. Statements

***Grubb v. YSK Corp.*, 16 Wage & Hour Cas.2d 1648 (6th Cir. 2010)**

In *Grubb*, the plaintiff claimed his employer terminated his employment in retaliation for taking protected FMLA leave to recover from a heart attack. The Sixth Circuit affirmed summary judgment in favor of the employer, holding that plaintiff failed to establish a prima facie showing that a causal connection existed between his protected FMLA leave and his termination.

First, the Court disregarded dismissive statements made by the plaintiff's plant manager regarding plaintiff's complaint of back pain and request for a motorized scooter to perform his work, which had occurred approximately a year prior to plaintiff's unrelated FMLA leave. Moreover, the Court found that there was no evidence that the plant manager was involved in the subsequent decision to discharge the employee.

Second, the Court rejected the plaintiff's assertion of a temporal proximity between his protected leave and his termination, finding that the employer had made the decision to discharge him prior to both his heart attack and FMLA leave, but simply waited for the plaintiff to return to work to offer him an opportunity to rebut the finding of work misconduct.

Finally, the Court stated that it could not consider the plaintiff's proffered evidence of pretext where he had not first established a causal connection between his use of FMLA leave and his termination. Accordingly, the Court held that district court's grant of summary judgment on the FMLA claim was appropriate.

***Mincy v. Cincinnati Children's Hosp. Med. Ctr.*, 715 F. Supp. 2d 770, 16 Wage & Hour Cas.2d (BNA) 316 (S.D. Ohio 2010)**

The defendant moved for summary judgment on the plaintiff's FMLA claim, arguing that it terminated the plaintiff for negligently performing her job duties, not because she took FMLA leave. The district court concluded that the plaintiff had proffered evidence that she might have been terminated because of her FMLA leave. In addition to the director informing the plaintiff she needed to improve her attendance, the director also testified that the plaintiff's attendance was "right on the cusp" of being an issue at the time of her termination. The court found this evidence sufficient to raise a genuine issue of material fact on causation and established the plaintiff's *prima facie* case. Further, the court considered several statements by the plaintiff's supervisors pretextual, including a report from one supervisor to another that the plaintiff was terminated not for negligence but for "other issues." The court also found that the plaintiff was the only individual terminated in September 2008 even though several of her co-workers committed similar errors at the same time. Accordingly, the court denied the defendant's summary judgment motion.

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Hollimon v. Potter*, 365 Fed. Appx. 546 (5th Cir. 2010)**

The plaintiff had a history of absences and tardiness, resulting in a "last chance agreement" whereby the plaintiff agreed to maintain a satisfactory level of attendance and adhere to all regulations, rules and policies pertaining to attendance and leave request procedures. The plaintiff acknowledged in the agreement that failure to maintain satisfactory attendance would be a breach of the agreement and would result in employment termination. After entering into the agreement, the plaintiff's absences and tardiness continued. None of the documented occurrences took place during a period of time in which the plaintiff was on FMLA leave. Given the continued occurrences, the plaintiff's employment was terminated.

The plaintiff filed a lawsuit claiming, among other causes of action, that the defendant retaliated against him for exercising his rights under the FMLA. The defendant filed a motion for summary judgment, which was granted because the plaintiff could not establish that the stated reason for his discharge was pretext. The Fifth Circuit affirmed the district court's order because there was no evidence that the defendant's stated reasons for termination were false.

Summarized Elsewhere:

***Andrews v. CSX Transportation, Inc.*, 2010 WL 3069484 (M.D. Fla. Aug. 2, 2010)**

***Casseus v. Verizon New York, Inc.*, 2010 WL 2736935, 16 Wage & Hour Cas.2d (BNA) 756 (E.D.N.Y. July 9, 2010)**

***Leal v. B F T, L.P.*, 713 F. Supp. 2d 669 (S.D. Tex. 2010)**

***McCully v. American Airlines, Inc.*, 695 F. Supp. 2d 1225 (N.D. Okla. 2010)**

***Nuzzi v. St. George Community Consolidated School Dist. No. 258*, 688 F. Supp. 2d 815 (C.D. Ill. 2010)**

***Reinwald v. The Huntington Nat. Bank*, 684 F. Supp. 2d 975 (S.D. Ohio 2010)**

***Roman v. Potter*, 604 F.3d 34, 109 Fair Empl. Prac. Cas. (BNA) 228 (1st Cir. 2010)**

***Thompson v. Chase Bankcard Services*, 2010 WL 3365913 (S.D. Ohio Aug. 23, 2010)**

***Wilson v. Noble Drilling Services, Inc.*, 2010 WL 5298018 (5th Cir. Dec. 23, 2010)**

3. Pretext

***Degraw v. Exide Technologies*, 2010 WL 4025394 (D. Kan. Oct. 13, 2010)**

An injury the plaintiff suffered at home resulted in him being placed on medical restrictions. These restrictions made him unable to perform his job or any other job at the

defendant's plant after his FMLA leave expired. As a result, the defendant terminated the plaintiff. The plaintiff argued that the defendant's reliance on a doctor's opinion was actually unlawful pretext. The court rejected this argument, concluding that that the relevant issue, for purposes of showing pretext, was whether the defendant honestly perceived that the plaintiff could not safely perform his job because of his medical condition. The court found no evidence supporting the plaintiff's claim that the doctor's opinion was so weak or that the defendant's reliance on it was so implausible or inconsistent that a reasonable jury could find that the defendant used the opinion as a pretext for FMLA retaliation.

The plaintiff also argued that his involuntary placement on FMLA leave, coupled with the defendant's refusal to reinstate him, constituted actionable FMLA interference. The court concluded that the fact that the plaintiff was not denied leave, and was instead forced to take leave, precluded an interference claim. Similarly there was no interference with any right to reinstatement because that right expired when the plaintiff's authorized leave expired and plaintiff could not return to work.

Summarized Elsewhere:

***Clark v. Macon County Greyhound Park, Inc.*, 2010 WL 2976492 (M.D. Ala. July 23, 2010)**

***Coffman v. Ford Motor Co.*, 2010 WL 2465376 (S.D. Ohio June 10, 2010)**

***Diaz v. Transatlantic Bank*, 367 Fed. Appx. 93 (11th Cir. 2010)**

***Schaar v. Lehigh Valley Health Services, Inc.*, 2010 WL 3069602 (E.D. Pa. Aug. 4, 2010)**

***Seil v. Keystone Automotive, Inc.*, 678 F. Supp. 2d 643 (S.D. Ohio 2010)**

a. Timing

***Kinney v. Holiday Companies*, 2010 WL 3937426 (9th Cir. Oct. 5, 2010)**

In an unpublished opinion, the Ninth Circuit affirmed in part and reversed in part the district court's grant of summary judgment in favor of the defendant. In his suit, the plaintiff alleged the defendant violated the FMLA by firing her for a pretextual reason intended to mask the true, health-related motivation for her termination and by denying her alleged requested leave. The district court granted summary judgment for the defendant on both issues and plaintiff appealed.

The Ninth Circuit reversed the district court on the first issue, holding that a genuine issue of material fact existed regarding whether the plaintiff's health issues were a negative factor in defendant's decision to terminate her. The defendant was aware of the plaintiff's need for future medical leave shortly before she was terminated and evidence showed that one of the two company policy violations cited by the defendant for discharging the plaintiff may never have occurred. The court remanded for further proceedings.

The Ninth Circuit affirmed the district court's grant of summary judgment on the plaintiff's claim that she was denied requested leave. The court held that the plaintiff did not make an unconditional request for leave when she told her manager she "wasn't feeling good," and asked her manager to "possibly find someone to come in." Nothing further was said to her manager regarding this leave. The court held this was not an unconditional request for leave, and even if it was, it did not comply with the FMLA's notice requirement.

***Leal v. B F T, L.P.*, 713 F. Supp. 2d 669 (S.D. Tex. 2010)**

In 2008, due to the decline in economic conditions, the defendant began questioning whether it needed the plaintiff's position. In 2009, the defendant laid off nine employees. Before she went on FMLA leave, the plaintiff's supervisor sent an e-mail saying that no further lay-offs were planned. The plaintiff subsequently took FMLA leave and, while on leave, the defendant eliminated her position.

The plaintiff argued that the defendant's legitimate nondiscriminatory reason, *i.e.*, that her position was eliminated, was merely pretextual based on the supervisor's e-mail. The court held that although the question was an extremely close one, the plaintiff did not question the defendant's assertion that the economic downturn created the need to make employment-related changes in her department. The temporal proximity between the plaintiff's FMLA leave and the elimination of her position, without more, was not sufficient to withstand summary judgment.

***Moss v. City of Abbeville*, 2010 WL 2851195 (D.S.C. Jul. 15, 2010)**

The plaintiff sued his former employer, a municipality, claiming that he was terminated in retaliation for exercising his FMLA rights. The plaintiff took FMLA leave due to planned hip replacement surgery. Before his twelve weeks of FMLA leave expired, the plaintiff asked for another 14 weeks of leave to recover. The defendant's policies allowed for extension of leave without benefits, and the defendant granted the plaintiff's extension request. On the same day that the plaintiff returned to work, the defendant terminated him, claiming that during the plaintiff's leave, it became apparent that the plaintiff's work had been both unhelpful and unsatisfactory.

The district court found that the plaintiff had established his *prima facie* case of FMLA retaliation. Specifically, the plaintiff demonstrated a causal connection between his FMLA leave and his termination by showing he was terminated on the same day he returned from his extended leave. This temporal proximity, combined with evidence that the plaintiff's performance was satisfactory prior to his leave, established the necessary causal connection. The court then concluded that the plaintiff demonstrated pretext based on, among other things, the lack of documentation related to poor performance. Accordingly, the district court adopted the magistrate's recommendation and denied the defendant's motion for summary judgment on the plaintiff's FMLA retaliation claim.

***Schrieber v. Federal Express Corp.*, 698 F. Supp. 2d 1266 (N.D. Okla. 2010)**

The plaintiff alleged his former employer interfered with his FMLA rights and retaliated against him for taking FMLA leave. The defendant had a policy where once an employee

accumulated three disciplinary actions in 12 months, that employee was subject to termination. While the plaintiff was on FMLA leave, this 12 month period was tolled. A month after he returned from leave, the plaintiff was terminated for having three disciplinary actions in 12 months (excluding the time plaintiff was on FMLA leave). In addition, while the plaintiff was on leave, his physician allowed him to return to work with certain restrictions. The plaintiff's supervisor declined his request to return on a restricted basis.

The plaintiff claimed the defendant's attendance policy interfered with his FMLA rights, as did the defendant's refusal to permit him to return to work with restrictions. The court granted summary judgment for the defendant on plaintiff's interference claim, finding that the defendant had the right to toll the 12-month disciplinary period for the duration of plaintiff's FMLA leave. The court also held that the plaintiff was not entitled to return to work on a reduced schedule because, by the plaintiff's own admission, he was unable to perform the essential functions of his job.

Regarding the plaintiff's claim that he was discharged in retaliation for taking FMLA leave, the court held that the temporal proximity between the plaintiff's leave and his discharge was relevant evidence of a causal connection sufficient to justify an appearance of retaliatory motive. The court said that a plaintiff may rely solely on temporal proximity only if the termination is "very closely" connected in time to the protected activity. Since the plaintiff was terminated just slightly more than a month after his return from FMLA leave, this was sufficient temporal proximity to survive summary judgment.

Summarized Elsewhere:

***Breeden v. Novartis Pharmaceuticals Corp.*, 684 F. Supp. 2d 58, 16 Wage & Hour Cas.2d (BNA) 309 (D.D.C. 2010)**

***Jelsma v. City of Sioux Falls*, 2010 WL 3910156 (D.S.D. Sept. 29, 2010)**

***Rensink v. Wells Dairy, Inc.*, 2010 WL 3767154, 16 Wage & Hour Cas.2d (BNA) 1223 (N.D. Iowa Sept. 15, 2010)**

***Thomas v. Euro RSCG Life*, 2010 WL 3735282 (S.D.N.Y. Sept. 27, 2010)**

***Wilson v. Noble Drilling Services, Inc.*, 2010 WL 5298018 (5th Cir. Dec. 23, 2010)**

b. Statements and Stray Remarks

***Jelsma v. City of Sioux Falls*, 2010 WL 3910156 (D.S.D. Sept. 29, 2010)**

On February 20, 2007, the plaintiff requested FMLA leave for shoulder surgery and to care for his ill mother. According to the plaintiff, his supervisors then repeatedly advised him to retire at meetings held on February 23 and 27, as well as March 1, 5 and 8. The plaintiff alleged that the supervisors threatened on March 5, 2008 to terminate his employment if he did not retire, which would cause him to lose his health and retirement benefits. At the March 8, 2008 meeting, the plaintiff completed his retirement paperwork.

The defendant asserted that its reason for the action was that the plaintiff would be unable to perform his job after surgery. In denying its motion for summary judgment, the court found that the plaintiff had established a genuine issue of material fact as to whether this reason was pretext for FMLA discrimination under the circumstances. The court stated that the medical certification the plaintiff provided regarding his ability to return to work was unclear as to what duties he would be able to perform. In addition, although the plaintiff was not able to perform all his duties six months after surgery, it was not clear whether these were essential job functions.

Summarized Elsewhere:

***Maxwell v. Kelly Services, Inc.*, 2010 WL 2720730, 16 Wage & Hour Cas.2d (BNA) 1428 (D. Or. July 7, 2010)**

***Mincy v. Cincinnati Children's Hosp. Med. Ctr.*, 715 F. Supp. 2d 770, 16 Wage & Hour Cas.2d (BNA) 316 (S.D. Ohio 2010)**

4. Comparative Treatment

***Thompson v. Chase Bankcard Services*, 2010 WL 3365913 (S.D. Ohio Aug. 23, 2010)**

The plaintiff was terminated roughly a month after asking for FMLA leave. The decision to terminate the plaintiff was made by a team of three supervisors, at least one of whom knew (1) that the plaintiff had taken FMLA leave in the past, (2) that she had misused FMLA leave on one occasion, and (3) of the plaintiff's recent request for additional leave. The court noted that it was irrelevant that, when the decision to discharge plaintiff was made, the plaintiff's supervisors did not know that the recent request for leave had been granted, because the FMLA protects both use of leave and requests for leave.

The court said that the temporal proximity between the request for leave and her termination raised an inference of retaliation. In addition to this temporal proximity, the plaintiff had, a month earlier, received a "met expectations" annual review, and had been nominated for employee of the year 10 months earlier. For these reasons, the court held that the plaintiff established a prima facie case of FMLA retaliation. The defendant successfully rebutted an inference of discrimination by showing that the decision to terminate the plaintiff was made after her supervisors determined that she intentionally failed to respond to a customer's questions, and otherwise provided poor service, which warranted her discharge. However, the plaintiff was able to establish pretext by showing that similarly situated employees were terminated only after multiple incidents of rude conduct or inappropriate behavior, and they were either given a written warning or received more extensive counseling before being terminated. The court also focused on the amount of discretion available to the plaintiff's supervisors, which made the decision to terminate the plaintiff suspect, because so much discretion makes an employment decision "easily susceptible to manipulation in order to mask" the actual reason for the decision.

C. Mixed Motive

D. Pattern or Practice

CHAPTER 11. ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. OVERVIEW

II. ENFORCEMENT ALTERNATIVES

A. Civil Actions

1. Who Can Bring a Civil Action

a. Secretary

b. Employees

c. Class Actions

***Duling v. Gristede's Operating Corp.*, 265 F.R.D. 91 (S.D.N.Y. 2010)**

The plaintiffs brought an employment discrimination class action against entities that operated several retail grocery store chains in the New York metropolitan area, alleging systemic gender discrimination in violation of Title VII and corollary state and city laws. After 19 months of class discovery and having filed for class certification, the plaintiffs moved to amend their complaint for a second time by, *inter alia*, adding a named plaintiff who alleged that the defendant employer violated the FMLA by restoring her to an inferior cashier position rather than her receptionist position following her return from maternity leave.

The defendant opposed the plaintiffs' motion, arguing that the plaintiffs had unduly delayed in bringing the motion, that the plaintiffs acted with dilatory purposes or bad faith, and that it would be prejudiced by the filing. The court rejected each of these arguments. In so holding, the court found that the new plaintiff's FMLA claim, while not having previously been articulated by the named plaintiffs, was not "so different from the class claims that they should not be added to the complaint at this point." The court then noted, "[f]urther, as Congress recognized in its explanation of the purposes underlying the Family and Medical Leave Act, pregnancy discrimination and sex discrimination are related."

Lastly, the defendant argued that the amendment would prove futile, as the class still could not be certified under the resulting amended complaint. Specifically, the defendant maintained that the new plaintiff could not satisfy a typicality showing because her pregnancy discrimination and FMLA claims were not shared by other class members. The court rejected this argument as well, observing that the breadth of the new plaintiff's claims included claims of mistreatment prior to her leave and that her interests were not antagonistic to those of other purported class members. Accordingly, the motion to amend was granted.

Summarized Elsewhere:

***Rodriguez v. City of New York*, 721 F. Supp. 2d 148 (E.D.N.Y. 2010)**

2. Possible Defendants

3. Jurisdiction

***Parsons v. Dept. of Youth Services*, 2010 WL 335016 (Ohio App. Jan. 15, 2010)**

The plaintiff, a former employee of the Ohio Department of Youth Services, sued her former employer for violation of the FMLA in an Ohio state trial court. After her claim was dismissed for lack of subject matter jurisdiction, the plaintiff contended the court had subject matter jurisdiction because civil claims for equitable relief may be heard in common pleas courts, which plaintiff alleged had "jurisdiction of federal claims, even for monetary damages against the state." The Ohio court of appeals rejected plaintiff's argument and affirmed the dismissal, holding that when the cause of action involves a civil suit for monetary damages against the state, the Court of Claims has exclusive, original jurisdiction. Whether the plaintiff was also seeking damages under a federal law, such as the FMLA, was irrelevant to the subject matter jurisdiction issue.

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

***Jorge-Colon v. Mandara Spa Puerto Rico, Inc.*, 685 F. Supp. 2d 280 (D.P.R. 2010)**

The plaintiff filed suit pursuant to Title VII, the FMLA, and other Puerto Rican laws against her former employer. The plaintiff alleged she was discriminated against because of her pregnancy and that the defendant failed to adequately notify her about her rights under the FMLA. The issue before the court was whether an arbitration agreement signed by the plaintiff was valid and enforceable for the alleged claims.

The plaintiff argued that labor disputes arising under Title VII and the FMLA may be raised directly in federal courts without resorting to arbitration. The court noted the Federal Arbitration Act was enacted by Congress to enforce arbitration provisions and that it is mandatory for district courts to compel arbitration where the parties signed a valid arbitration agreement governing the issues in dispute. Here, the plaintiff conceded that she signed the arbitration agreement and that it purportedly governed her claims, yet she argued that Supreme Court precedent allowed her to file suit on federal statutory claims in federal court. The court disagreed, holding that subsequent Supreme Court cases limited the previous holding and enforced arbitration provisions in statutory contexts, including the FMLA. The court granted the defendant's motion to compel arbitration and referred the parties to arbitration.

***Shorts v. Parsons Transportation Group, Inc.*, 679 F. Supp. 2d 63 (D.D.C. 2010)**

The plaintiff was hired by Parson Transportation Group in 2004. In accepting the position, he signed an offer letter that included a three-step dispute resolution mechanism (expression and appeal, mediation, and arbitration) as the exclusive means of resolving

workplace disputes. He also signed an employee agreement whereby he agreed to use the defendant's dispute resolution mechanism.

Following his termination after taking FMLA leave, the plaintiff filed suit under the FMLA. In response, the defendant filed a motion to dismiss and compel arbitration based on the plaintiff's failure to seek redress through the contractually-established dispute resolution procedures. The court granted the motion and dismissed the complaint, stating that whether the defendant terminated the plaintiff in retaliation for invoking his FMLA rights was a proper subject for arbitration.

3. Arbitration Under a Collective Bargaining Agreement

III. REMEDIES

A. Damages

1. Denied or Lost Compensation

***Johnson v. Potter*, 2010 WL 3190037 (M.D. Fla. Aug. 10, 2010)**

The plaintiff requested FMLA leave to care for her daughter, who had a difficult pregnancy, in February and March 2008. This request was denied because the plaintiff's daughter was an adult and, therefore, the leave did not qualify under the FMLA. The plaintiff then filed suit against her employer alleging FMLA interference.

The defendant moved for summary judgment, asserting that the plaintiff did not suffer any damages. The court granted the defendant's motion, noting that the plaintiff admitted in her answers to interrogatories that she neither lost income nor incurred any expenses as a result of the employer's denial of her FMLA leave request. Moreover, the FMLA provides no relief unless the plaintiff has been prejudiced in some way, and also does not provide for nominal or emotional distress damages.

2. Actual Monetary Losses

***Rensink v. Wells Dairy, Inc.*, 2010 WL 3767154, 16 Wage & Hour Cas.2d (BNA) 1223 (N.D. Iowa Sept. 15, 2010)**

The plaintiff alleged that his former employer interfered with the exercise of his FMLA rights by refusing to excuse his one-day absence as FMLA leave and instead counting it as an unexcused absence. The defendant argued that the plaintiff suffered no damages as a result of being denied FMLA leave since, with or without FMLA leave, the absence would be unpaid. The court agreed with the defendant and granted its motion for summary judgment. The court rejected the plaintiff's arguments that the unexcused absence was a form of discipline and was a determining factor in his ultimate termination. Further, the court found that the plaintiff suffered no prejudice or loss as a result of his being denied FMLA leave and no equitable relief would be appropriate given the minimal consequences of the potential violation. Thus, his interference claim was denied.

The plaintiff also alleged that the defendant terminated him on May 22, 2008 for taking FMLA leave. Because of severe migraine headaches, the plaintiff routinely took intermittent FMLA leave prior to his termination, with the last FMLA leave occurring from April 21 to 23, 2008. The court found that even if the temporal proximity was sufficient to establish a prima facie case, plaintiff could not satisfy demonstrate the employer's proffered reason for discharging plaintiff, a serious safety violation, was pretextual. Noting that the plaintiff had taken FMLA leave on numerous prior occasions without incident and there was no evidence of remarks about the plaintiff's migraines or use of FMLA leave, the court found a jury could not reasonably conclude the defendant retaliated against the plaintiff. Accordingly, the court granted the defendant's motion for summary judgment on this claim as well.

Summarized Elsewhere:

***Harris v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 594 F.3d 476, 108 Fair Empl. Prac. Cas. (BNA) 925, 15 Wage & Hour Cas.2d (BNA) 1441 (6th Cir. 2010)**

3. Interest

4. Liquidated Damages

   a. Award

***Brown v. Nutrition Management Services*, 370 Fed. Appx. 267, 15 Wage & Hour Cas.2d (BNA) 1806 (3d Cir. 2010)**

The plaintiff was terminated after informing several coworkers that she was pregnant and would need time off for the birth of her child. The plaintiff claimed that her employer interfered with her right to take FMLA leave. The jury returned judgment in the plaintiff's favor, and the district court awarded liquidated damages and attorneys' fees, but denied plaintiff front pay. The parties filed cross appeals.

The defendant claimed that liquidated damages were not warranted in this case. The court determined that the defendant did not meet its burden of establishing that the termination was in good faith and there were reasonable grounds for believing that the termination was a violation of the FMLA. The court based its decision, in part, on its observation that the witnesses offered conflicting testimony regarding the reason for the plaintiff's termination.

The defendant also claimed that the attorneys' fees award should have been adjusted because the attorneys' time records were vague and because the plaintiff was not successful on all of her claims. In upholding the award, the court noted that the lower court did adjust the award based on (1) the plaintiff's overall lack of success, (2) her failure to prove she was entitled to front pay, and (3) the difference between the award she sought and the award she received from the jury.

The plaintiff appealed for front pay, arguing that the jury had not been instructed properly. The district court had explained to the jury that if they awarded front pay, they should permit the judge to determine the amount. Consequently, the jury's response regarding front pay

was "OMIT per Judge's instructions." The Third Circuit determined that this answer was ambiguous, and the matter was remanded to the district court for final determination of any award of front pay.

The defendant also took issue with a jury instruction and claimed that the district court should have instructed the jury on its affirmative defense to an interference claim. The Third Circuit, in an unpublished opinion, acknowledged the defendant's right to this instruction and the district court's error in refusing to give it. However, the court determined that the defendant suffered no prejudice because the jury was informed that it could not find the defendant liable under the FMLA unless it found the plaintiff was terminated because of her pregnancy.

Summarized Elsewhere:

***Highlands Hosp. Corp. v. Preece*, 2010 WL 569745 (Ky. App. Feb. 19, 2010)**

***Roman v. Potter*, 604 F.3d 34, 109 Fair Empl. Prac. Cas. (BNA) 228 (1st Cir. 2010)**

***Traxler v. Multnomah County*, 596 F.3d 1007, 15 Wage & Hour Cas.2d (BNA) 1584 (9th Cir. 2010)**

b. Calculation

5. Other Damages

Summarized Elsewhere:

***Saavedra v. Lowe's Home Centers, Inc.*, 2010 WL 3656008, 16 Wage & Hour Cas.2d (BNA) 1061 (D.N.M. Sept. 2, 2010)**

B. Equitable Relief

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in All Actions

a. Reinstatement

b. Front Pay

***Traxler v. Multnomah County*, 596 F.3d 1007, 15 Wage & Hour Cas.2d (BNA) 1584 (9th Cir. 2010)**

In *Traxler*, the plaintiff claimed her termination was the result of her legitimate use of protected leave under the FMLA. The jury found in favor of the plaintiff and awarded her $250,000.00 in damages for back pay and $1,551,000.00 in front pay. The court declined to enter a judgment for liquidated damages. The defendant filed a motion seeking to limit the front pay awarded to the employee. The district court held that it had erred in allowing the jury to

determine the front pay award as front pay is an equitable remedy that must be determined by the court. As a result, the district court vacated the jury's front pay award and awarded the plaintiff $267,000.00 in front pay. The plaintiff appealed the district court's finding that front pay is an equitable remedy to be decided by the court, as well as the district court's refusal to assess liquidated damages.

The Ninth Circuit held that front pay is an equitable remedy that must be determined by the court, both as to the availability of the remedy as well as its amount. In so holding, the court stated that it was agreeing with decisions of the Fourth, Fifth, and Tenth Circuits on this precise issue. The court stated that since front pay is not included in the enumerated damages portion set forth in §2617(a)(1)(A), the district court's power to award front pay derives solely from the portion of the FMLA which allows for equitable remedies. As an equitable remedy, the decision to award it to a plaintiff rests solely with the court, not the jury.

The court also held that the district court's refusal to assess liquidated damages was improper as it never made an explicit finding as to whether the defendant's conduct was taken in good faith or whether it had reasonable grounds for believing that its action was not a violation of the FMLA. As such, the court remanded the matter to the district court for an explanation supporting its denial of liquated damages.

Summarized Elsewhere:

***Brown v. Nutrition Management Services*, 370 Fed. Appx. 267, 15 Wage & Hour Cas.2d (BNA) 1806 (3d Cir. 2010)**

***Highlands Hosp. Corp. v. Preece*, 2010 WL 569745 (Ky. App. Feb. 19, 2010)**

c. Other Equitable Relief

C. Attorneys' Fees

***Rodriguez v. City of New York*, 721 F. Supp. 2d 148 (E.D.N.Y. 2010)**

The plaintiffs, current and former civilian employees of the New York City Police Department, were part of a class action against New York City and the NYPD alleging various violations of the FMLA. The court reviewed the reasonableness of the parties' proposed stipulation of settlement of attorneys' fees and costs in which the parties agreed to award attorneys' fees to plaintiffs' counsel. The plaintiffs were represented by the General Counsel's Office of District Council 37, AFSCME, AFL-CIO, the union representing the plaintiffs, and a private law firm, Lewis Brisbois. The union paid fees and costs to Lewis Brisbois at a below-market rate.

The original proposed attorneys' fees award had three components: (1) the union's fees at the market rate; (2) reimbursement to the union for fees and costs it paid to Lewis Brisbois; and (3) fees to Lewis Brisbois to make up the difference between what the union paid and the market rate. The court had already granted fees to Lewis Brisbois but had reserved decision as to the fees for the union.

The court held that reimbursement to the union for the fees it paid to Lewis Brisbois was proper. However, the court held that, absent a separate legal fund for depositing attorneys' fees, the union could only be reimbursed for the actual costs it incurred for the work of its in-house attorney on the case. The court found that awarding market rate attorneys' fees for the in-house counsel's work would run afoul of the ethical prohibitions on fee-sharing with non-lawyers. Since the fees would be paid directly to the union, which is neither a party to the action nor a law firm, the difference between the actual costs of the staff attorney's work and the market rate would amount to a profit. The court found that if a union creates a separate legal fund, the fund is viewed as a non-profit legal services organization and there is no bar to recovery at the market rate.

***Hardaway v. Ridgewood Corp.*, 706 F. Supp. 2d 436 (S.D.N.Y. 2010)**

In *Hardaway*, the plaintiff sought to recover his attorneys' fees and costs as a prevailing party under the FMLA. The defendant argued that the plaintiff's award should be reduced by at least 60 percent because the amount of damages the plaintiff actually recovered was much less than initially sought.

The court explained that there were two alternative ways to consider the degree of the plaintiff's success on the merits in determining an award of attorneys' fees: (1) evaluating the plaintiff's success on the merits as one of the factors to determine a "presumptively reasonable fee;" or (2) considering the plaintiff's success on the merits as an equitable factor that proportionally reduces the "presumptively reasonable fee." Although the court endorsed the latter approach, it nonetheless found that its conclusion would be the same under either option.

The following facts suggested to the court that the attorney's fees award should be reduced by reason of the plaintiff's limited success: (1) the plaintiff's total monetary recovery was substantially less than what he had initially demanded in his complaint, (2) the plaintiff did not obtain any injunctive or other non-monetary relief, and (3) the plaintiff could have discovered one of the facts germane to the merits of his claims in a more efficient manner than litigation. However, the court also recognized that the plaintiff did, in fact, achieve his "primary goal" of recovering monetary compensation even though it was not as much as he initially requested. Furthermore, most of the facts which diminished the plaintiff's likelihood of success on the merits were not known to him when he commenced the litigation, but rather were revealed only after the parties had engaged in discovery. In light of the foregoing considerations, the court ultimately determined that the plaintiff's attorney's fees award should be reduced by 25 percent as a result of his limited success on the merits.

Summarized Elsewhere:

***Brown v. Nutrition Management Services*, 370 Fed. Appx. 267, 15 Wage & Hour Cas.2d (BNA) 1806 (3d Cir. 2010)**

D. Tax Consequences

IV. OTHER LITIGATION ISSUES

A. Pleadings

***Carlson v. Geneva City School Dist.*, 679 F. Supp. 2d 355, 108 Fair Empl. Prac. Cas. (BNA) 1355 (W.D.N.Y. 2010)**

The plaintiff was a former employee of the school district, who brought claims under state and federal law, including under the FMLA. The defendants moved to dismiss the FMLA claim under Fed. R. Civ. P. 12(b)(6) and the court determined that the plaintiff failed to plead: (1) that she was an eligible employee under the FMLA; (2) that the individual defendants constituted an employer under the FMLA; (3) that she was entitled to leave under the FMLA; (4) that she gave notice to the defendants of her intention to take leave; and (5) that the defendants denied her benefits to which she was entitled by the FMLA. Thus, the court dismissed plaintiff's FMLA claims but allowed her leave to amend her complaint.

***Crawford v. City of Tampa*, 2010 WL 3766627, 16 Wage & Hour Cas.2d (BNA) 1359 (11th Cir. Sept. 28, 2010)**

In an unpublished opinion, the Eleventh Circuit reversed the district court's dismissal of the plaintiff's claim under Fed. R. Civ. P. 12(b)(6). The plaintiff, a city employee, requested and was denied a medical leave of absence under the defendant's sick leave policy. The defendant terminated the plaintiff shortly thereafter. The plaintiff sued, alleging, among other things, interference with her FMLA rights. The district court dismissed the plaintiff's FMLA claim under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, noting the plaintiff had asserted only that the defendant denied her sick leave request based on her race.

The Eleventh Circuit reversed on appeal. Relying on FMLA regulations, the court explained that an employee "need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed." Then, once an employee informs the employer that potentially FMLA-qualifying leave is needed, "the regulations place on the employer the burden of ascertaining whether the employee's absence actually qualifies for FMLA protection." According to the Eleventh Circuit, the district court "imposed too high a pleading obligation in this case." Because the complaint alleged that the plaintiff was eligible for benefits under the FMLA and that she requested leave for medical reasons, her failure to specifically allege that she invoked the FMLA when requesting leave "does not warrant dismissal."

***Drew v. Plaza Construction Corp.*, 688 F. Supp. 2d 270 (S.D.N.Y. 2010)**

The plaintiff alleged both FMLA interference and retaliation. The defendant filed a motion for summary judgment, arguing that the retaliation claim was duplicative of the interference claim. In denying the defendant's motion to dismiss, the court first observed that both FMLA interference and retaliation claims may be, and routinely are, asserted by plaintiffs in the Second Circuit. The court also reasoned that while a plaintiff is not required to make out a prima facie case of retaliation in his complaint, the plaintiff had done just that by contending that he: (1) requested FMLA leave; (2) was qualified for his position; (3) suffered an adverse

employment action the same day he requested FMLA leave; and (4) was not provided any examples of alleged insubordination, the singular ground cited for his termination.

Summarized Elsewhere:

***Duling v. Gristede's Operating Corp.*, 265 F.R.D. 91 (S.D.N.Y. 2010)**

***Jones v. Sternheimer*, 2010 WL 2711305 (4th Cir. July 6, 2010)**

***Kronenberg v. Baker & McKenzie, LLP*, 692 F. Supp. 2d. 994 (N.D. Ill. 2010)**

***Saavedra v. Lowe's Home Centers, Inc.*, 2010 WL 3656008, 16 Wage & Hour Cas.2d (BNA) 1061 (D.N.M. Sept. 2, 2010)**

B. Right to Jury Trial

C. Protections Afforded

D. Defenses

1. Statute of Limitations

a. Generally

***Coffman v. Ford Motor Co.*, 2010 WL 2465376 (S.D. Ohio June 10, 2010)**

In *Coffman*, the plaintiff sued her former employer claiming she was fired in retaliation for taking FMLA leave. The defendant moved for summary judgment on the basis that the claims were time barred by the two-year statute of limitations. The defendant terminated the plaintiff on July 25, 2005, for unexcused absences on June 17-20, 2005. The plaintiff did not initiate suit until July 23, 2008. The court found that the claims were time-barred under the two-year statute of limitations and that the three-year statute of limitations for willful violation did not apply because the plaintiff knew that she was to timely submit medical certification in order to receive FMLA medical leave. The defendant claimed the plaintiff had more than ten absences during November 2004 through June 2005 for which she did not submit timely medical documentation. In addition, pursuant to a collective bargaining agreement, the plaintiff was subject to progressive discipline for such unexcused absences.

Even though the court determined the plaintiff's claims were time barred, the court considered the claims on the merits in granting the defendant's motion. The court held that while a causal connection existed between the plaintiff's request for FMLA leave and termination, the plaintiff had not worked the requisite 1,250 hours needed for FMLA leave eligibility in June 2005 and, accordingly, the defendant's decision to terminate her employment for unexcused absences could not be considered a pretext for an FMLA retaliatory discharge.

b. Willful Violation

Summarized Elsewhere:

***Bosse v. Baltimore County*, 692 F. Supp. 2d 574 (D. Md. 2010)**

***McCully v. American Airlines, Inc.*, 695 F. Supp. 2d 1225 (N.D. Okla. 2010)**

2. Sovereign Immunity

***Brown v. Lieutenant Governor's Office on Aging*, 697 F. Supp. 2d 632 (D.S.C. 2010)**

The plaintiff sued her former employer, the Lieutenant Governor's Office on Aging, alleging it retaliated against her for taking self-care leave under the FMLA. The defendant moved to dismiss the plaintiff's FMLA claim.

First, the court addressed plaintiff's argument that the Supreme Court's decision in *Nevada Department of Human Res. v. Hibbs*, 538 U.S. 721 (2003), which held that Congress validly abrogated the sovereign immunity of States with regard to the FMLA's family-care provisions, should be interpreted to also waive States' Eleventh Amendment immunity rights with regard to self-care leave under the FMLA. The *Brown* court first noted that every circuit court to consider this issue post-*Hibbs* has concluded that Congress did not validly abrogate sovereign immunity with regard to the FMLA's self-care provisions. The court went on to discuss a pre-*Hibbs* Fourth Circuit decision, *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001), which broadly held that Congress exceeded its authority in applying the FMLA to the States. Regardless of the continuing viability of *Lizzi* post-*Hibbs*, the *Brown* court concluded that the Fourth Circuit would likely agree with the holdings of other circuit courts and concluded that the FMLA's self-care provisions did not validly abrogate sovereign immunity.

Second, the court addressed plaintiff's argument that she should be able to bring a FMLA claim against supervisors of a public agency in their individual capacities because they are covered by the FMLA's definition of an employer. The court found this issue controlled by a second holding in *Lizzi*; that Eleventh Amendment immunity is extended to supervisory employees of a state who are sued for damages under claims the state is entitled to immunity against. Rejecting plaintiff's reliance on district court cases, the court held that *Lizzi* remains controlling precedent. As such, the court dismissed the plaintiff's FMLA claim against the individual defendants in their official capacities.

***Burg v. U. S. Dep't of Health and Human Services*, 2010 WL 2842858 (3d Cir. July 21, 2010)**

The plaintiff was a senior auditor of the Office of Inspector General of the U.S. Department of Health and Human Services who asserted claims under the FMLA. The Seventh Circuit held that, as a government employee, the plaintiff had no private right of action under Title II of the FMLA because the government had not expressly waived its sovereign immunity.

***Emmons v. City University of New York*, 715 F. Supp. 2d 394 (E.D.N.Y. 2010)**

The plaintiff had complained to an executive at her former employer, City University of New York, that her salary was discriminatorily low. Several months later, the plaintiff took off one week for medical reasons. While on leave, the defendant terminated the plaintiff. The plaintiff complained and was ultimately reinstated with a higher salary. In February 2008, the plaintiff went on FMLA leave and, after several changes in her job status, was ultimately discharged on June 4, 2008 due to job elimination.

The defendant moved to dismiss plaintiff's FMLA claims based on sovereign immunity. The court dismissed the claims against the defendant as well as two individuals in their official capacity. The court found that Congress did not have authority to abrogate sovereign immunity for issues related to medical leave for one's own health condition, although sovereign immunity has been waived for leave to care for a family member.

The court also found that the plaintiff failed to state an interference claim because her FMLA leave was granted and she returned to work upon its completion. The plaintiff's claims of verbal "harassment" while on leave did not show a denial of benefits. The transfer to a new position was not interference because the new position was substantially equivalent. The court found that the plaintiff did adequately plead a cause of action for retaliation by alleging that the transfer, refusal to offer a different position, and discharge were based on the defendant's frustration with her FMLA leave. The court also found that the defendants who controlled, in whole or in part, a person's ability to take a leave of absence and return to her position may be held individually liable.

***Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 110 Fair Empl. Prac. Cas. (BNA) 1217, 16 Wage & Hour Cas.2d (BNA) 1537 (4th Cir. 2010)**

The Fourth Circuit distinguished *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, (2003), and found that the FMLA provision relating to self-care did not constitute a valid abrogation of the states' sovereign immunity. While the Supreme Court found that the family care provision of the FMLA was enacted to combat gender-based discrimination, this was not the case for self-care. Rather, Congress included the self-care provision to attempt to alleviate the economic effect on employees and their families due to sickness and also to protect employees from being discriminated against because of their serious health problems. Without such evidence of gender-based motivation, the Fourth Circuit held that Congress could not abrogate the state's sovereign immunity. The court also refused to impute the family-care provision's immunity abrogation to the entire FMLA because the Supreme Court in *Hibbs* only addressed the family care provision and other circuit courts that have directly considered the issue concluded that Congress did not validly abrogate sovereign immunity as to the FMLA's self-care provision. Thus, the Fourth Circuit ultimately affirmed the district court's decision to grant the motion to dismiss.

3. Waiver

Summarized Elsewhere:

***Whiting v. Johns Hopkins Hospital*, 680 F. Supp. 2d 750 (D. Md. 2010)**

4. Res Judicata and Collateral Estoppel

***Dobrowski v. Jay Dee Contractors*, 2010 WL 293069 (Mich. App. Jan. 26, 2010)**

The plaintiff filed suit under the FMLA and a corollary state law, arguing that the defendant's proffered legitimate business reason for his termination was pretext. The federal court dismissed the FMLA claim on the alternative grounds that: (1) the plaintiff was not an eligible employee under the FMLA, and (2) even if he was, he had failed to show that the defendant's stated business reasons for the dismissal were pretext for discrimination because: he would have been fired anyway and no causal connection existed between his leave and his firing. The court declined to hear the state law claim and instead remanded it to state court.

On remand, the state trial court expressed disagreement with the federal court's conclusion that the plaintiff could not show pretext. But, because that showing is an element of the plaintiff's state law claim and had already been decided by the federal court, the state court granted summary disposition citing the doctrine of collateral estoppel. Thereafter, the Sixth Circuit Court of Appeals affirmed the district court holding on the ground that the plaintiff was not an eligible employee under the FMLA, but it declined to reach the second basis for the grant of summary judgment

On appeal at the state court level, the plaintiff argued that collateral estoppel did not bar the state trial court from hearing his state law claim, because the federal district court expressly declined to hear that claim and instead remanded it to state court. The majority disagreed, however, citing the Second, Third, Seventh, Ninth, and Eleventh Circuits for the proposition that issue preclusion extends to alternate, but independently sufficient, grounds for a judgment. In so doing, it noted but rejected the Tenth, Fourth, Fifth and Sixth Circuits' holdings to the contrary.

***Webster v. Milwaukee County*, 2010 WL 2900374 (E.D. Wis. July 21, 2010)**

In *Webster*, a former county employee brought an action alleging that he was unlawfully disciplined and eventually terminated for exercising his rights in requesting intermittent leave under the FMLA. The defendant moved for summary judgment, arguing that the plaintiff's claims were barred by the doctrine of issue preclusion because the quasi-judicial Milwaukee County Personnel Review Board ("PRB") had already determined that the plaintiff violated the defendant's attendance policy, thereby barring any re-litigation as to the propriety of the plaintiff's termination.

In deciding whether issue preclusion barred the plaintiff's FMLA claims, the court first acknowledged that there was no binding conclusive precedent as to whether prior state administrative proceedings should be given preclusive effect in a subsequent FMLA lawsuit. Nonetheless, the court decided to follow the approach taken by the Second Circuit and held that

factual determinations of state administrative agencies could, depending on governing state law, bar the subsequent litigation of an FMLA claim under the doctrine of issue preclusion.

The court then looked to Wisconsin state law, which says that the doctrine of issue preclusion applies only when a question of fact or law was actually litigated in a previous action and was necessary to the judgment. Applying this analysis, the court held that the plaintiff's FMLA claims were not barred by the doctrine of issue preclusion under Wisconsin law because the only issue before the PRB was whether the plaintiff violated the defendant's attendance policy. Because the PRB did not determine whether the defendant violated the FMLA, the doctrine of issue preclusion did not bar the plaintiff's claims under that statute. The court further noted that there was no indication that the PRB possessed the requisite statutory authority to adjudicate the FMLA claims asserted by the plaintiff.

The court went on to discuss why application of the doctrine would be fundamentally unfair to the plaintiff in the present circumstances. First, the court found that the procedural and substantive rights afforded employees in the PBR proceedings were substantially less than those afforded a litigant in a formal lawsuit. Second, the court determined that the application of issue preclusion would be fundamentally unfair because the scope of the PRB hearing was limited and, therefore, the plaintiff had no incentive to fully litigate the merits of his FMLA claims in that forum. For these reasons, the court also concluded that the fundamental fairness element of the issue preclusion test provided additional support for refusing to give the PRB's decision preclusive effect.

5. Equitable Estoppel as a Bar to Certain Defenses

***Collins-Pearcy v. Mediterranean Shipping Co. (USA) Inc.*, 698 F. Supp. 2d 730 (S.D. Tex. 2010)**

In *Collins-Pearcy,* one of two plaintiffs alleged interference and retaliation in violation of the FMLA. This plaintiff was employed for less than 12 months before going out on maternity leave, which the employer relied upon in arguing that she was ineligible for FMLA protection. The court granted the employer's motion for summary judgment on the FMLA claim, finding that the defendant was not estopped from asserting that the employee was not an eligible employee.

The plaintiff recognized that she did not meet the eligibility criteria of the FMLA, but argued that she could establish a viable FMLA claim under a "detrimental reliance" principle in the context of an equitable-estoppel theory. Although there was no record of the plaintiff ever applying for FMLA leave, she argued that the defendant's Director of Human Resources told her that she was an eligible employee entitled to leave under the FMLA. To support her claim, the plaintiff presented several documents that referenced the FMLA, including the defendant's response to the plaintiff's state discrimination charge in which the HR Director stated that the plaintiff returned from "FMLA leave," as well as e-mails referring to FMLA forms that were never sent to the employee. The district court held that this evidence was insufficient to establish detrimental reliance. Thus, the plaintiff failed to raise a genuine issue of material fact that the company should be equitably estopped from asserting her status as an ineligible employee under the FMLA.

***Murphy v. Fedex National LTL, Inc.*, 618 F.3d 893, 16 Wage & Hour Cas.2d (BNA) 952 (8th Cir. 2010)**

The plaintiff requested FMLA from her employer to care for her husband, who was hospitalized unexpectedly, and she provided a medical certification for the leave. After her husband passed away, the plaintiff called her supervisor and requested 30 days off work to get things in order. In response to this request, her supervisor said "not a problem, I'll let human resources know." Human Resources later denied the leave because the plaintiff did not have a serious health condition and then discharged the plaintiff.

The plaintiff sued her former employer, claiming the defendant was estopped from denying her leave based on her supervisor's representation that the leave would not be a problem. The defendant appealed the district court's finding in favor of the plaintiff, arguing that court committed an error in submitting the case to the jury with an estoppel-based verdict director. The defendant argued that the court should have required the jury to find that the plaintiff actually needed FMLA leave for a serious health condition. The Eighth Circuit rejected this argument, stating that an employer who makes an affirmative representation in response to a request for leave that an employee reasonably and detrimentally believes was a grant of FMLA can be estopped from later arguing that the employee was not entitled to that leave because she did not suffer a serious health condition.

The defendant also argued that the jury should have been required to find that the plaintiff provided the defendant with sufficient notice that she was requesting FMLA leave. The Eighth Circuit agreed and held that to prove equitable estoppel, the plaintiff must demonstrate adequate and timely notice of the need for leave. The Eighth Circuit granted the defendant's request for a new trial, finding the district court's jury instruction was inadequate. The Eighth Circuit held that, at the new trial, the jury must be instructed on the notice requirement and also that it must find that the plaintiff reasonably believed that the defendant represented it granted her FMLA, rather than some other kind of leave, in order to find for the plaintiff.

The court also addressed the plaintiff's cross-appeal which alleged the defendant waived the right to challenge her FMLA eligibility because it failed to request a medical certification from her. The court noted that if an employer does not require a medical certification of serious health condition, this is not an absolute waiver of challenging whether an employee has a serious health condition. The defendant here could have later requested a medical certification for the leave.