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SECTION OF LABOR AND EMPLOYMENT LAW
COMMITTEE ON FEDERAL LABOR STANDARDS LEGISLATION**

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Submitted by:

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II. PRIVATE SECTOR EMPLOYERS

A. Basic Coverage Standard

B. Who Is Counted as an Employee

1. Location of Employment

Hodge v. United Airlines, 2011 WL 5024176 (D.D.C. Oct. 21, 2011)

A flight attendant sued his employer for violation of FMLA, and the district court granted the employer's motion for summary judgment, holding the employee was not eligible for FMLA leave. The employee was not eligible because he was based outside the United States in Hong Kong. 29 C.F.R. § 825.111(a)(2); 29 C.F.R. § 825.800. The employee was also not eligible because he had worked fewer than 1,250 hours per year, despite that flight attendants were prohibited by their collective bargaining agreement from working more than 1,104 hours per year. Although the FMLA was amended in 2009 to provide for a different, lower number of worked hours for flight attendant eligibility, those amendments were not in effect at the time plaintiff sought leave and were not retroactive. *See* 29 U.S.C. § 2611(2)(D).

2. Payroll Status

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III. PUBLIC EMPLOYERS

A. Federal Government Subdivisions and Agencies

1. Coverage Under Title I

Luat v. Mabus, WL 6152285 (S.D. Cal. Dec. 12, 2011)

Plaintiff, a contract specialist with the United State Navy, sued the Navy and Secretary of the Navy on several counts, including sexual harassment and retaliation under Title VII and a purported claim of violations of the FMLA. Defendant moved to dismiss plaintiff's FMLA claim because defendant was immune from such a claim due to the lack of a private right of action under Title II of the FMLA.

The court struck plaintiff's FMLA claim, and ruled defendant's motion to dismiss was moot. First, the court found that because plaintiff's complaint lacked adequate pleading to show an unequivocal waiver of immunity, defendant should be considered immune from her FMLA claim. Further, plaintiff argued that her purported FMLA claim was really not an FMLA claim, but a Title VII retaliation claim, thus the claim should continue. The court agreed and held that her purported FMLA claim was actually a Title VII retaliation claim in that the alleged

retaliatory action was defendant's refusal to approve her FMLA leave request because she reported sexual harassment. As such, the court ruled that to the extent plaintiff attempted to allege defendant violated her FMLA rights, she was barred from doing so. Also, plaintiff's FMLA allegations in support of her Title VII claims contained in the purported FMLA count of her complaint were redundant and were struck by the court *sua sponte*.

2. Civil Service Employees

Asahan v. United States, 2011 WL 3439941 (D. Haw. Aug. 5, 2011)

Plaintiff, a nurse at an Army health clinic, alleged she was harassed by her supervisor and a co-worker for taking FMLA leave after her husband returned from a deployment with a traumatic brain injury. Specifically, she alleged that she was issued three disciplinary write-ups and her co-worker questioned the legitimacy of her leaves. Plaintiff was arrested by military police for larceny after plaintiff reported that her supervisor and her co-worker had colluded to create the false impression that the workplace was being monitored.

Plaintiff brought a claim under the Federal Tort Claims Act ("FTCA"), alleging that the Army negligently supervised her co-worker and her supervisor. Defendants moved to dismiss plaintiff's claim on the theory that it was preempted by Title VII of the Civil Rights Act, the Rehabilitation Act, and the Civil Service Reform Act ("CSRA"). The court found that neither Title VII nor the Rehabilitation Act preempted plaintiff's claim because plaintiff was not alleging that she belonged to a class protected by either of these acts.

However, the court held plaintiff's claim was preempted by the CSRA, which prohibits a claim for failure to take personnel action with respect to an employee's disclosure of information that the employee reasonably believes to be in violation of a law, rule, or regulation. The court reasoned that, because plaintiff alleged that defendants failed to take disciplinary action once they were aware that plaintiff was being illegally harassed for taking FMLA leave, her claims were precisely the type the CSRA was designed to prevent.

3. Congressional and Judicial Employees

B. State and Local Governments and Agencies

Austin v. Cook County et al., 2011 WL 5872836 (N.D. Ill. Nov. 16, 2011)

Plaintiff filed suit alleging FMLA interference and retaliation following his discharge in August 2005. In 2002, plaintiff was transferred from the Cook County Facilities Management department to work for the newly elected Cook County Commissioner ("Commissioner") as an Administrative Assistant V. On July 9, 2005, plaintiff went to the hospital for a drug overdose and was arrested for possession of drug paraphernalia. On July 11, 2005, the Commissioner sent plaintiff a letter advising him of a thirty-day suspension without pay in light of his recent arrest and pending charges. The Commissioner also directed plaintiff to the Employee Assistance Program for treatment that he "may require during the leave of absence." Thereafter, plaintiff alleged that he attended counseling and completed six weeks of intensive treatment for substance

abuse. Plaintiff also alleged that he kept the Commissioner apprised of his leave status, which the Commissioner denied. The Commissioner discharged plaintiff effective August 15, 2005, allegedly due to the circumstances surrounding the alleged drug overdose, subsequent arrest and pending criminal case. Plaintiff was never convicted and his arrests were ultimately expunged.

The parties filed cross motions for summary judgment. On the interference claim, the parties disputed whether plaintiff was an “employee.” Defendant argued he was not because he was a member of the Commissioner’s personal staff. The court considered 29 U.S.C. § 203(C), which concerns the status of individuals employed by a state or political subdivision. The court concluded that plaintiff meet the first prong of the statute, which requires that the individual not be subject to civil service laws. Here, defendants admitted that plaintiff was an at-will employee, and the court located a case that held at-will employees were not protected by civil service regulations.

The second element of the statute concerned whether the individual met one of five exceptions. The parties disputed the third exception, which asks whether plaintiff was “selected by the holder of such an office to be a member of his personal staff.” The parties both focused on whether plaintiff was subject to the “Shakman consent decree,” which prevents the county from firing an individual for political reasons. The court, however, disregarded this entire argument, finding it irrelevant to whether the termination was for a discriminatory reason. Instead, the court considered whether the Commissioner appointed plaintiff by applying a list of six non-exhaustive factors created by the Fifth Circuit. Applying the factors, the court denied summary judgment to both parties. It noted that the employee exception is to be narrowly construed and is a highly factual inquiry, and therefore held that a genuine issue of material fact exists regarding “who” had the right to discharge plaintiff from his position, which was one of the six factors. It also highlighted the parties’ failure to fully address the remaining factors. Because the court found a genuine issue of material facts existed as to whether plaintiff was an employee under the FMLA, it declined to address the retaliation claim.

Benavides v. City of Oklahoma City, et al., 2011 WL 1457331 (W.D. Okla. April 14, 2011)

Plaintiff filed suit against the City of Oklahoma City, the Oklahoma City Police Department (“police department”), and a number of individuals in both their official and individual capacities (“the individuals”). The police department and the individuals filed motions to dismiss pursuant to Rule 12(b)(6). The court held that, because the police department is a subordinate department of a municipality, it lacks the ability to sue or be sued. As such, the police department’s motion to dismiss was granted.

The individuals argued that the claims asserted against them in their official capacity were duplicative of the claims against the City of Oklahoma City. The court granted the individuals’ motion to dismiss on this basis, noting that dismissal of the official capacity claims would not prevent plaintiff from pursuing his claims against the City of Oklahoma City, and dismissal would prevent confusion over which defendants are potentially liable for which claims. In addition, the individuals argued in favor of dismissal of the FMLA claims asserted against them in their individual capacity. The court noted that the issue of individual liability under the FMLA is not as clearly defined as it is under the ADA. Nevertheless, because there was no

evidence that the individuals had supervisory authority in relation to plaintiff and his FMLA leave, the court dismissed plaintiff's FMLA claims against them in their individual capacity.

Fields v. Trollinger, 2011 WL 3422689 (W.D.N.C. Mar. 28, 2011)

Plaintiff was an elementary school teacher who took full time FMLA leave due to a major depressive disorder that required her to be admitted to in-patient mental healthcare for two weeks. After she was discharged from in-patient treatment, the school's principal and assistant principal visited plaintiff at her parents' home. During the visit, plaintiff claimed that she told them that she would need three more weeks of leave, but after that she would be able to return to work. The principal and assistant principal then allegedly informed plaintiff she would not be allowed to return to work because she had lost credibility in the community and that her best option would be to resign before the school board discharged her at an upcoming meeting. Plaintiff then signed a resignation letter. Plaintiff filed suit against the school board, the principal, the assistant principal, and the school's superintendent alleging interference with her FMLA rights by failing to allow her to take leave and retaliation by constructively discharging her for exercising her rights under the FMLA.

Defendants filed a motion to dismiss, arguing that the principal, assistant principal, and superintendent could not be sued in their individual capacities and that plaintiff failed to state an FMLA violation claim because she voluntarily resigned and was not discharged. The court interpreted the plain meaning of the FMLA's text to allow employees of public agencies to be individually liable. The court also rejected defendants' argument that the FMLA's separate rules for school entities preclude individual liability. However, the court found that the doctrine of qualified immunity applied to the individual defendants and plaintiff's claims against them should be dismissed. The school board's motion to dismiss was denied, though, because plaintiff alleged constructive discharge and the school board did not allege sufficient facts to show that it obtained her resignation properly.

Summarized Elsewhere:

Chen v. Grant County, D et al., 2011 WL 830108 (E.D. Wash. Mar. 3, 2011)

Clark v. Dominique, 2011 WL 2580366 (N.D.N.Y. June 28, 2011)

Harville v. Texas A&M Univ., 2011 WL 2295279 (S.D. Tex. June 8, 2011)

Mason v. Massachusetts Department of Environmental Protection, 774 F. Supp. 2d 349 (D. Mass. 2011)

Porter v. New Age Services Corp., 2011 WL 1099270 (N.D. Ill. Mar. 22, 2011)

Rynders v. Williams, 650 F.3d 1188 (8th Cir. 2011)

Westermeyer v. Kentucky Dep't of Public Advocacy et al., 2011 WL 830342 (E.D. Ky. Mar. 3, 2011)

Weth v. O'Leary, 2011 WL 2693178 (E.D. Va. July 11, 2011)

IV. INTEGRATED EMPLOYERS

Beamer v. Herman Chiropractic Center, Inc., 2011 WL 4352123 (M.D. Pa. Sept. 16, 2011)

A chiropractor experienced pregnancy-related complications. She submitted physicians' notes to her employer indicating she was not able to work. There was a factual dispute regarding whether she was told not to come back to the office thereafter, or whether she voluntarily resigned.

Defendants moved for summary judgment on plaintiff's FMLA claim, arguing that plaintiff failed to present evidence that they employed 50 employees, thus relieving them of liability. Plaintiff argued that defendants had 50 employees if the court adopted the "integrated employers" test and included employees at two of the company's locations. The court explained that separate entities may be considered a single entity if the totality of the circumstances shows that there is: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. The court held that even assuming defendants were integrated employers and that the total number of employees may be combined, plaintiff failed to present evidence that defendants together employed 50 employees. One defendant asserted it employed 39 people and the other did not employ any individuals. Additionally, the other two worksites were more than 75 miles from the office where plaintiff had worked and thus could not be included to meet the threshold number of employees under the FMLA.

Sorrells v. Lake Martin, Inc., 2011 WL 627049 (M.D. Ala. Feb. 11, 2011)

Plaintiff worked for defendant convenience store at various locations. Defendant also owned a Honey Baked Ham franchise and 23 other companies. The convenience store shared a common bookkeeper with the Honey Baked Ham franchise and one other corporation. In December 2007, plaintiff notified his manager that he had a serious digestive disease and gave notice that he intended to resign within three weeks. At the end of the three weeks, plaintiff's manager asked that he stay with the convenience store company on a part time basis. Plaintiff agreed to do so and provided written documentation stating that his condition required that he work part-time. In March 2008, plaintiff's condition worsened and he took a medical leave of absence to have emergency surgery. Within a few weeks after his return to work, defendant terminated his employment. Plaintiff introduced evidence that on multiple occasions, defendant's owner erroneously told other store managers that plaintiff had AIDS and should be taken off the schedule.

Defendant moved for summary judgment on Plaintiff's claims for FMLA interference and retaliation, arguing that at the time plaintiff was employed by the company, it was not an "employer" as defined by the FMLA because it did not have the requisite number of employees. Plaintiff argued that although the convenience store business did not have enough employees to be a covered employer under the FMLA, the convenience store was an "integrated employer" with the owner's Honey Baked Ham franchise and a third company because all three companies had the same owner and shared a bookkeeper, and further pointed to the fact that the

convenience store issued an employee handbook to employees beginning in 2006 stating employees had a right to FMLA leave. The district court found that this evidence was sufficient to hold that the three companies were an “integrated employer” and therefore, that plaintiff’s leave was protected under the FMLA.

The court then turned to plaintiff’s FMLA interference claim, holding that because of the close proximity in time between his request for a reduced schedule and his discharge, a question of fact existed as to whether defendant’s decision to remove plaintiff from the schedule and terminate his employment interfered with plaintiff’s right to work a reduced schedule. Defendant’s owner asserted that he removed plaintiff from the schedule because he was a part-time employee. The court found that a jury could conclude that the owner did not want plaintiff working part-time, in violation of his right to do so under the FMLA.

The court also denied defendant’s motion for summary judgment as to plaintiff’s FMLA retaliation claim. Defendant owner stated that he removed plaintiff from the schedule and terminated his employment because plaintiff was sick all the time and because he believed plaintiff had AIDS. Plaintiff introduced evidence that he was willing to work full-time to keep his job, that he attempted to communicate this to defendant, and that defendant refused to return his calls. Thus, the court concluded that a jury could find that defendant’s false statements and desire to discharge plaintiff were in retaliation for him seeking to work part-time after his surgery.

V. JOINT EMPLOYERS

A. Test

Baer v. Masonite Corp., 2011 WL 3806279 (N.D. Ind. Aug. 29, 2011)

Masonite terminated plaintiff’s employment for attendance after Prudential, defendant’s FMLA leave administrator, denied plaintiff’s request for FMLA leave. In his Complaint, plaintiff alleged that both Masonite and Prudential were responsible for his discharge and that both were liable for interference with his FMLA rights. Plaintiff argued that because Prudential exercised some control over his working conditions by directly approving a portion of his FMLA leave request, Prudential was a joint employer under the FMLA, subject to liability for any FMLA violations.

The court granted Prudential’s motion for a judgment on the pleadings, holding that Prudential was not plaintiff’s joint employer. In so holding, the court noted that Prudential simply provided recordkeeping services for Masonite and had no authority to take adverse employment action against plaintiff. The legal standard, however, to find a joint employer relationship depended on the ability to exercise control over plaintiff’s working conditions. The court reasoned that, even when taken in the light most favorable to plaintiff, this “mere tangential involvement with the termination decision” was not sufficient to establish a joint employer relationship.

Cuff v. Trans States Holding, Inc., 2011 WL 4712027 (N.D. Ill. 2011)

A former airline manager brought suit against Trans States Holdings, Inc. (“TSH”), Trans States Airlines LLC (“TSA”), and GoJet Airlines, LLC (“GoJet”), alleging interference and retaliation under the FMLA. All parties filed motions for summary judgment. The primary issue before the district court was whether TSH, TSA, and GoJet were joint employers so that the employees of each entity should be added together to determine whether there were 50 employees within 75 miles of plaintiff’s worksite. The district court granted plaintiff’s motion with regard to liability and denied defendants’ motion for summary judgment in all respects.

Defendants asserted TSA was the only entity that employed plaintiff and it was not subject to the provisions of the FMLA because it did not have 50 employees. Defendants did not dispute plaintiff’s assertion that TSA and its parent, TSH, were joint employers but asserted they were still not a covered employer under the FMLA because TSH had no employees. Plaintiff contended the evidence showed he was actually employed and supervised by TSH (the parent company) and showed TSH assigned him to perform the same basic duties for its subsidiaries, TSA and GoJet.

The district court found TSA, TSH and GoJet were joint employers. Specifically, the court found GoJet, TSA and TSH shared plaintiff’s services and he was employed for the benefit of and did the same type of work for TSA and GoJet. As such, the court found there was at least an implicit arrangement between defendants to share plaintiff’s services and although GoJet disclaimed any control over plaintiff, it obtained the benefit of his services.

The court also rejected defendants’ assertion that they were excused from complying with the FMLA because plaintiff needed leave only due to his failure to follow his doctor’s instructions and his decision to stop taking his medication. The court found no case law to support the argument and further found that it amounted to speculation to assume plaintiff would not have needed leave if he had followed his doctor’s orders.

Porter v. New Age Servs. Corp., 2011 WL 1099270 (N.D. Ill. Mar. 22, 2011)

In *Porter*, plaintiff sued her former employer, a private, not-for-profit corporation that provided mental health services and drug treatment programs under a contract with the Illinois Department of Human Services. After her son died, plaintiff was diagnosed with Acute Stress Disorder and went on approved leave with medical benefits from May 7, 2009 until September 20, 2009. Defendant notified plaintiff that her medical benefits could not be extended beyond October 1, 2009, and ultimately terminated plaintiff’s employment on October 31, 2009 when plaintiff did not return to work.

Defendant filed a motion for summary judgment, arguing that it did not employ at least 50 employees during the relevant time period so as to require compliance with the FMLA. In response plaintiff first argued that defendant was a public agency, and therefore subject to the requirements of the FMLA regardless of the number of employees it had. The court rejected this argument, finding that defendant’s status as a state contractor did not make it a “public agency” within the meaning of the statute. The court further opined that even if defendant were a public agency, plaintiff would not have been entitled to FMLA benefits because she did not show that

defendant employed at least 50 employees. It explained that even though public agencies fall within the FMLA regardless of the number of employees, those employees may only seek FMLA benefits where a public agency has at least 50 employees.

Next, plaintiff argued that defendant was a joint employer with two public agencies that funded defendant's operations, and therefore met the 50-employee minimum. The court also rejected this argument, finding that plaintiff had put forth no evidence to show that any entity other than defendant exercised control over plaintiff's employment. The court therefore granted defendant's motion for summary judgment in its entirety.

Prychyna v. Barrett Business Services, 2011 WL 4498843 (D. Or. Sept. 27, 2011)

Plaintiff, a chimney mason, alleged that both a professional employee organization ("PEO") and a chimney company jointly violated the FMLA. The PEO argued it was not an employer or a joint employer under the FMLA, relying in part on the supplementary information section of the federal regulations for the proposition that a contractual reservation of a PEO's right to hire or fire does not by itself create an employment relationship. The district court noted that the section cited by the PEO was merely the Department of Labor's summary of *public* comments and that the PEO failed to cite any actual authority standing for the position that a contractual reservation of PEO's right to hire was insufficient to create an employment relationship. The court also found that the PEO's argument ran counter to the regulations, which expressly state, the "right" to hire, fire and discipline "may lead to a determination that the PEO would be a joint employer with the client employer." 29 C.F.R. § 825.106(b)(2). Additionally, the court noted that the complaint did not simply allege that the PEO reserved the right to hire, fire and discipline, but it also alleged plaintiff worked for the PEO. Applying the totality of the circumstances and the economic reality of the relationship between the PEO and plaintiff, the court denied the PEO's motion to dismiss.

The court, however, granted the chimney company's motion to dismiss because the complaint did not adequately plead it jointly employed more than 50 employees. The complaint only alleged that defendants "were joint employers of plaintiff ... who collectively ... had more than 50 employees," which was insufficient.

- B. Consequences
- C. Allocation of Responsibilities

VI. SUCCESSORS IN INTEREST

- A. Test
- B. Consequences

Little v. Stock Building Supply, LLC, 2011 WL 5149176 (E.D.N.C. Sept. 2, 2011)

Plaintiff's employer had been owned by several entities and had been transferred and sold during the time in question. The court noted that multiple entities can be held liable as an

“integrated employer” under FMLA case law, and that the FMLA’s definition of employer extends to “any successor in interest of an employer.” The court analyzed the eight factors in 29 C.F.R. § 825.107(b) that concern whether an entity is a successor in interest, finding that plaintiff had properly alleged facts that defendants seeking dismissal were properly included as potential successors in interest. The court reasoned that it would be manifestly unfair to require plaintiff to allege specific details of the corporate relationship between the parties at the outset when defendants were the parties with knowledge of those details. The court therefore denied defendants’ motion to dismiss.

VII. INDIVIDUALS

Clark v. Dominique, 2011 WL 2580366 (N.D.N.Y. June 28, 2011)

A former state employee brought this action against her employer, a state agency, and several individual public employees. Plaintiff alleged that she was retaliated against because she took a three month FMLA leave of absence from October 2006 through December 2006.

The court acknowledged that individual public employees may be liable under the FMLA if they qualify as an employer by exercising substantial control over employment. The court granted defendants’ motion to dismiss because plaintiff failed to allege that any of the individual defendants exercised control over her right to take leave under the FMLA or to return plaintiff to her position.

DeMarco v. City of New York, 2011 WL 1104178 (E.D.N.Y. Mar. 23, 2011)

Plaintiff was a tenured teacher who was informed of charges filed against him for workplace absences for which he requested FMLA leave. Plaintiff demanded a hearing before a three-member panel of arbitrators. He was informed that one arbitrator would hear his case. Plaintiff requested that the hearing be adjourned until he completed a child adoption process as he believed that was his right under the FMLA. The arbitrator set the matter for a hearing without considering Plaintiff’s request for leave. Plaintiff then brought this lawsuit claiming his FMLA rights were violated.

The court granted defendants’ motion to dismiss. Aside from the arbitrator having absolute immunity, the court found that the FMLA did not apply to the arbitral proceeding and the independent arbitrator was not plaintiff’s employer.

Harville v. Texas A&M Univ., 2011 WL 2295279 (S.D. Tex. June 8, 2011)

Plaintiff’s employment was terminated while she was on intermittent FMLA leave, following her repeated failure to give notice of her absences. Prior to her FMLA leave, plaintiff had received a poor performance evaluation due to numerous unexplained absences. Plaintiff brought multiple claims under the FMLA and both sides filed motions for summary judgment. Plaintiff named the following parties as defendants: 1) the university, where her laboratory workplace was located; 2) the Assistant Professor who ran the laboratory; 3) the Assistant Department Head who had determined FMLA eligibility; and 4) the Director of Policy and Practice Review who requested her discharge.

The court first considered whether the Assistant Department Head and the Director of Policy and Practice Review were “employers” under the FMLA. In determining whether a defendant is an FLSA or FMLA employer, a court must determine whether an individual effectively dominates an employer’s administration or otherwise acts, or has the power to act, on behalf of the employer vis-à-vis its employees. The court found that the Assistant Department Head and the Director of Policy and Practice Review did not supervise plaintiff’s day-to-day duties or activities, nor did they have the authority to control the university’s compliance with the FMLA. Requesting a discharge or condoning an adverse employment action does not equate to having authority to execute these employment decisions unfettered. Accordingly, the court entered summary judgment for these two defendants on this issue.

The court then considered whether the three individuals named as defendants were government officials shielded by qualified immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The court found that defendants did not violate a clearly established federal right when terminating plaintiff’s employment after her absences exceeded the amount allowed. The court also found that defendants’ actions were not objectively unreasonable because plaintiff had violated employer policy by not contacting her supervisor after being told repeatedly to do so. Accordingly, the court entered summary judgment for defendants on this issue.

Regarding plaintiff’s claim for interference, the court determined that plaintiff could not demonstrate that defendants denied her FMLA leave or benefits. The notice requirements imposed by defendant did not rise to the level of FMLA interference. An employer may require an employee on intermittent FMLA leave to give notice of her absences as soon as practicable. Accordingly, the court entered summary judgment for defendants on this issue.

As to plaintiff’s claim for retaliation, the court determined that defendants offered a legitimate, nondiscriminatory reason that plaintiff would have been discharged regardless of her FMLA leave. An anti-retaliation statute does not allow an employee to violate company job requirements or work rules. Violations of work rules are legitimate, nondiscriminatory reasons for adverse employment actions. The court found that plaintiff could have been discharged for repeatedly missing work in excess of her medical certification and for violating the Assistant Professor’s reporting requirements.

Hurley v. Kent of Naples, Inc., et al., 2011 WL 2217770 (M.D. Fla. June 7, 2011)

Plaintiff sued his employer, as well as the corporation’s Chief Executive Officer (“CEO”) and Chief Financial Officer (“CFO”), for interference with his rights under the FMLA and retaliation for exercising rights under the Act. Plaintiff contended that both the CEO and CFO were “employers” under the Act. Looking to decisions under the Fair Labor Standards Act, the court concluded that the CEO was an employer within the meaning of the FMLA because he exercised the right to hire and fire employees, determined rates and scope of duties, as well as schedules of work, and because plaintiff reported directly to him. As to the CFO, however, the court found that there was a material issue of fact because there was insufficient evidence to

show the CFO either had authority over day-to-day operations of the corporation or had responsibility for the supervision of plaintiff. The court therefore granted plaintiff's motion for summary judgment as to the employer status of the CEO, but denied the motion as to the CFO.

Lindsey v. Brinker International Payroll Company, L.P., 2011 WL 2493047 (W.D. Okla. June 22, 2011)

The individual defendant filed a motion to dismiss the FMLA count, alleging he was not an "employer" under the FMLA. The court held the complaint sufficiently pled that the individual defendant had supervisory authority over plaintiff and was thus sufficient to state a claim under the FMLA.

Mason v. Massachusetts Department of Environmental Protection, 774 F. Supp. 2d 349 (D. Mass. 2011)

Plaintiff sued the state agency and several supervisors and managers asserting various theories under the FMLA. Defendants moved to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6). The department of environmental protection ("DEP") moved to dismiss citing the immunities given to the states under the Eleventh Amendment. The court granted the DEP's motion because although the Supreme Court abrogated states' Eleventh Amendment immunity for claims under the family-care provisions of the FMLA, the court did not similarly abrogate that immunity for claims brought under the personal-care provisions of the FMLA.

As for the individual defendants' motion to dismiss, the court dismissed the claims against them to the extent that they were brought against them in their official capacities because such claims are actually brought against the office the person holds—not the individual—and therefore represent suits against the state that are barred by the Eleventh Amendment.

The court, however, allowed plaintiff's claims to proceed against the individual defendants in their individual capacities. The court recognized the split between the circuit courts of appeals that hold that the FMLA does not allow for individual liability for public employees (the Sixth and Eleventh Circuits) and the courts that hold that it does (the Fifth and Eighth Circuits). It ultimately sided with the Fifth and Eighth Circuit's view and relied on the FMLA's definition of an employer, which includes "any person who acts, directly or indirectly, in the interests of an employer," as well as a public agency.

Moore v. Novo Nordisk, Inc., 2011 WL 1085015 (D.S.C. Mar. 22, 2011)

Plaintiff brought nine state and federal claims against her former employer and four of its employees, including claims under the FMLA. The district court dismissed the FMLA claims against the four individual defendants because such claims can be asserted only against the employer and not against the individual supervisors.

Rynders v. Williams, 650 F.3d 1188 (8th Cir. 2011)

In *Rynders*, plaintiff filed post-termination FMLA interference and retaliation claims against defendant, one of the chief executive officers for the county for which plaintiff had worked, in his personal and official capacities. After receiving a written warning for tardiness, plaintiff met with managers of his department (but did not meet with defendant himself) and informed them that some of his tardiness and absences were due to the medication he was taking to treat high-blood pressure. At this meeting plaintiff also claimed that he asked for information on taking FMLA leave and stated that he may need to miss more work due to his illness. One of the managers disputed plaintiff's account, stating that plaintiff never asked for FMLA paperwork and lost interest in taking FMLA leave when he learned that it was unpaid. Four months later plaintiff was suspended for being late to work 52 times and taking 20 sick days during the preceding year. Plaintiff met with defendant two days later to respond to the suspension, and his employment was terminated five days later.

On appeal plaintiff argued that the district court erred in granting summary judgment to defendant based on defendant's argument that he did not receive adequate notice that plaintiff suffered from a serious health condition or was requesting FMLA leave. Reversing the district court on plaintiff's claims against the individual in his official capacity, the Eighth Circuit found that when plaintiff met with his supervisors, he informed them of "his exact medical condition, his debilitating symptoms resulting from the condition, and likelihood that he would need to take intermittent leave in the future." In addition, the court found that plaintiff had specifically referenced the FMLA and requested information on how to take leave, and that his requests had been denied. The Eighth Circuit therefore held that plaintiff created a genuine issue of material fact as to whether he had provided sufficient notice to the county of his serious health condition. One judge dissented, arguing that plaintiff failed to give adequate notice of his serious health condition. He argued that even if plaintiff were entitled to FMLA leave, "the entitlement does not extend to random, unannounced leave or tardiness with no notice at all."

In contrast, the Eighth Circuit agreed with the district court's conclusion that there was no genuine issue of material fact that the individual defendant had not personally received sufficient notice. It found that plaintiff did not argue that defendant personally received adequate notice, and also found that plaintiff failed to rebut defendant's testimony that he generally delegated the operations of plaintiff's department to defendant's subordinates. Summary judgment was therefore affirmed for defendant on the individual capacity claims.

Summarized Elsewhere:

***Benavides v. City of Oklahoma City, et al.*, 2011 WL 1457331 (W.D. Okla. April 14, 2011)**

***Chen v. Grant County, D et al.*, 2011 WL 830108 (E.D. Wash. Mar. 3, 2011)**

***Fields v. Trollinger*, 2011 WL 3422689 (W.D.N.C. Mar. 28, 2011).**

***Kosierowski v. Fitzgerald*, 2011 WL 573449 (W.D. Tex. Feb. 14, 2011)**

Westermeyer v. Kentucky Dep't of Public Advocacy et al., 2011 WL 830342 (E.D. Ky. Mar. 3, 2011)

Weth v. O'Leary, 2011 WL 2693178 (E.D. Va. July 11, 2011)

CHAPTER 3. ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. OVERVIEW

II. BASIC ELIGIBILITY CRITERIA

Walls v. Cent. Contra Costa Transit Auth., 653 F.3d 963 (9th Cir. 2011)

In *Walls*, a bus driver brought suit against his former employer claiming that his discharge violated the FMLA. Plaintiff was discharged on January 27, 2006, but ultimately was reinstated on March 2, 2006, pursuant to a reinstatement agreement reached through a grievance process between his union and the employer. The agreement contained certain attendance requirements that plaintiff violated four days after being reinstated. Shortly thereafter, the employer terminated plaintiff's employment for violating the reinstatement agreement.

Plaintiff claimed that his discharge violated the FMLA because he verbally requested leave on March 1, 2006, the day before the employer formally agreed to reinstate him. Although the employer admitted that a verbal request was made at that time, the Ninth Circuit affirmed the district court's decision to grant summary to the employer on the grounds that plaintiff was not technically reinstated until March 2, 2006, the date the parties' agreement became effective. Thus, plaintiff was not an "eligible employee" within the meaning of the FMLA at the time he made the request for leave.

In reaching this decision, the Ninth Circuit declined to adopt a *per se* rule holding that a reinstatement agreement could never retroactively change a former employee's status from discharged to "eligible employee" for purposes of the FMLA. Rather, the court emphasized that the terms of the specific agreement at issue could not be construed to have a retroactive effect.

III. MEASURING 12 MONTHS OF EMPLOYMENT

Aquart v. Ascension Health Information Services, 2011 WL 233587 (W.D. Tex. Jan. 24, 2011)

In June, plaintiff requested FMLA leave for knee surgery scheduled for July. The employer's third party leave administrator denied plaintiff's request because she had not worked for the employer for twelve months. Plaintiff rescheduled her surgery for August, but was discharged for poor performance on July 15, 2008.

Plaintiff claimed that the stated reason for her discharge was pretext and that she was in fact discharged because of her health problems and FMLA inquiries. The court dismissed plaintiff's claims on the employer's motion for summary judgment, concluding that she was not an eligible employee under the FMLA because she had not been employed for 12 months at the time she requested leave. The court held that plaintiff's employment began August 5, 2007, the day she commenced working, not, as plaintiff argued, July 9, 2007, the day she accepted the job offer.

Basden v. Professional Transp., Inc., 2011 WL 2940726 (S.D. Ind. July 19, 2011)

Plaintiff was discharged for unexcused absences just short of her one-year anniversary with defendant. Plaintiff acknowledged that she was not eligible for FMLA leave because she had not worked for defendant for twelve months. However, plaintiff argued that plaintiff had violated the FMLA, because defendant had terminated her employment to prevent her from becoming eligible for FMLA leave. The court granted defendant's motion for summary judgment, noting that plaintiff had offered no legal authority for this "novel theory."

Farrell v. HRI Lodging, Inc., 2011 WL 2413467 (E.D. La. 2011)

Plaintiff was ineligible for FMLA leave on the date he requested it. Plaintiff argued he would have been eligible at the time his leave commenced because he would have been employed twelve months from the time he was offered employment, though he did not start working until a later date. The court assumed, but did not decide, an employee could be an eligible employee based on requesting leave prior to twelve months of employment that would commence after twelve-months of employment. However, the court held that plaintiff was ineligible in this instance because the date for eligibility commences when the employee is actually paid and starts to work, not when employment is initially offered. The court therefore granted summary judgment for the employer.

Rodriguez, ex rel. Fogel v. City of Chicago, 2011 WL 1103864 (N.D. Ill. Mar. 25, 2011)

Plaintiff alleged interference with her rights under the FMLA and retaliation for taking FMLA leave. In this opinion, the court considered three threshold issues: (1) measuring twelve months of employment; (2) "serious health condition"; and (3) employee notice of intent to take FMLA leave, and found that plaintiff satisfied all three threshold requirements. As to plaintiff's eligibility for FMLA leave based on her hours of work, applying pre-2009 regulations that were in effect when the events at issue occurred, the court held that an employer is entitled to use any of four methods enumerated in the regulations to calculate an employee's leave entitlements, provided that the method is applied consistently and universally to all employees. If an employer does not make clear that it has selected one particular method of calculating FMLA leave, then the method that provides the most beneficial outcome for the employee will be used. The court held evidence was absent that defendant chose a particular method for determining the amount of FMLA leave, and plaintiff was therefore entitled to use the method most favorable to her and she was eligible for leave.

As to the question of plaintiff's entitlement to FMLA leave based on a serious health condition, defendant attempted to argue that plaintiff no longer suffered from a serious health condition after receiving a particular procedure for her heart condition because none of plaintiff's cardiologists could find any cardiac abnormalities after that procedure. The court rejected this argument and stated that drawing all reasonable inferences in plaintiff's favor, a fact-finder might find that plaintiff's continued visits to the doctor qualified as treatment under the FMLA because the purpose of the visits was to determine if a serious health condition existed and to evaluate whether plaintiff was suffering a recurrence of her cardiac problem. The court found that the fact plaintiff did not receive a new diagnosis of her original problem or a diagnosis of

additional heart problems did not preclude her from establishing that she was afflicted by a serious health condition.

As to the notice issue, the court noted that an employee does not need to use a particular form to put the employer on notice of need for FMLA leave; the employee must simply provide enough information to put the employer on notice of a probable basis for FMLA leave. It is then the employer's duty to investigate into whether the employee's leave should qualify for leave under the FMLA. The court held that the fact that plaintiff was taken to the hospital from the office on two occasions and spoke to her supervisors on numerous occasions about her health conditions was enough to put defendant on notice of plaintiff's need for FMLA leave. The court rejected defendant's argument that plaintiff's failure to use the proper FMLA leave request forms constituted a waiver of plaintiff's right to invoke FMLA leave, stating that to waive FMLA rights, an employee must clearly express to her employer that she does not wish to use the protections of the FMLA.

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

Been v. New Mexico Dept. of Information Technology, 2011 WL 4565475 (D.N.M. Sept. 30, 2011)

Plaintiff suffered from pregnancy-related complications. Defendants asserted that plaintiff sporadically contacted them during her nearly month-long absence, but failed to comply with its policies regarding leave and approval and was therefore considered absent without leave ("AWOL"). Plaintiff insisted that she complied with the applicable policies by contacting her supervisors via email or telephone on a regular basis. She presented evidence that due to a misunderstanding by her physician, the applicable medical certification was not faxed to her employer until her employer had already mailed her termination letter, which she had not yet received. No action was taken on this FMLA request. Defendants moved for summary judgment on both plaintiff's interference and retaliation claims, while plaintiff moved for summary judgment on just her interference claim.

The court first addressed whether plaintiff worked more than the requisite 1,250 hours during the 12-month period immediately preceding the requested start date of her FMLA. Plaintiff asserted she did and submitted an affidavit of her attorney who reviewed and added up the hours for the relevant pay periods based on plaintiff's official time records maintained by the State, which include a section entitled "FMLA Eligible Hours Worked." Defendants contended plaintiff was ineligible for leave, disputed this calculation, and submitted an affidavit averring that the State's time records did not include several hours of leave plaintiff took, but failed to enter into the system. The court concluded neither party established the number of hours plaintiff actually worked as a matter of law and thus denied both parties' motions.

The court continued to find that the timing of plaintiff's discharge in relation to her leave strongly demonstrated causation, since she was discharged while absent and had requested FMLA leave for that absence. Thus, a genuine issue of material fact existed regarding whether

plaintiff was truly discharged for failure to follow her employer's absence policies. However, the court was not persuaded by defendants' argument that they could not have retaliated against plaintiff because they had already mailed the termination letter before they received her medical certification form requesting retroactive FMLA leave. It explained that plaintiff began asserting her FMLA rights, including telling her employer she was pregnant, requesting the necessary paperwork to secure FMLA benefits, and emailing her supervisor to request that her leave be covered by the FMLA, before being sent the notice of termination. Thus, the court ultimately denied both parties' motions for summary judgment.

Buchanan-Rushing v. City of Royse City, 2011 WL 2292132 (N.D. Tex. June 7, 2011)

Beginning in January 2008, Royse City (“City”) assigned plaintiff, a police officer, to work as a School Resource Officer (“SRO”) where she was responsible for protecting students, teachers, and staff on campus, including intervening in fights, making arrests, and confiscating weapons. In March 2008, plaintiff was placed on light duty until August 20, 2008, by her neurologist. In June, while still on light duty, she informed the City that she was pregnant and intended to take FMLA leave to have her baby sometime near the end of 2008. The following month the City told plaintiff she would resume her duties as an SRO after her pregnancy, but that she would be replaced by another SRO until that time. On August 19, 2008, the City placed plaintiff on involuntary medical leave. From October to December, the police department allowed her to work part-time doing clerical work. However, when she applied for FMLA leave on December 8, 2008, to have her baby, her request was denied.

In her complaint, plaintiff alleged that the City violated her FMLA rights by forcing her to take leave beginning in August of 2008, which in turn rendered her ineligible for FMLA leave in December of 2008. Moving for summary judgment, the City argued that plaintiff was not an eligible employee under the FMLA as of December 8, 2008, because she did not work the requisite 1,250 hours in the twelve months preceding her request. Plaintiff responded that she would have met the hours requirement if the City had not placed her on involuntary leave in the fall. The court noted that plaintiff’s arguments had been rejected in other cases, with courts finding that “Congress’ clear statutory prerequisites for bringing an FMLA claim did not provide for waiver of the minimum eligibility requirements when an employer has taken some action that allegedly precludes the employee from becoming statutorily eligible for protection under the Act” and that “plaintiff had no standing to sue under the FMLA because such an action is really just an adverse employment action, for which plaintiff may have a cause of action under another statute.” Finding plaintiff’s claim lacking in statutory and relevant case law support, the court granted the City’s motion for summary judgment with respect to the FMLA claim.

Gangnon v. Park Nicollet Methodist Hospital, 771 F. Supp. 2d 1049 (D. Minn. 2011)

Plaintiff alleged that defendant, in violation of the FMLA, failed to grant her an extended leave of absence in connection with her pregnancy. Defendant moved for summary judgment, which the court granted because plaintiff had not worked a sufficient number of hours to qualify for FMLA leave.

Riis v. Goodyear Tire & Rubber Co., 2011 WL 3608682 (D. Kan. Aug. 12, 2011)

Plaintiff’s employment was terminated after he failed to report to work for seven consecutive days, and he alleged his discharge violated the FMLA. The employee was on leave for over seven months in 2007, including FMLA leave from March 17, 2007 through June 23, 2007. He remained on personal sickness or other personal leave from June 23 through November 25, 2007. The employee was again absent from work beginning March 18, 2008, ostensibly because he had another seizure, and he was discharged on April 25, 2008. The employer argued that the employee was not an eligible employee because he only worked 700 hours in the 12 months preceding the leave. Relying on unconverted evidence that the employee

only worked 700 hours, in the form of an affidavit from the employer and the employee's deposition admissions, the court granted the employer's motion for summary judgment.

Wansitler v. Hurley Medical Center, 2011 WL 734938 (E.D. Mich. Aug. 11, 2011)

The court held that plaintiff had not worked 1,250 hours in the preceding 12-month period and therefore could not maintain a claim under the FMLA. Plaintiff submitted pay stubs showing that he had worked 1,327 years during the relevant 12-month period to support his claim that he did work 1,250 hours prior to making his FMLA request. The court, however, determined that the pay stubs failed to establish that plaintiff worked 1,250 hours because they included "holiday" hours for which he was compensated but did not actually work. In concluding that the "holiday" hours should not be counted for purposes of determining FMLA eligibility, the court relied on previous Sixth Circuit precedent holding that "hours of service" under the FMLA only included those hours actually worked in the service and at the gain of the employer. Because plaintiff undisputedly failed to meet the FMLA's 1,250 hours of service requirement after the "holiday" hours were removed, the court granted summary judgment in favor of the employer.

Welsh v. State of Louisiana, 2011 WL 2473003 (E.D. La. June 22, 2011)

Plaintiff, a teacher in the Louisiana public school system, requested FMLA leave for the birth of her child. The school district denied plaintiff's FMLA leave request as ineligible because plaintiff has only worked 1,125.5 hours during the 12-month period prior to her requested leave. Plaintiff filed suit against the school district contending that she was eligible for FMLA leave because her timesheets reflected that plaintiff was on campus 1,297.5 hours during the preceding 12 months.

The employer moved for summary judgment on eligibility grounds and argued that plaintiff did not meet the requisite hours threshold. Specifically, when her timesheets were adjusted for lunch periods, plaintiff's true hours of service for FMLA purposes were only 1,125.5. In opposition, plaintiff claimed that she was entitled to a presumption of FMLA eligibility as a full-time teacher because she worked numerous hours outside of the regular school day. The court denied summary judgment and found that there material issues of fact as to whether plaintiff worked sufficient hours to be eligible for FMLA leave. According to the court, the two factual issues were (1) how many days plaintiff was required to work through her lunch during the school day; and (2) the amount of time plaintiff was required to work outside of regular school time.

Wilkes v. T-Mobile, 2011 WL 1113397 (E.D. Tenn. March 24, 2011)

A customer service representative filed suit and alleged that her discharge violated the interference and retaliation provisions of the FMLA. The court, however, dismissed plaintiff's FMLA claims and granted summary judgment to the employer for a variety of reasons. As an initial matter, the court found that plaintiff was not an "eligible employee" for purposes of the FMLA because it was undisputed that she had not worked 1,250 hours in the preceding twelve months.

Additionally, the court determined that plaintiff's FMLA claims failed as a matter of law even if she was an "eligible employee." With respect to the interference claim, the court found that there was no evidence suggesting that the employer denied plaintiff the right to FMLA leave because her absences from work were not protected by the statute. As for the retaliation claim, the court concluded that plaintiff did not suffer an adverse employment action because she had resigned her employment and failed to produce sufficient evidence to establish constructive discharge.

V. DETERMINING WHETHER THE EMPLOYER EMPLOYS FIFTY EMPLOYEES WITHIN 75 MILES OF THE EMPLOYEE'S WORKSITE

A. Determining the Number of Employees

Summarized Elsewhere:

Beamer v. Herman Chiropractic Center, Inc., 2011 WL 4352123 (M.D. Pa. Sept. 16, 2011)

Prychyna v. Barrett Business Services, 2011 WL 4498843 (D. Or. Sept. 27, 2011)

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

Larson v. United Natural Foods West, Inc., 2011 WL 3267316 (D. Ariz. July 29, 2011)

Plaintiff alleged defendant violated the FMLA by failing to grant employee FMLA leave for alcohol dependence treatment as recommended by defendant's substance abuse professional. Defendant determined that plaintiff was not eligible for FMLA coverage because the company did not employ 50 or more persons within 75 miles of plaintiff's Phoenix, Arizona trucking terminal worksite. Plaintiff's employment was terminated ten days later and he subsequently filed suit.

Plaintiff argued that since defendant considered him an employee of the company's larger truck terminal in Moreno Valley, California where it employed more than 50 employees, defendant should have determined his FMLA eligibility based on the Moreno Valley terminal instead of the smaller Phoenix terminal. Plaintiff also argued that a truck driver's assigned terminal constitutes his worksite for FMLA purposes only when that terminal is owned or controlled by his employer, thus he should have been eligible for FMLA leave.

In rejecting plaintiff's ownership or control argument, the court reasoned that while the FMLA does not define the term *worksite*, federal regulations specifically describe the worksite for mobile employees and truck drivers as the "terminal to which they are assigned, report for work, depart, and return after completion of a work assignment." The court further pointed out that neither Congress nor the Department of Labor has imposed an "ownership" or "control" component on the definition of "worksite." Thus, the court held that because plaintiff's Phoenix

terminal worksite had fewer than 50 employees, plaintiff was not an eligible employee under the FMLA.

Newsome v. Young Supply Co., 2011 WL 6308441 (E.D. Mich. Dec. 15, 2011)

Plaintiff sued the employee leasing company that hired him (“primary employer”), and its customer to which he was assigned (“secondary employer”), for refusing to restore him to his original position, or an equivalent position, after taking FMLA leave. Defendants moved for summary judgment, claiming that plaintiff’s “worksite” was the secondary employer’s facility, which did not have 50 employees within 75 miles. Plaintiff opposed the motion, asserting that under 29 C.F.R. § 825.111(a)(3), which defines “worksite” for an employee of joint employers, his “worksite” was the primary employer’s facility, where defendants admittedly employed 50 or more employees within 75 miles.

The court denied defendants’ motion for summary judgment. Defendants argued that 29 C.F.R. § 825.111(a)(2) governed, making plaintiff’s worksite the secondary employer’s location, because the regulation provides that transportation employees with no fixed workplace work at “the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment.” The court rejected this argument, holding that the regulation did not apply to this joint employer situation. Furthermore, since the 50/75 “worksite” provision is an “exclusion” to coverage, the court construed the provision narrowly. Affording *Chevron* deference to 29 C.F.R. § 825.111(a)(3)(1995), the court held that plaintiff’s “worksite” under the FMLA was the primary employer’s office. Finally, the court did not give retroactive application to the revised version of 29 C.F.R. § 825.111(a)(3)(2009), which would have made the secondary employer’s facility the “workplace,” primarily because Congress did not give the Secretary of Labor the authority to make regulations retroactive.

VI. INDIVIDUALS WHO ARE DEEMED TO BE ELIGIBLE EMPLOYEES UNDER THE FMLA

Summarized Elsewhere:

Wilson v. Rawle & Henderson LLP, 2011 WL 5237345 (E.D. Pa. Nov. 2, 2011)

VII. EXCEPTION FOR CERTAIN AIRLINE EMPLOYEES [New Topic]

Summarized Elsewhere:

Hodge v. United Airlines, 2011 WL 5024176 (D.D.C. Oct. 21, 2011)

CHAPTER 4. ENTITLEMENT OF EMPLOYEES TO LEAVE

I. OVERVIEW

II. TYPES OF LEAVE

- A. Birth and Care of a Newborn Child
- B. Adoption or Foster Care Placement of a Child
- C. Care for a Covered Family Member With a Serious Health Condition
 - 1. Eligible Family Relationships
 - a. Spouse
 - b. Son or Daughter

Patton v. eCardio Diagnostics, 793 F. Supp. 2d 964 (S.D. Tex. 2011)

Plaintiff brought an FMLA retaliation claim against her employer, and the employer moved for summary judgment. Plaintiff took FMLA leave after her daughter was injured in a car accident. When she returned to work approximately two weeks later, she was terminated “because her skill level was inadequate and ...accounts payable was no longer a full time position.” The firm hired another employee while she was on FMLA leave to replace her position. The employer argued plaintiff did not qualify for FMLA leave since her daughter was 18 years old at the time of the accident and did not suffer from a physical disability that rendered her unable to care for herself.

The court ruled plaintiff showed issues of material fact as to whether she was absent from work to care for her daughter, and whether her daughter’s condition from December 17, 2009 through December 22, 2009 constituted a physical disability for purposes of her FMLA claim. Plaintiff presented evidence showing her daughter was substantially limited in walking. Defendant also argued it had decided to discharge plaintiff in November of 2009, but presented no documentary evidence to support that claim. Therefore, the court ruled that there was an issue of material fact as to the employer’s decision to terminate plaintiff’s employment.

Summarized Elsewhere:

Bentley v. Dollar Tree Stores, Inc., 2011 WL 3678688 (N.D. Fla. 2011)

- c. Parent

Summarized Elsewhere:

Ruble v. American River Transportation Co., 2011 WL 2600118 (E.D. Mo. June 29, 2011)

d. Certification of Family Relationship

2. “To Care For”

Baham v. McLane Foodservice, Inc., 2011 WL 2623575 (5th Cir. July 1, 2011)

Plaintiff’s daughter suffered serious head trauma while on vacation. Plaintiff requested FMLA leave while his daughter underwent emergency surgery and treatment in Miami. During his FMLA leave, plaintiff returned home to Texas while his wife and daughter remained in Miami for two more weeks. Plaintiff testified that he returned to maintain his home and add padding to the house in preparation for his daughter’s arrival. He also asserted that he was in constant contact by telephone with his wife and daughter. When plaintiff returned to work, his employer requested that he complete his FMLA paperwork. Later that day, plaintiff left the employer’s premises, leaving his keys and identification card with a security guard. The employer interpreted plaintiff’s departure as a resignation and sent a letter two days later terminating plaintiff’s employment.

Plaintiff sued alleging that defendant had retaliated against him for exercising his rights under the FMLA. Defendant argued that plaintiff was not protected by the FMLA because he did not use the leave to care for his daughter. The Fifth Circuit affirmed summary judgment in favor of defendant. In so doing, the court noted decisions from the Ninth Circuit affirming the use of FMLA leave only where the employee is in physical proximity to the cared-for person. Instead, plaintiff had spent two weeks in a different state. The court held that the work plaintiff did, housework and padding furniture, was not sufficient to qualify as care under the FMLA.

Chappell v. Bilco Co., 2011 WL 9037 (E.D. Ark Jan. 3, 2011)

Plaintiff’s mother had hip surgery on October 2, 2006, and needed care due to incapacity through October 30, 2006. Approximately one week before the surgery, plaintiff requested FMLA paperwork to request leave to care for his mother. On October 1, 2006, plaintiff found out that he would need to be absent to be present with his mother during the surgery. He left messages on his supervisor’s voicemail on October 2 and 3, 2006, stating that he would not be at work to care for his mother.

Plaintiff first alleged that defendant interfered with his FMLA rights when it assessed six attendance points against him and suspended him for three days in relation to his absences on October 2 and 3, 2006. Defendant contended that plaintiff was disciplined for reasons unrelated to his FMLA claim, namely that plaintiff violated the company’s call in policy when he left messages for his supervisor without speaking to him directly. The court determined that plaintiff’s violation of the company policy was unrelated to plaintiff’s FMLA leave.

Plaintiff’s second interference claim was based on defendant’s denial of FMLA leave to allow plaintiff to care for his mother after she attended a funeral. Although plaintiff claimed that his mother was diabetic and needed his care, the court found that plaintiff provided insufficient evidence to establish that he was needed to care for his mother’s basic medical, hygienic, psychological, or safety needs. Based on the evidence on the record, no reasonable juror could

conclude that it was necessary for plaintiff to provide care for his mother, as a result of a serious health condition, after she attended a funeral.

Plaintiff's third interference claim was based defendant's assessment of an attendance point against him after he took time off of work to take his mother to the doctor. Defendant argued that the attendance point was not assessed because of plaintiff's care of his mother, but because plaintiff did not come to work before the doctor's appointment. Plaintiff maintained that before the doctor's appointment, he cooked breakfast for her. However, his own testimony also revealed that his mother did not require constant care. As a result, the court found that defendant did not violate the FMLA by assessing plaintiff an attendance point for failing to come to work before his mother's appointment.

Finally, the court determined that defendant was entitled to summary judgment on plaintiff's claims of retaliation. Plaintiff claimed that he exercised his rights under the FMLA when he filed a lawsuit against his employer in 2005 and, in retaliation therefore, was discharged in 2007. As evidence of a causal link between the two events, plaintiff argued that (1) a supervisor once asked him if he sued the company; (2) he was moved to a new machine in 2006; (3) his supervisor lied by telling plaintiff that he could leave information regarding absences on voicemail; (4) he was assessed six attendance points within two months of settling his claims against his employer.

The court determined that even if plaintiff could establish a prima facie case of retaliatory discharge based on the evidence above, plaintiff's claim would still fail because he was not able to demonstrate that defendant's stated reason for termination was pretext. The court found no evidence in the record to support plaintiff's allegations. Summary judgment was awarded in favor of defendant on all of plaintiff's FMLA related claims.

McCoy v. State of Alabama Dep't of Corrections, et. al., 427 Fed. Appx. 739 (11th Cir. 2011), cert. denied, 132 S. Ct. 416 (2011)

In *McCoy*, the Eleventh Circuit affirmed summary judgment for the employer. Plaintiff claimed violations of the FMLA because his employer failed to excuse his absences from work to: (1) attend his former legal guardian's funeral; (2) search for his missing wife; and (3) have his mother involuntarily committed for mental health treatment. The Eleventh Circuit held that he had failed to show he was denied a benefit to which he was entitled under the FMLA. First, the absences to attend the funeral and to search for his wife did not involve caring for a relative with a serious health condition and, thus, were not protected under the FMLA. Second, although his mother's mental health treatment could relate to a serious health condition, plaintiff presented no evidence that he ever requested leave or gave his employer notice that he needed leave to take care of her.

Pilger v. Bowman, 2011 WL 2269342 (D. Md. June 3, 2011)

Plaintiff was unable to establish that he engaged in protected activity under the FMLA. Plaintiff took several days off to assist his wife with the care of her mother. Plaintiff's wife had arthritis and found it difficult to drive long distances or help her mother with routine tasks.

Plaintiff argued that the FMLA should be read inclusively, and that plaintiff's time away from work to help his wife care for her mother should be a protected activity.

The court noted that the FMLA was enacted to allow workers the flexibility to take time off to deal with family and medical problems. The FMLA expressly grants leave to care for the spouse, or son, daughter or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition. However, the FMLA is not designed to cover every family emergency. To be within the protection of the FMLA, plaintiff needed to present evidence that his leave was needed to care for his *wife's* basic needs because she was unable to care for those needs herself. Instead, the record provided that plaintiff drove his wife to her mother's house – a trip unrelated to his wife's medical condition or basic needs. As a result, summary judgment was granted in favor of defendant.

- D.** Inability to Work Because of an Employee's Own Serious Health Condition
- E.** Qualifying Exigency Due to a Call to Military Service [New Topic]
 - 1. Covered Military Members [New Topic]
 - 2. Qualifying Exigency [New Topic]
 - a. Short Notice Deployment [New Topic]
 - b. Military Events and Related Activities [New Topic]
 - c. Childcare and School Activities [New Topic]
 - i. Leave to Arrange for Alternative Childcare [New Topic]
 - ii. Leave to Provide Childcare on an Urgent Basis [New Topic]
 - iii. Leave to Enroll in or Transfer to a New School or Daycare Facility [New Topic]
 - iv. Leave to Attend Meetings with School or Daycare Staff [New Topic]
 - d. Financial and Legal Arrangements [New Topic]
 - e. Counseling [New Topic]
 - f. Rest and Recuperation [New Topic]
 - g. Post-Deployment Activities [New Topic]
 - h. Additional Activities [New Topic]

3. Eligible Family Relationships [New Topic]
- F.** Care for a Covered Servicemember with a Serious Injury or Illness [New Topic]
1. Covered Servicemembers [New Topic]
 2. Serious Illness or Injury [New Topic]
 3. Eligible Family Relationships [New Topic]
 4. Relationship to Leave to Care for a Family Member With a Serious Health Condition [New Topic]

III. SERIOUS HEALTH CONDITION

- A.** Overview
- B.** Inpatient Care
- C.** Continuing Treatment
 1. Incapacity for More Than Three Consecutive Calendar Days and Continuing Treatment by Health Care Provider

Finch v. Pulte Homes, Inc., 2011 WL 3438347 (E.D. Mich. Aug. 5, 2011)

In September 2008, plaintiff found a lump in his lower back. His physician recommended removal of the lump and physical therapy to prevent further injury to his back. Plaintiff informed his immediate supervisor that he was to begin physical therapy and would likely need surgery in the future. Soon after, plaintiff took two business-related trips. Because of these trips and his workload, he contended he was unable to start physical therapy until November 2008. He also claimed he was asked to cancel an upcoming therapy session in December to attend to work in the office. That same month, plaintiff was discharged.

Plaintiff filed suit against his employer and immediate supervisor, alleging violations of the FMLA, which the court interpreted as including both interference and retaliation claims. The court granted defendant-employer's motion to dismiss, finding plaintiff had failed to establish a *prima facie* case for either claim. First, plaintiff failed to establish he was entitled to FMLA leave due to a "serious health condition" as required for a *prima facie* case of interference. To qualify as a serious health condition, a health issue must either require an overnight stay in a hospital or a medical facility, or continuing treatment from a medical provider. "Continuing treatment" requires a period of incapacity of three consecutive days, during which plaintiff was prevented from working or performing other daily activities. As plaintiff had not pled facts sufficient to constitute either inpatient care or continuing treatment, he had failed to establish that he was entitled to FMLA leave due to a serious health condition. The court also found plaintiff failed to show he had provided notice of his intention to take leave, as an attempt to take leave,

such as his scheduling physical therapy, is not protected unless a serious medical condition is shown.

As to the retaliation claim, the court found plaintiff failed to establish either that he had engaged in any protected activity, or that any causal connection existed between any such activity and his discharge. Further, plaintiff's own allegations contained a legitimate, non-discriminatory explanation for his discharge, in that he alleged his employer had begun reducing its workforce due to a crisis in subprime mortgage lending. Thus, his retaliation claim failed.

- a. Incapacity for More Than Three Calendar Days
- b. Continuing Treatment

Matthys v. Wabash Nat'l, 799 F. Supp. 2d 891 (N.D. Ind. 2011)

Defendant had an attendance policy that assessed various points for unexcused absences and further provided that employees accumulating twenty or more points in a twelve-month period were subject to discharge. After accumulating 15 attendance points, plaintiff suffered a work-related injury to her right wrist. After being assessed by the company's medical department, plaintiff was returned to work with restrictions. After several assessments by the company's medical department, plaintiff decided to go to her personal physician, who also provided some workplace restrictions. When plaintiff presented this doctor's note to the company, she was told that she could not return to work until she provided her doctor's medical records. She was also told that the company's medical department did not need to follow her personal physician's restrictions because she had gone outside the workers' compensation system. The company warned plaintiff that she would accrue attendance points until the company received her physician's records.

After being told she could not return to work and that the absences would be counted, plaintiff inquired about FMLA leave to cover her time off work. Plaintiff further claimed that she called the company's FMLA benefits office but did not receive a response. As requested, plaintiff asked her personal doctor to provide the company with her records. Because plaintiff missed additional days of work while the company awaited her medical records, she continued to accrue attendance points. Plaintiff eventually returned to work but, at that point, she had accrued 23 points. After 2 days of working, a Human Resources Supervisor met with plaintiff to inform her that the company was considering discharging her because she had accumulated 23 attendance points. Plaintiff mentioned her previous FMLA inquiries and was directed to the company's FMLA benefits office. Following the meeting, plaintiff claims that she went to the FMLA office and met with a Benefits Coordinator who assured plaintiff that she was "going to fill out paperwork" on plaintiff's behalf. Plaintiff claimed that her memory regarding what exactly transpired in that meeting was cloudy because she was "very distraught at the time" and "under extreme emotional distress." The company's benefits coordinators denied that they knew about the requested FMLA leave. A few days later, the company called plaintiff and informed her that her employment had been terminated because she accumulated too many attendance points.

Turning to plaintiff's FMLA interference claim, the court initially found that plaintiff had failed to produce evidence of a "serious health condition" that would entitle her to FMLA leave. Because plaintiff presented no evidence of inpatient care, she was required to submit evidence that she was receiving "continuing treatment by a health care provider." Under the regulation's definition of "continuing treatment," because plaintiff submitted no evidence that she needed to have restorative surgery, she was instead required to submit evidence of a period of incapacity lasting more than three consecutive days. Although it was undisputed that work-related restrictions were placed on plaintiff, the court found that because she could have arguably worked within these restrictions, she had failed to present evidence of continuing treatment under the FMLA. Nonetheless, plaintiff claimed defendant was equitably estopped from claiming that she was ineligible for FMLA leave because the company prevented her from returning to work and did not give her 15 days to provide an FMLA certification. The court refused to apply equitable estoppel because plaintiff could not establish entitlement to FMLA leave. Moreover, the court found that in most cases that had applied equitable estoppel, the disputed issue was eligibility for FMLA leave, which was not a disputed issue in this case. Finally, the court found that equitable estoppel was not applicable because plaintiff had not shown that defendant affirmatively represented that her leave qualified for FMLA. To the contrary, the employer represented that the FMLA would not cover her absences.

The court went on to find that plaintiff failed to submit evidence to establish that she had provided sufficient notice to her employer. Although plaintiff inquired about FMLA leave on at least 4 occasions, the facts did not establish that she actually sought FMLA leave. Although plaintiff claimed that she had met with the company's benefits coordinator, she testified that her memory regarding the meeting was clouded because of her emotional distress. Thus, the court concluded that her facts were "too flimsy" to establish that she gave notice.

The court also rejected plaintiff's FMLA retaliation claim based primarily on her inability to establish that she was entitled to FMLA leave. Moreover, the court found that plaintiff had not established a causal connection between her discharge and FMLA inquiry because the company had begun disciplinary proceedings based on her poor work attendance before her FMLA inquiry.

Summarized Elsewhere:

***Beem v. Providence Health & Services*, 2011 WL 4852301 (E.D. Wash. Oct. 13, 2011)**

***Kirchner v. Sunbelt Rentals, Inc.*, 2011 WL 1303997 (N.D. Ill. Apr. 1, 2011)**

***Rodriguez, ex rel. Fogel v. City of Chicago*, 2011 WL 1103864 (N.D. Ill. Mar. 25, 2011)**

***Suchanek v. University of Kentucky*, 2011 WL 3045986 (E.D. Ky. July 25, 2011)**

c. Treatment by Health Care Provider

***Tayag v. Lahey Clinic Hospital*, 632 F.3d 788 (1st Cir. Jan. 27, 2011)**

Plaintiff had requested and had been approved for intermittent FMLA leave to care for her husband, who suffered from various serious health conditions. Plaintiff then requested seven weeks of vacation and told her supervisor that her husband would need medical care during this time. The supervisor then gave plaintiff FMLA paperwork and she requested FMLA leave for this time without mentioning to her supervisor that she was requesting the six weeks off for a spiritual pilgrimage to the Philippines. Before plaintiff left on the trip, she provided defendant with a note from her husband's primary care physician indicating that plaintiff should receive medical leave to accompany her husband on trips because he needs assistance. Then, after plaintiff had already left, her husband's cardiologist sent a certification form to defendant stating that he was not incapacitated and plaintiff would not need leave. Defendant then discharged plaintiff for taking unapproved leave.

Plaintiff contended the discharge violated the FMLA because the trip was a "healing pilgrimage." The court found that plaintiff's "healing pilgrimage" did not constitute medical care under the FMLA, finding no support in either the statute or its regulations. The court found that faith healing can constitute medical care under the FMLA when conventional medical health services would be inconsistent with an individual's religious beliefs. The court found that this exception did not apply to plaintiff because she did not allege that her husband's religious beliefs precluded ordinary medical care and because she had taken FMLA time to assist her husband in receiving conventional medical treatments. In addition, the primary care physician certification did not provide a basis for granting seven weeks of leave and the cardiologist certification said plaintiff would not need leave. Therefore, plaintiff's time off was not protected leave under the FMLA.

2. Pregnancy or Prenatal Care

Wahl v. Seacoast Banking Corp. of Florida, 2011 WL 861129 (S.D. Fla. Mar. 9, 2011)

Plaintiff alleged her former employer discharged her in retaliation for exercising her right to FMLA leave and also interfered with her substantive FMLA rights. Plaintiff had missed work on a number of occasions due to pregnancy-related conditions and prenatal care. Despite being notified of the reasons for plaintiff's absences, the employer placed her on disciplinary probation for excessive absences. After plaintiff was absent from work on two more occasions because of complications associated with her pregnancy, the employer discharged her.

In granting plaintiff's motion for summary judgment, the court first found that the time plaintiff took away from work for prenatal care appointments and morning sickness was protected activity under the FMLA. Because plaintiff was disciplined and discharged for excessive absences – at least some of which were FMLA-protected – the court determined that plaintiff had established a *prima facie* case of FMLA retaliation. Furthermore, the court found that summary judgment in favor of plaintiff was appropriate because the employer conceded that the only reason she was disciplined and fired was because of her FMLA-protected absences from work.

The court also entered summary judgment for plaintiff on her FMLA interference claim. In reaching this conclusion, the court held that the undisputed facts established that the employer

knew that plaintiff's absences from work were the result of her pregnancy, yet it still did not designate her leave as FMLA qualifying nor provide any notification of her rights under the FMLA. Because plaintiff had established that she was entitled to FMLA leave which was wrongfully denied by the employer, the court concluded that she was entitled to summary judgment.

3. Chronic Serious Health Condition

Anderson v. Nissan North America, Inc., 2011 WL 4625647 (S.D. Miss. Sept. 30, 2011)

The employer had an attendance policy under which employees received "points" for certain work absences that were not covered by accrued paid time off (PTO). Plaintiff was discharged when her points reached a level justifying discharge under the policy. Plaintiff alleged that she had improperly received attendance points for two absences that should have been covered by the FMLA and that these points contributed to her eventual discharge.

First, plaintiff claimed that the employer had denied her FMLA leave associated with breast surgery and that this absence was counted against her. The court found that the record established that plaintiff received FMLA leave for her surgery and that she received no points for that absence.

Plaintiff also alleged that the employer improperly counted against her an absence related to her husband's visit to the emergency room. Plaintiff was at work when she received word that her husband had left his job that day to go to an emergency room. Although plaintiff believed, at the time she left work, that her husband had had a heart attack, he was in fact suffering from anxiety. Plaintiff took her husband home from the emergency room, and then returned to work. She worked every scheduled workday thereafter until her discharge. The court found that this absence was not covered by the FMLA because, although plaintiff submitted letters from her husband's doctor after the fact, those letters omitted any mention of frequent or ongoing treatment for a chronic health condition or any diagnosis at all of a chronic health condition. As a result, plaintiff failed to establish her husband had a serious health condition and the court granted the employer's summary judgment motion.

Harrell v. Jacobs Field Services North America, 2011 WL 3044863 (C.D. Ill. July 25, 2011)

After he had worked for defendant for one year, plaintiff requested FMLA leave due to allergic rhinitis. Defendant discharged plaintiff after he failed to return to work following his leave. Plaintiff contended that he did not return to work because defendant told him that he was not allowed to return. Plaintiff then filed a lawsuit, alleging that defendant's failure to allow him to return to work violated the FMLA. Both parties filed motions for summary judgment.

Defendant first contended that plaintiff was not eligible for FMLA leave because allergic rhinitis is not a serious health condition. The court rejected this argument, finding that allergic rhinitis is a chronic condition and that plaintiff received ongoing treatment for it. Alternatively, defendant was estopped from making this argument because it did not question the medical certification plaintiff had provided in support of his leave.

Defendant next argued that it did not deny plaintiff FMLA benefits because plaintiff did not furnish the periodic reports that they requested from him and because plaintiff's failure to return from leave was a resignation and not a discharge. The court found that plaintiff was not obligated to furnish the periodic reports to defendant because that obligation only applies if plaintiff was unsure of his return date and both parties knew the date plaintiff was supposed to return to work. The court also found that there was a factual dispute as to whether plaintiff resigned or was discharged and that this dispute precluded granting summary judgment to either party.

Rosenfeld v. Canon Business Solutions, Inc., 2011 WL 4527959 (D.N.J. Sept. 26, 2011)

Rosenfeld worked the late shift from 11:30am to 8:00pm. Throughout Rosenfeld's employment, he performed fairly well but took far more sick days than defendant allowed. In early May 2008, Rosenfeld informed his boss that he suffered from insomnia, and submitted a reasonable accommodation request form to human resources requesting an earlier work schedule. He attached a doctor's note to the request form, which stated that Rosenfeld suffered from insomnia and stress due to his abnormal work hours.

The following week, defendant asked Rosenfeld to sign an authorization form that would allow it access to Rosenfeld's medical records, which Rosenfeld provided. Sometime after Rosenfeld submitted his reasonable accommodation request, human resources requested that Rosenfeld undergo a sleep study. Rosenfeld agreed and the results of the study were provided to human resources in the fall of 2008. These results revealed that Rosenfeld indeed suffered from insomnia.

Rosenfeld began looking for other positions within the company in August or September 2008, around the same time defendant entered a hiring freeze due to the economic conditions. On multiple occasions, Rosenfeld requested updates from defendant on his accommodation request. Many of these inquiries were during telephone conversations with human resources. On some of these calls, Rosenfeld was offered transfers to positions with an earlier work schedule. Rosenfeld rejected these offers because he believed they were demotions.

In March 2009, defendant decided to terminate Rosenfeld's employment if he refused to accept a transfer to a position with an earlier work schedule that defendant deemed on the same supervisory level as his current position. On April 16, 2009, defendant offered the supervisory position. Rosenfeld requested some time to consider the offer.

From April 20 through April 23, Rosenfeld was out sick. On April 21, he sent his boss an email stating he would not be at work due to a migraine. His boss replied that, due to his extended absences, Rosenfeld must contact the third-party FMLA administrator. Rosenfeld contacted the administrator, requesting intermittent leave. On April 23, Rosenfeld emailed his supervisor to inform him he needed to use an FMLA day. He obtained a doctor's note the following day stating he was absent for migraine headaches from April 20 to April 24.

On April 27, Rosenfeld returned to work and was again offered the supervisory position. When Rosenfeld declined, he was fired. While defendant originally said it fired Rosenfeld for other reasons, it later conceded that Rosenfeld's absenteeism played a part in the termination decision. On April 28, defendant's FMLA administrator determined Rosenfeld was FMLA eligible as of April 7.

Rosenfeld sued defendant on FMLA interference and retaliation theories for (1) not offering him FMLA leave related to his migraines and insomnia; (2) failing to provide individualized notification of his FMLA rights; (3) not referring Rosenfeld to human resources or the FMLA administrator prior to April 2009; (4) not designating any of Rosenfeld's absences as FMLA-qualifying prior to April 2009; (5) discouraging Rosenfeld from taking FMLA leave; and (6) considering FMLA-qualifying absences in its decision to fire Rosenfeld. Both parties moved for summary judgment, plaintiff on his FMLA interference claims and defendant on all claims.

The district court granted defendant's motion in part, denied it in part, and denied plaintiff's motion in its entirety. It analyzed Rosenfeld's first five arguments, above, under an interference framework, and held that the sixth was properly analyzed under a retaliation framework. The court noted that, although firing an employee for making a valid request for FMLA leave may constitute both interference and retaliation, Rosenfeld's claim fell under retaliation because he received the leave he was entitled to.

Rosenfeld's interference claims survived in part. The court noted that three issues were dispositive, namely whether Rosenfeld suffered from a "serious health condition," whether he gave defendant sufficient notice of his need for leave, and whether defendant denied Rosenfeld FMLA rights.

First, the court held that a material fact dispute remained on whether Rosenfeld's insomnia was sufficiently severe and chronic to be a serious health condition under the FMLA. With respect to Rosenfeld's migraine headaches, the court held that because Rosenfeld did not seek medical treatment for migraines during the relevant timeframe, the migraines were not serious health conditions under the FMLA.

Second, the court held that Rosenfeld gave adequate notice to defendant of his insomnia in early May 2008, when he submitted the request for accommodations. The court rejected defendant's argument that Rosenfeld failed to inform defendant that his absences were due to insomnia, noting that employers have an affirmative duty to ascertain whether absences are FMLA-qualifying if they do not have sufficient information to make such a determination.

Third, the court held that material fact issues remained on the question of whether defendant actually interfered with Rosenfeld's FMLA rights. The court held that defendant's posters and handbook, which was accessible via the company's intranet but which Rosenfeld denied receiving, met the general notice requirements of the FMLA. It held, however, that a material fact issue remained on whether defendant failed to meet its individualized notification requirement. Because Rosenfeld provided adequate notice in early May 2008, defendant's obligation would be triggered if Rosenfeld's insomnia was a serious health condition. Finally,

the court addressed Rosenfeld's argument that his boss' comments and criticisms in response to his absences unlawfully discouraged Rosenfeld from exercising his rights under the FMLA. It held that material fact dispute remained on whether these comments deterred Rosenfeld from pursuing FMLA leave.

Rosenfeld's retaliation claim survived summary judgment. Because defendant admitted that Rosenfeld's termination was partially motivated by his attendance record, the court found that direct evidence of retaliation existed, and applied the mixed-motive analysis under *Price Waterhouse*. It held that material fact issues remained on whether defendant would have terminated Rosenfeld regardless of his FMLA-qualifying absences, an issue defendant would have to prove by a preponderance of evidence at trial.

Summarized Elsewhere:

Anderson v. Discovery Communications, LLC, 2011 WL 4526019 (D. Md. Sep. 29, 2011)

4. Permanent or Long-Term Incapacity
5. Multiple Treatments

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments
2. Treatment for Substance Abuse

Ames v. Home Depot U.S.A., Inc., 629 F.3d 665 (7th Cir. 2011)

Plaintiff requested assistance via Home Depot's Employee Assistance Program (EAP) for her asserted alcohol dependency. After a paid one-month leave of absence, plaintiff returned to work after passing a return-to-work drug and alcohol test and meeting the other requirements of the EAP. Among other things, she agreed that she would be subject to periodic drug and alcohol testing and that her employment would be immediately terminated if she refused to take or failed a drug and alcohol test. About a month later, she was convicted of driving under the influence of alcohol. As a result, she was ordered under the terms of the EAP to undergo an evaluation at an alcohol treatment facility.

Shortly thereafter, and before undergoing the required evaluation, plaintiff asked her supervisor for assistance in rearranging her work schedule to permit her to attend Alcoholics Anonymous (AA) meetings. She presented her supervisor with a copy of her AA meeting schedule, as well as a note from her primary care physician stating that she had been referred to a licensed clinical social worker for counseling and that she was seeing a doctor for psychiatric medication management. The note did not provide any more information regarding plaintiff's health condition, nor did it request leave. About a week later, plaintiff disclosed to her supervisor various concerns, including whether Home Depot would pay for the EAP-mandated evaluation and her belief that her current alcohol treatment program was inadequate. Plaintiff admitted in deposition that she did not specifically ask for leave during this conversation.

Three days later, plaintiff reported to work smelling of alcohol. A blood alcohol test revealed that she was under the influence of alcohol. Home Depot decided to terminate plaintiff's employment, but the day before the scheduled termination meeting, plaintiff checked herself into a hospital. She was discharged the next day with directions to enroll in an outpatient alcohol treatment program. Thereafter, plaintiff was notified that her employment was terminated, effective the date of her positive blood alcohol test.

Plaintiff sued, claiming that Home Depot had interfered with her FMLA rights and retaliated against her for her exercise of FMLA rights. The Seventh Circuit affirmed the district court's ruling that plaintiff had failed to establish that she was entitled to leave under the FMLA because she had not established that she was afflicted with a serious health condition. The court noted that although substance abuse can qualify as a serious health condition if it involves inpatient care or continuing treatment by a healthcare provider, plaintiff did not go into inpatient care until after the positive blood alcohol test that triggered her discharge. In addition, the letter from plaintiff's doctor did not establish that she was undergoing continuing treatment, as it simply referred to counseling and psychiatric medication management. Plaintiff's retaliation claim also failed, because she presented no evidence of a causal relationship between her alleged requests for leave and her discharge.

Neal v. Ingram Book Group, Inc., 2011 WL 5859498 (M.D. Tenn. Nov. 21, 2011)

Plaintiff, a human resource manager, began receiving treatment for alcoholism in August 2008, for which she had previously been treated. She was prescribed valium and depakote as part of an outpatient detox program. During the week of September 9, 2008, plaintiff met with her immediate supervisor on multiple occasions to discuss her job performance. Plaintiff told her supervisor that she was experiencing personal stress and was seeing a psychiatrist. The following Monday, plaintiff requested FMLA paperwork from a subordinate, telling that employee she would use the paperwork to sue her employer if she was fired. During a meeting with her supervisor and defendant's general counsel, Plaintiff informed them that she did not want to take leave, even though she admitted that some of her medication was impairing her judgment and she was to meet with her doctor later that day to discuss getting off that medicine. Plaintiff was discharged for poor judgment after a pattern of performance issues and lost confidence in her ability to perform her job. Plaintiff moved for partial summary judgment on her unlawful interference claim. The district court denied her motion because she failed to establish that she had a serious health concern and failed to provide proper notice under the FMLA.

The court held plaintiff had failed to establish a serious health concern because she had no evidence that she received inpatient care. Further, plaintiff could not make out a case for a serious health condition under the "continuing treatment" theory because she could not establish a period of incapacity. The medical records did not show any indication that her healthcare provider determined plaintiff unable to work or that she was otherwise incapacitated by her condition. Meanwhile, the court held plaintiff did not provide defendant with proper notice of any leave. Since plaintiff told her supervisor and defendant's general counsel that she did not want to take FMLA leave, there was simply no evidence that plaintiff even actually requested the leave.

Picarazzi v. Crane, 2011 WL 486211 (S. D. Tex. Feb. 7, 2011)

Plaintiff was an alcoholic and disclosed his condition to his employer at approximately the same time that he entered an alcohol treatment program. Plaintiff completed leave of absence paperwork, and defendant granted plaintiff FMLA leave from April 1, 2008 through May 2, 2008.

Plaintiff was released from the treatment center on April 23, 2008, but did not return back to work. In fact, plaintiff returned to the treatment center on April 30, 2008 through May 8, 2008 for a second term of rehab. Plaintiff later returned to work on May 13, 2008. This return to work date was consistent with the return to work date provided by his physician. Plaintiff called in sick on May 15 and 16, 2008, for “blood pressure” problems. Unfortunately, plaintiff began drinking again between May 20, 2008 and May 23, 2008. He notified his supervisor that he had suffered a relapse. On May 24, 2008, plaintiff completed another Leave of Absence Request form. In addition, plaintiff had a physician complete a Certification of Health Care Provider Form, which documented that plaintiff was unable to work from June 2, 2008 through June 30, 2008.

On June 9, 2008, once again, plaintiff checked himself into an alcohol treatment facility. While plaintiff was in treatment for the third time, defendant advised plaintiff that it needed more information to evaluate his May 24, 2008 request for a Leave of Absence. On June 20, 2008, plaintiff was issued both a written warning and final warning for attendance. Plaintiff was discharged six days later, on June 28, 2008, because he had accumulated too many points under defendant’s attendance policy due to absences.

Pursuant to 19 C.F.R. § 825.1119, an employee suffering from alcoholism that suffers as a serious health condition is only entitled to FMLA leave when he is receiving treatment for addiction, not before or after, when he is broadly suffering from his condition. As a result, defendant contended that plaintiff’s substance abuse problem did not qualify him for FMLA leave under the federal regulations because plaintiff failed to show that he was in treatment on all days on which he claims he was on leave. Accordingly, defendant assessed attendance points against plaintiff for all days plaintiff was on leave but not in treatment.

The court found that contrary to defendant’s interpretation, the regulations did not require plaintiff to be enrolled in a rehab institution or under the care of a physician *each day* that he was on leave. Moreover, the court found that defendant was equitably estopped from assessing attendance points against plaintiff during periods of time for which defendant had granted plaintiff FMLA leave. Moreover, the evidence supported that plaintiff was given the impression that he was approved for FMLA leave even though he was not actually enrolled in a treatment program. Since plaintiff was able to raise a genuine issue of material fact about whether defendant improperly assessed absences against him while on FMLA leave, plaintiff was able to survive summary judgment on the issue of whether he was discharged due to his request for FMLA or his decision to take FMLA.

Next, the court reviewed defendant’s contention that plaintiff failed to provide sufficient medical documentation to show that he was receiving treatment for FMLA related purposes.

The court acknowledged that an employer may require an employee to furnish certification issued by a healthcare provider in order to support a request for FMLA leave. However, if an employer requires additional information it must (1) provide the employee with seven calendar days to cure a deficiency; and (2) advise the employee of the anticipated consequences of failing to provide adequate certification. Plaintiff raised genuine issues of material fact to whether defendant complied with these guidelines.

Finally, the court determined that because plaintiff succeeded in raising a genuine issue of material fact as to whether defendant properly assessed attendance points; plaintiff successfully contradicted defendant's assertion that it neutrally applied its attendance policy which resulted in termination. The court reasoned that if plaintiff was on an approved FMLA leave, then it is not clear that defendant would have had sufficient grounds to terminate him. Accordingly, the court found plaintiff presented evidence of pretext sufficient to survive summary judgment.

3. "Minor" Illnesses

Summarized Elsewhere:

Mackie v. Jewish Foundation for Group Homes, 2011 WL 1770043 (D. Md. May 9, 2011)

4. Mental Illness

CHAPTER 5. LENGTH AND SCHEDULING OF LEAVE

I. OVERVIEW

II. LENGTH OF LEAVE

- A. General
- B. Measuring the 12-Month Period
- 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
- F. Measuring Military Caregiver Leave [New Topic]

III. INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES

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

Kleinser v. Bay Park Cmty. Hosp., 793 F. Supp. 2d 1039 (N.D. Ohio 2011)

Plaintiff worked for defendant hospital as a bedside nurse. She suffered an on-the job injury which restricted her lifting ability, but was allowed to return to work through the hospital's light duty program. The light duty program was available to eligible employees so long as they demonstrated sufficient progress towards returning to full duty or their original position. While on light duty, plaintiff requested and was granted intermittent FMLA leave related to her original injury. Several months later, plaintiff was removed from the light duty program because of failure to progress toward recovery and placed on continuous FMLA leave. When her FMLA leave expired, plaintiff requested to return to the light duty program because she was still unable to perform the essential functions of her original job. The hospital denied the request and subsequently terminated her employment. Plaintiff then brought suit under the FMLA for interference with her use of intermittent FMLA leave. The parties filed cross-motions for partial summary judgment on the interference claim asking the court to resolve the following legal issue: "whether Defendant interfered with Plaintiff's FMLA rights when it terminated Plaintiff's light-duty assignment and required Plaintiff to enter continuous FMLA leave during a period in which Plaintiff's injury prevented her from performing an essential function of her original position."

Plaintiff first argued that by terminating her light duty assignment, the hospital unlawfully interfered with her "unfettered" right to elect intermittent FMLA leave. The court rejected this proposition explaining that the right to intermittent FMLA was not "unfettered;"

rather, the intermittent leave schedule must “best accommodate” the medical needs of the ill or injured employee, as determined by the medical documentation identifying the impact an injury or illness has on the employee’s ability to perform her job. Because the grant (or denial) of intermittent leave would not “best accommodate” plaintiff’s ability to perform her original job of bedside nurse, there was no interference claim. The court also found no interference with plaintiff’s FMLA rights by requiring her to take leave on a continuous as opposed to intermittent basis following the termination of the light duty position. While involuntary leave may constitute interference in certain circumstances, plaintiff had no FMLA protection in her strictly temporary position, meaning the hospital was free to discontinue the position and the intermittent leave schedule without regard to Plaintiff’s FMLA leave rights.

Plaintiff next argued that by removing her from light duty and requiring her to take continuous FMLA leave, the hospital was essentially requiring her to show continued physical recovery in order to continue to exercise her intermittent FMLA rights, which she claims was a “stricter standard” than the FMLA requires. The court also rejected this argument, reasoning that the FMLA does not provide any minimum standards for participation in a transitional or light duty work program like the one that the hospital maintained.

Third, the court rejected plaintiff’s claim that by terminating her light duty assignment and placing her on continuous FMLA leave, the hospital was requiring her to take more leave than medically necessary and therefore interfering with her FMLA rights. After questioning whether this constituted interference in the aftermath of the revised regulations, the court held that plaintiff’s interference claim was still not viable because the FMLA did not require the hospital to continue the light-duty position, and, unless plaintiff could demonstrate that she could return to her original position when her light duty job ended, there was no FMLA violation by requiring her to take continuous FMLA leave going forward. There was no other option that would allow her to perform her original job and use anything less than continuous FMLA time.

Lastly, the court rejected plaintiff’s claim that the hospital interfered with her FMLA rights by refusing to reinstate her to a light duty job at the conclusion of her continuous FMLA leave. The court held that the right of reinstatement did not extend to plaintiff’s temporary light-duty position.

In conclusion, the court reasoned that defendant had afforded plaintiff all the protections the FMLA extends to injured employees “and then some” by allowing her to participate in a light-duty program in the absence of which she would have had to enter continuous FMLA leave immediately. Because the FMLA does not require more, the court held that defendant’s decision to remove her from her light-duty position and terminate her intermittent leave accommodation did not violate the FMLA and granted defendant’s cross-motion from partial summary judgment on plaintiff’s FMLA interference claim.

Summarized Elsewhere:

Beem v. Providence Health & Services, 2011 WL 4852301 (E.D. Wash. Oct. 13, 2011)

- 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
- 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
 - 1. Foreseeable Leave
 - a. Need for Leave Foreseeable for 30 or More Days

Danek v. County of Cook, 2011 WL 5979880 (N.D. Ill. Nov. 29, 2011)

Plaintiff asked his supervisor for vacation leave from August 11, 2008 to September 11, 2008, which she denied. Plaintiff then submitted an FMLA leave of absence form on August 7, 2008, seeking three months of leave beginning August 11, 2008, due to lower back pain that started in 1998 and chronic depression that began in 2004. Plaintiff's physician completed the FMLA "Certification of Physician or Practitioner," which plaintiff submitted along with his leave of absence form to defendant's Employee Health Services Office and human resources department on August 7, 2008. On August 8, 2008, plaintiff went to an appointment with an Employee Health Services physician, who ultimately sent plaintiff to the emergency room due to complaints of dizziness and his high blood pressure. Plaintiff then failed to show to work on August 11, 2008, and missed his August 12, 2008 follow-up with the Employee Health Services department.

On August 21, 2008, the supervisor sent plaintiff a letter stating that defendant had not yet approved his leave, and that he needed to report to work by August 25, 2008. After another letter and subsequent disciplinary hearing, which plaintiff missed, defendant terminated plaintiff's employment on September 22, 2008, for job abandonment. During his deposition, plaintiff admitted that he did not know whether his leave had been approved or denied as of August 8, 2009, and that three days after he requested leave, he began traveling, first to Wisconsin, then Texas, and then to Mexico to visit friends.

The employer moved for summary judgment on plaintiff's interference and retaliation claims, which the court granted. The court held that plaintiff failed to demonstrate interference for three reasons. First, plaintiff did not satisfy the notice requirements under 29 C.F.R. § 825.302(a) because he provided only four days notice of the need for leave based on chronic

conditions, dating back to 1998 and 2004 respectively. There was no evidence in the record that plaintiff lacked knowledge of approximately when his leave would begin, that it was unforeseeable, or that there was any medical emergency or change in circumstances. Second, the court held that plaintiff did not take his leave for its intended purpose. Instead, plaintiff requested FMLA only after his supervisor denied his request for vacation leave three days earlier, and plaintiff admitted to travelling through mid-November 2008. As such, the court held that the employer demonstrated its honest belief that plaintiff was using his leave for vacation purposes. Finally, plaintiff failed to complete the proper FMLA process since the Department of Human Resources did not grant plaintiff's FMLA request prior to his requested leave date. The court noted that an employer is entitled to enforce compliance with its usual and customary notice and procedural requirements granting leave. As to plaintiff's retaliation claim, the court also granted summary judgment, finding that the since plaintiff was not entitled to FMLA leave, he did not engage in protected activity and therefore he had no retaliation claim.

b. Need for Leave Foreseeable for Less Than 30 Days

2. Unforeseeable Leave

Righi v. SMC Corp., 632 F.3d 404 (7th Cir. 2011)

The employee was scheduled to attend a two-week training session, but left early after his mother went into a diabetic coma. While he told a co-worker he had to attend to a family emergency, he did not contact his supervisor. The next day, the employee sent his supervisor an email, requesting "the next couple days off" and stating that "I do have the vacation time, or I could apply for the family care act, which I do not want to do at this time." The employee did not communicate with anyone at the employer for several days. After receiving the email, the supervisor unsuccessfully attempted to contact the employee by phone numerous times. When the employee arrived at work, he was discharged for violating the employer's attendance policy, which stated that failure to report to work for two consecutive days without notifying a supervisor is grounds for termination.

The Seventh Circuit affirmed dismissal of the employee's FMLA interference claim on only one of the two grounds cited by the district court. The court rejected the district court's conclusion that the employee was not entitled to FMLA protection because he disavowed any intent to use FMLA leave. According to the court, the email left some room that the employee might change his mind and use FMLA leave rather than vacation time to cover his absence. The court held, however, that the employee's failure to inform the employer of his return-to-work date, as required by the policy and applicable FMLA regulations, required dismissal of the employee's claims. According to the court, while the employee's email was too ambiguous to trigger the employer's affirmative duty to provide written FMLA materials and forms, it was sufficient to give rise to the employer's duty to make further inquiry. Although the employer attempted to fulfill its regulatory obligation to inquire further, the employee failed to respond to the employer's phone calls or otherwise contact the employer. Thus, beyond the ambiguous reference to needing the "next couple days off," which was exceeded anyway, the employee did not comply with 29 C.F.R. § 825.302, which requires an employee to provide notice to the employer about the anticipated duration of unforeseeable leave "as soon as practicable." Finally,

the employee's failure to adhere to the employer's internal leave policy provided a sufficient ground for termination and foreclosed the employee's FMLA claim.

Towns v. Northeast Mississippi Electric Power Ass'n, 2011 WL 839759 (N.D. Miss. Mar. 8, 2011)

A cashier sued her employer, alleging FMLA interference after it discharged her on the last day she received short term disability. The employer filed a motion for summary judgment, which the court granted. The court determined that plaintiff did not provide her employer with proper notice, nor did she provide her employer with sufficient information to apprise it of her request for leave.

The employer's policy required plaintiff to notify a department head of the need for leave. She instead notified a secretary. In addition, plaintiff provided her employer with a physician's report, which indicated that she could return to work on light duty. After working one day, plaintiff did not return to work. The employer did not receive a second physician's report. The court noted that plaintiff's conversations with her friend, who was the employer's accounts receivable manager, regarding her condition were not sufficient to put her employer on notice that she had continuing treatment of a serious health condition.

The court also rejected plaintiff's claim that the doctrine of equitable estoppel applied to this case. The court held that where the employer never assured the employee she was on FMLA leave and where the employer never argued that plaintiff was not eligible for FMLA leave, the doctrine of equitable estoppel did not apply. The court, therefore, granted the employer's motion for summary judgment.

3. Military Family Leave [New Topic]

B. Manner of Providing Notice

Rivera v. Rochester Genesee Reg'l Transp. Auth., 761 F. Supp.2d 54 (W.D.N.Y. 2011)

Plaintiff alleged interference and retaliation claims under the FMLA based on defendant's failure to allow him to return to work after taking leave. The court found it was undisputed that plaintiff never notified defendant that he required FMLA leave. The court rejected plaintiff's contention that the fact that he used personal, vacation, and sick days should have placed his employer on sufficient notice that he was undergoing treatment for a medical condition and required FMLA leave.

The court further found that plaintiff's failure to complete and return the requisite medical certification before returning to work justified defendant's refusal to allow plaintiff to return to work. The court rejected plaintiff's contention that he was justified in failing to complete the medical certification form because he disagreed with defendant's judgment as to what type of medical specialist should be required to fill out the form. It was undisputed that: the form was required by defendant's written policy concerning absences from work, plaintiff had received a copy of the policy, was aware of its requirements, and had successfully used it to

take an FMLA medical leave from defendant during the preceding year. Accordingly, the court granted defendant's motion for summary judgment.

C. Content of Notice

Anderson v. Discovery Communications, LLC, 2011 WL 4526019 (D. Md. Sep. 29, 2011)

Plaintiff, an attorney, claimed to suffer from a sleep disorder. She requested a reduced work schedule, asking to work no more than eight hours per day, including her commute. Plaintiff never requested any leave and was discharged for performance reasons about a month later. The court dismissed plaintiff's FMLA interference and retaliation claims, explaining that she had not established that she had a serious medical condition because her doctor had concluded that she did not have significant impairment in focus, concentration, alertness, mood or memory that would prevent her from working. The court further held that plaintiff's request for a reduced work schedule was not sufficient to alert the employer that FMLA leave was needed. Thus, the court granted summary judgment for the employer.

Davis v. Wayne State University, 2011 WL 2786186 (E.D. Mich. July 15, 2011)

Plaintiff filed ADA and FMLA claims against her former employer after she was discharged. Two years prior to her discharge, plaintiff had carpal tunnel repair surgery and took intermittent leave for physical therapy. Plaintiff had some recurring pain that caused her to occasionally miss work but she did not disclose the reason for her absences to defendant. The court granted defendant's motion to dismiss, finding that plaintiff failed to state either a valid retaliation claim or a valid interference claim under the FMLA.

The court rejected plaintiff's argument that a performance review she received two months prior to her discharge established a causal connection sufficient to state a retaliation claim. The court found that even though the performance review pointed out attendance problems, plaintiff had not provided defendant with sufficient information to determine whether her absences qualified as FMLA leave. Because of this lack of sufficient information, an interference claim was also precluded.

Debell v. Maimonides Medical Center, 2011 WL 4710818 (E.D.N.Y. Sept. 30, 2011)

Plaintiff was a hospital employee familiar with the employer's FMLA leave procedures and had availed himself of FMLA leave on numerous occasions since 2005. Each request for leave was approved without incident. In 2009, he was transferred to a hospital unit where he collected and cleaned dirty instruments while wearing two pairs of gloves, a face mask, a hat and a plastic robe. By this time, he had suffered from psoriasis for approximately twenty years. On Friday, April 3, 2009, he informed his supervisor that his psoriasis was bothering him and could not work that day. He was told to leave work and see his physician for treatment. From then through Monday, April 5, 2009, he did not see his physician. On April 6, 2009, Plaintiff met with his employer and returned his beeper and hospital identification. Human resources investigated and concluded that Plaintiff resigned.

Plaintiff sued, claiming, among other things, that his employer violated the FMLA by failing to notify him of his FMLA rights; violated the FMLA by refusing to allow him to be treated by his physician and discharging him in response to his request for leave. The employer filed a motion for summary judgment.

The employer argued that plaintiff failed to provide it with notice of his intention to take FMLA leave. The court denied the employer's motion for summary judgment, finding that the employer knew plaintiff left work because of his psoriasis flare-up and upon receipt of notice of the need for leave, the employer had an affirmative duty to make certain inquiries of the employee to see if it qualified for FMLA protection. The employer argued that because plaintiff was aware of the procedure for requesting and obtaining FMLA leave, his not asking for it in this instance left him without FMLA protection. The court found this argument unavailing as an employee is not required to request FMLA leave by name. The employee asked for time off to see his doctor and he told his supervisors that he suffered from a skin condition that was exacerbated by his employment tasks. As such, plaintiff raised a disputed issue of material fact as to whether the employer was on notice that he needed FMLA leave.

Deloatch v. Harris Teeter, Inc., 797 F.Supp. 2d 48 (D.D.C. Cir. July 13, 2011)

Plaintiff filed claims against his former employer, alleging violations of the FMLA. Plaintiff alleged that his wife was hospitalized for three days due to emergency gallbladder surgery and that his request for three weeks off following her release from the hospital was denied. In addition, plaintiff alleged that he was given some but not all of the time off he requested after his mother was diagnosed with pancreatic cancer. Plaintiff alleged that his supervisor told him to take as much time as he needed after his mother passed away while defendant contended plaintiff was given three days of bereavement leave. Plaintiff did not report to work for three weeks, during which time defendant attempted to contact him. After not being able to reach him, defendant discharged plaintiff.

The court granted summary judgment in favor of defendant on plaintiff's FMLA interference claims. His claim regarding leave to take care of his wife failed because plaintiff did not provide any evidence that his wife suffered a serious health condition following her discharge from the hospital. Although it was clear that plaintiff's mother did suffer from a serious health condition, there was no evidence that plaintiff told his employer the reason for his requested leave or the nature of her condition. Instead, plaintiff's deposition testimony only indicated that he told his supervisor that he "needed some time off to help his mom." Because plaintiff failed to provide sufficient information to defendant, his FMLA interference claim regarding leave to take care of his mother also failed. In addition, the court found that plaintiff's bereavement leave was not covered by the FMLA.

The court also granted summary judgment in favor of defendant on plaintiff's FMLA retaliation claim. The court found that plaintiff did not engage in statutorily protected activity because he did not allege that he either opposed a practice unlawful under the FMLA or objected to defendant's FMLA policies or practices. Alternatively, the court found that defendant had a legitimate non-retaliatory reason for discharging plaintiff that was not pretext.

Escriba v Foster Poultry Farms, 793 F. Supp. 2d 1147 (E.D. Cal. 2011)

In November 2007, plaintiff requested a leave to care for her father who she alleged was seriously ill. Plaintiff's father lived in Guatemala. Plaintiff was granted two weeks of vacation time and flew to Guatemala. She did not return to work after those two weeks and was discharged by her employer. Few other facts are agreed to between the parties. Plaintiff claims that she told her employer about her father's serious illness and that her employer was on notice of her need for FMLA leave, not just two weeks of vacation. Plaintiff also states that she provided medical documentation of her father's illness.

Defendant in turn claims that plaintiff's supervisor specifically told plaintiff to go to Human Resources and request an FMLA leave because it was apparent that plaintiff might need more than two weeks off to attend to her father in Guatemala. Defendant claims she refused to do so. Plaintiff argues that this conversation never took place, or that if it did, it took place in English and she did not understand what her supervisor was suggesting as Spanish was her primary language. The parties also disputed whether the evidence plaintiff provided to her employer established plaintiff's father had a serious medical condition. At that time of plaintiff's request, she was 50 years old and had only a third grade education. She had, however, requested and been granted numerous FMLA leaves to care for herself over the many years of her employment.

After her discharge, plaintiff sued her former employer for interfering with her right to take a leave to care for her father and for failing to reinstate her after she took more than two weeks off from work to care for him. Defendant maintains that plaintiff did not adequately place the company on notice that her father was seriously ill, and that if she did, she refused to go to Human Resources and apply for FMLA leave. Consequently, when she flew to Guatemala, there was no FMLA leave in place to protect her job. Both parties moved for summary judgment and the court denied both motions, holding that there were disputed material facts as to the communication between the parties and whether plaintiff had adequately placed defendant on notice of her need for an FMLA leave.

Escriba v. Foster Poultry Farms, 2011 WL 4591096 (E.D. Cal. 2011)

Plaintiff brought a motion for judgment as a matter of law and/or a new trial after a jury's verdict that Plaintiff had not provided her employer sufficient notice of her intent to take leave pursuant to FMLA or the California Family Rights Act ("CFRA"). Plaintiff argued that her statement to her employer that she was taking leave for an FMLA qualifying reason, that she was taking care of a sick father, automatically placed her on FMLA leave.

The court rejected Plaintiff's motion. Although FMLA notice is sufficient if an employee notifies her employer that she will be absent under circumstances under which FMLA might apply, that does not mean an employee will "automatically" be placed on leave. Defendant presented evidence that Plaintiff had requested and taken FMLA leave in the past, knew that she needed to go to Human Resources to make the request, and that Plaintiff declined to do so and declined to take more time in deciding whether to do so in the present case, though the employer

offered her the opportunity. In this context, the conflicting testimony between the employer and employee as to the content and import of the notice presented credibility issues that the jury resolved.

Lichtenstein v. University of Pittsburgh Medical Center, 2011 WL 3360337 (W.D. Pa. Aug. 3, 2011)

When plaintiff's mother was injured in an accident, plaintiff e-mailed the administrator to request a leave of absence for the same day, a day she was scheduled to work. Plaintiff and the administrator coordinated a time to talk, but when the time came, Plaintiff requested to reschedule and a leave of absence. Defendant then terminated plaintiff's employment for excessive tardiness and absenteeism based on this absence and a history of absenteeism. Defendant moved for summary judgment.

The court granted defendant's motion. It reasoned that plaintiff did not give proper notice because she requested leave based on the fact that a family member was in the emergency room, which does not necessarily reflect a serious medical condition sufficient to support a request for leave under the FMLA. Furthermore, in her deposition, plaintiff testified that she first gave notice of her request for FMLA leave on January 8, which was five days after her request for a leave of absence due to the emergency room visit on January 3. The court also held that no direct evidence existed to show that Plaintiff intended to take FMLA leave on January 3, and that defendant was allowed to rely on that absence as a reason to terminate plaintiff's employment. Because plaintiff could not show that defendant's reasons for termination were pretextual, the court granted defendant's motion for summary judgment on both her interference and retaliation counts.

Nicholson v. Pulte Homes Corp., 2011 WL 1691999 (N.D. Ill. May 3, 2011)

Nicholson was employed by Pulte Homes Corp. ("Pulte") as a sales associate for ten years until June 2009, when Pulte discharged her for performance reasons. Nicholson claimed she was discharged for taking time off to care for her ailing parents and brought a lawsuit alleging interference with her FMLA rights and retaliation. The court found that Pulte did not interfere with Nicholson's FMLA rights or retaliate against her, but that it had failed to demonstrate that she had not followed their FMLA policies when requesting FMLA leave. The court noted that Pulte had presented no evidence that its handbook covered unforeseeable leave request procedures, and that Nicholson had complied with the applicable regulations when requesting leave.

However, the court nonetheless granted summary judgment to Pulte because Nicholson had failed to put the company on notice of her need for FMLA leave. The court observed that Nicholson failed to either request FMLA leave or to alert Pulte to the seriousness of her parents' health conditions. Because she "did not fulfill her obligations in order to be protected" under the FMLA, the court held that Nicholson could not maintain an FMLA interference claim. Given her failure to put Pulte on notice that she wished to exercise her right to FMLA leave, the court also held that she could not prevail on her retaliation claim.

Ruble v. American River Transportation Co., 2011 WL 2600118 (E.D. Mo. June 29, 2011)

Plaintiff had worked for his former employer in a position that required him to stay aboard a vessel for 26 to 34 days at a time. Upon boarding the vessel for a voyage, plaintiff informed two supervisors that his grandmother was ill and he may need to leave the vessel early. Plaintiff had been raised primarily by his grandmother for several years of his childhood.

In the middle of the voyage, plaintiff was informed that his grandmother was not expected to live more than one week. Shortly after, he informed a supervisor that he wanted to leave the vessel to see his grandmother and he also called a personnel manager, informing her that his grandmother was ill and that he needed to go see her because she had taken care of him. The personnel manager informed plaintiff that the earliest a replacement could be substituted on the vessel was April 14, three days later, but did not confirm that a substitute would be available on that day. Plaintiff left the vessel on April 14, even though a replacement was not available until the following day and his supervisor had not authorized him to leave. As a result, defendant terminated plaintiff's employment. Plaintiff then stayed with his grandmother at the hospital where he provided psychological support, comfort, and care for her. After he was discharged, plaintiff filed a lawsuit, alleging that defendant had unlawfully discharged him after he had attempted to exercise his rights under the FMLA.

Defendant filed a motion for summary judgment, contending that plaintiff failed to provide sufficient notice of the need for FMLA leave. The court first examined whether defendant had been sufficiently informed that plaintiff's grandmother stood in loco parentis to him. The court found that plaintiff's testimony indicating that he informed personnel that his grandmother had taken care of him and that he told supervisors "facts that showed his grandmother was in loco parentis to him" gave rise to factual disputes on this issue. The court then examined whether plaintiff gave defendant sufficient information indicating that he needed leave to provide care to his grandmother as opposed to merely visiting her. The court found that plaintiff's statement that he needed leave "to see" his grandmother may have been sufficient to trigger defendant's FMLA duties. The court also found that the notice plaintiff gave to defendant was timely. As a result, the court denied defendant's motion for summary judgment on the basis of failure to provide sufficient notice.

Lastly, defendant contended that plaintiff's discharge should actually be considered a resignation because its policy clearly indicated that departing a vessel without proper relief authorization amounted to a resignation. Although a reason for discharge unrelated to FMLA leave can preclude recovery under the Act, the court found that the reason for plaintiff's discharge was not independent from his FMLA request. Therefore, defendant was not entitled to summary judgment due to having a non-discriminatory reason for the discharge.

Stohs v. Bic Graphics USA Mfg. Co., 2011 WL 1328036 (D. Kan. Apr. 5, 2011).

Plaintiff and her girlfriend, A.R., both worked for defendant. On February 13, 2008, A.R. had hernia-repair surgery, and plaintiff took vacation time to care for her. Following the surgery, plaintiff returned to work. Plaintiff worked full days on February 18, 19, and 21, but only a half

day on the February 20, 2008. According to plaintiff, she told her immediate supervisor that the rash was due to stress. Sometime long before this, plaintiff had told defendant's Human Resource ("HR") manager that she breaks out in a head to toe rash when she is under extreme stress. February 21, 2008 was the last day plaintiff reported to work.

Sometime between February 25, 2008 and February 29, 2008, plaintiff called defendant's HR manager and requested leave, which was denied. Plaintiff claimed that the HR manager denied her request for FMLA leave without inquiry, assuming plaintiff was seeking FMLA leave to care for her girlfriend. Each day following the denial, plaintiff called in and said, "I'm not going to be able to come into work today." On March 6, 2008, defendant terminated plaintiff's employment for excessive absenteeism.

Plaintiff sued, and defendant moved for summary judgment, arguing plaintiff failed to provide sufficient information to put defendant on notice that she might be entitled to FMLA leave. The court agreed with defendant and granted its motion for summary judgment, because there was no evidence that the HR manager had any knowledge that plaintiff left work early on February 20, 2008 due to a rash. Therefore, it was only reasonable that the HR manager assumed plaintiff was seeking leave to care for A.R., rather than due to her stress-related rash. And because plaintiff failed to provide any information as to why she was requesting FMLA leave, defendant had no duty to inquire.

Summarized Elsewhere:

Cureton v. Montgomery Cty Bd. Of Educ., 2011 WL 5118416 (D. Md. Oct. 25, 2011)

Neal v. Ingram Book Group, Inc., 2011 WL 5859498 (M.D. Tenn. Nov. 21, 2011)

Righi v. SMC Corp., 632 F.3d 404 (7th Cir. 2011)

Scott v. UPMC, 435 Fed. Appx. 104 (3d Cir. 2011)

- D. Change of Circumstances
- E. Consequences of Employee Failure to Comply With Notice of Need for Leave Requirements

Beem v. Providence Health & Services, 2011 WL 4852301 (E.D. Wash. Oct. 13, 2011)

A medical lab technician who worked at a hospital alleged that her tardiness was due to various medical conditions, including fibromyalgia, osteoarthritis, thyroid irregularities and morbid obesity. She argued she should have been permitted to use intermittent FMLA to take leave in short increments (usually 15 minutes or less), with little notice to her employer (at times an hour before her scheduled start time), to cover her tardiness. She was terminated in February

2009, allegedly for receiving 39 tardies in the previous 12 months, in violation of the company's tardy policy. Both parties moved for summary judgment on the FMLA claims.

As an initial matter, the court addressed whether plaintiff had "serious health conditions," specifically whether she required continuing medical treatment. The medical certification she submitted in December 2005 indicated that it was *not* necessary for her to work only intermittently or to work less than a full schedule. The court stated this amounted to a "negative certification," on which the employer was entitled to rely, and the employer was not required to seek a second opinion. Moreover, the court noted that if her claim was premised on such documents, it would be time-barred, given the lawsuit was not filed until February 2010. The court also stated that plaintiff's mere declaration that she has a serious health condition was not enough to meet her burden. However, while expressing serious questions existed as to whether plaintiff established she had a serious health condition, the court assumed she did for purposes of the motions.

Defendant argued that even if plaintiff had a serious health condition, she failed to make a request for FMLA leave related to her tardies. The court highlighted the fact that plaintiff had previously submitted requests on six occasions between 2002 and 2008 for FMLA leave unrelated to her tardiness, all of which were approved. It was undisputed that she did not complete her employer's written FMLA application or complete a medical certification to seek leave regarding her tardiness after receiving the FMLA application packet from her employer. Citing 29 C.F.R. §§ 825.302(d), 825.311, the court noted that an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave and that 15 days is presumptively reasonable amount of time to complete a medical certification. Plaintiff was discharged more than 30 days after receiving the application packet. Furthermore, the court held that plaintiff's FMLA claims were legally deficient because FMLA leave does not cover short, unplanned, sporadic tardiness. Accordingly, the court denied plaintiff's motion for partial summary judgment and granted defendant's motion for summary judgment on plaintiff's FMLA claims.

Crawford v. City of Tampa, 2011 WL 940305 (M.D. Fla. Mar. 17, 2011)

The employee requested leave without pay from March 23, 2007 to April 5, 2007, but did not mention any medical reason for the leave. The city denied the request. Despite the denial, plaintiff took off work after March 23, 2007, and did not return to work. The employee telephoned on several occasions stating she was "out sick" with no further detail. On April 26, 2007, the employee applied to use hours from the "sick leave bank" from March 28, 2007 to May 23, 2007. The application stated she was on leave secondary to treatment for certain psychiatric conditions. Plaintiff's request for sick leave was denied May 11, 2007, due to her failure to follow the sick leave bank policy. Defendant discharged plaintiff's employment May 24, 2007, for various reasons, including absenteeism and abuse of leave privileges.

The district court found that it was not until the employee's application for use of the sick leave bank on April 26, 2007 that she made any claim her absence related to a specific medical condition, more than a month after her unexcused absences began. The court found her telephone calls that she was "out sick" were not sufficient to place the city on notice that she had

a potentially FMLA-qualifying medical condition. Further, the city's knowledge that the employee suffered from depression in 2005 did not place a burden on the city to guess that the employee's one-month unexcused absence was attributable to depression, anxiety, and post-traumatic stress. Since plaintiff had never been granted FMLA leave, her claim that defendant interfered with her right to restoration upon expiration of her FMLA leave was meritless. As a result, the court granted defendant's motion for summary judgment.

Cummings v. TAC Mfg., 2011 WL 65878 (E.D. Mich. Jan. 10, 2011)

Plaintiff worked as a full-time, hourly production employee. Defendant had a points-based attendance policy. From August 24, 2009 to October 22, 2009, plaintiff was on FMLA leave due to tendinitis in her wrists. Upon her return to work, she wore splints, which plaintiff contends impeded her ability to meet her daily quota for a couple of days before her performance improved. On October 28, 2009, plaintiff reported to work with an upset stomach, diarrhea, and nausea, resulting in her leaving her workstation several times during non-break periods, which management observed, who concluded that if she continued to leave her work area, she would be sent home. After another such occurrence, she was confronted regarding her poor performance and her frequent use of the restroom. Plaintiff objected to being sent home because the resulting attendance points would result in her discharge. There was no discussion of her tendinitis or use of splints, and plaintiff also claimed that she was feeling better and could secure medicine during her lunch break or do anything else necessary to avoid the points. Defendant instead sent her home, assessed the attendance points, and terminated her.

On motion for summary judgment, the court granted judgment for the employer. After noting that plaintiff had to show that she was denied an FMLA benefit that was denied, the court addressed the requirement of notice to the employer of need for FMLA leave. It was undisputed that tendinitis was not mentioned prior to her discharge, and the court rejected the argument that defendant should have known she was suffering from the "residual effects" of tendinitis. The court further noted that after being sent home, plaintiff could have asked for retroactive designation of the absence as FMLA, but did not do so.

Ike-Ezunagu v. Deco, Inc., 2011 WL 1485277 (D. Md. April 18, 2011)

Plaintiff alleged her former employer violated the FMLA by terminating her employment for missing work as a result of a covered medical condition. However, undisputed evidence showed that plaintiff did not request FMLA leave in connection with her leave of absence. She stated in her deposition that she intended to use sick leave, not FMLA leave, in connection with her absence. Additionally, the evidence showed that plaintiff was familiar with the procedures for requesting FMLA leave, as she had previously requested and received FMLA leave. Because plaintiff did not request FMLA, the court granted the employer's motion for summary judgment on the FMLA claim.

Scott v. UPMC, 435 Fed. Appx. 104 (3d Cir. 2011)

Plaintiff had worked for defendant for just over a year when she requested light duty at the recommendation of her treating physician. She had previously requested time off of work for medical procedures and was advised of her rights under the FMLA in connection with those

leaves at least once. Plaintiff appealed the district court's grant of summary judgment to the employer. The Third Circuit affirmed the District court.

The court first reviewed whether plaintiff notified her employer of her need for leave. In this instance, the employee's request for light duty was not sufficient to apprise the employer of her need for FMLA. While the notice of need for FMLA is a question of fact, the court did not find a dispute of fact. During discovery, the employee stated she had never asked for time off and that she did not need time off. The court found that the employee only asked for light duty, did not reply to messages granting her light duty and did not inform the employer that she had changed her mind and wanted to request leave instead of light duty.

The employer's FMLA administrator, Work Partners, informed plaintiff that she would receive FMLA paperwork, which she should fill out and return. The paperwork was misaddressed and plaintiff did not receive it or request it be re-sent. A representative of Work Partners spoke with plaintiff and she told them she had not received FMLA paperwork and that she could not work the light-duty shift offered to her. Work Partners told plaintiff it would speak to plaintiff's supervisor and get back to her about her FMLA paperwork. Near the same time, plaintiff's supervisor instructed her in writing to contact him by a specific date and advise him of her intentions of maintaining active employment status. Plaintiff admitted receiving the letter. After this, plaintiff received a written communication from Work Partners that if she failed to return to work she would be subject to disciplinary action. The court found there was no dispute of fact that plaintiff failed to comply with her employer's reasonable request for information regarding whether she intended to return to work. As a result, the Third Circuit affirmed summary judgment for the employer.

Viramones v. U.S. Bancorp, 2011 WL 6780644 (N.D. Ill. Dec. 27, 2011)

The employee took FMLA leave for foot surgery. The employer discharged her five months after she returned from leave for failure to meet the expectations set forth in a performance action plan. The employee filed interference and retaliation claims under the FMLA. The court found that both U.S. Bancorp, a holding company, and U.S. Bank, which paid plaintiff's wages, payroll taxes, and unemployment compensation, were employers under the FMLA and denied defendants' motion to dismiss U.S. Bancorp.

The court granted defendants' motion for summary judgment on the interference claim. The court held that defendants had adequately posted public FMLA notices. Furthermore, plaintiff did not fulfill the requirement to give 30 days advance notice of the start of leave when that was practicable.

The court denied defendants' motion for summary judgment, however, on the retaliation claim. Causation between plaintiff's FMLA leave and her discharge was shown by: plaintiff's manager's statements discouraging her from taking FMLA leave, the manager's demand that she return to work while on leave, and the manager's placing her on a performance action plan shortly after he was investigated by U.S. Bank as a result of plaintiff's letter complaining about him.

Summarized Elsewhere:

Coffman v. Ford Motor Co., 2011 WL 5865438 (6th Cir. Nov. 22, 2011)

Danek v. County of Cook, 2011 WL 5979880 (N.D. Ill. Nov. 29, 2011)

IV. EMPLOYER RESPONSE TO EMPLOYEE NOTICE

- A. Notice of Eligibility for FMLA Leave [Renumbered and Amended Heading Title (Formerly IV.C, “Notice of Ineligibility for Leave”)]
- B. Notice of Rights and Responsibilities [Amended Heading Title (Formerly “Individual Notice to Employee Concerning FMLA Leave”)]

Seiler v. Hollidaysburg Am. Legion Ambulance Serv., Inc., 2011 WL 4017965 (W.D. Pa. Sept. 8, 2011)

Defendant demoted plaintiff from a management position to an emergency medical technician (“EMT”) position, even though defendant was aware that plaintiff was physically unable to perform the duties of an EMT. Plaintiff filed a lawsuit, alleging defendant failed to offer him the opportunity to utilize FMLA leave during the time he was physically incapable of performing EMT duties. Both plaintiff and defendant filed motions for summary judgment.

The court denied defendant’s motion for summary judgment, finding that it had reason to know that plaintiff may have wanted to exercise his rights under the FMLA. The court also denied plaintiff’s motion for summary judgment. The court could not determine whether defendant was obligated to notify plaintiff of his rights under the FMLA because a reasonable jury could find that plaintiff declined defendant’s EMT position offer and, therefore, voluntarily resigned his position.

Summarized Elsewhere:

Rosenfeld v. Canon Business Solutions, Inc., 2011 WL 4527959 (D.N.J. Sept. 26, 2011)

- C. Designation of Leave as FMLA Leave [Renumbered Heading (Formerly IV.A.)]

Jackson v. Simon Property Group, Inc., 795 F. Supp. 2d 949 (N.D. Cal. 2011)

Plaintiff sued his former employer for interference with his FMLA rights and retaliation in violation of the FMLA. Plaintiff’s principal claim was based on defendant’s failure to specifically notify him that the more than 12 weeks of leave he received were designated “FMLA leave.” The court rejected this claim, noting that plaintiff had received more leave than he was entitled to under the FMLA and that failure to designate his leave as FMLA leave could not interfere with plaintiff’s FMLA rights. The court also held that because the undisputed evidence, including plaintiff’s own evidence, showed that he was unable to perform the essential

functions of his job, defendant did not retaliate against plaintiff by refusing to return him to work.

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

Haitz v. Don Jacobs Imports, Inc., 2011 WL 4743384 (E.D. Ky. Oct. 6, 2011)

Plaintiff was discharged while on leave for foot surgery and recovery. According to the employer, plaintiff alleged that he was not aware that his leave was designated as FMLA leave or that it had run out when he received a notice that he was considered to have voluntarily resigned from the company. The employee filed a claim of FMLA interference against the employer and the employer sought summary judgment.

The district court recognized that the failure to provide notice under the FMLA Regulations, which impose four separate and distinct notification duties, can constitute interference. In denying the employer's motion for summary judgment, the court found that the employer failed to provide the following to the employee: general notice under 29 C.F.R. § 825.300(a); notice that his leave was FMLA-eligible under 29 C.F.R. § 825.300(b) once it became aware that the leave may qualify as FMLA leave; a rights and responsibilities notice under 29 C.F.R. § 825.300(c), which specifically describes an employee's obligations and the employer's expectations for the FMLA leave; and a designation notice under 29 C.F.R. § 825.300(d).

1. Eligibility Notice [Renumbered and Amended Heading Title (Formerly IV.D.3, "Notice of Ineligibility")]

Boecken v. Gallo Glass Co., 412 Fed. Appx. 985 (9th Cir. Jan. 27, 2011)

Plaintiff conceded that he had misused his FMLA time because he had spent approved FMLA time in the park instead of caring for his grandmother. Nonetheless, plaintiff challenged his discharge, arguing that defendant failed to provide him with advance notice of his obligations under the FMLA or the consequences of his failure to meet these obligations. Defendant's employee handbook stated that an employee could be discharged immediately only for theft or dishonesty, but did not provide that misuse of FMLA time was grounds for immediate discharge. Defendant did not argue that it discharged plaintiff for either theft or dishonesty, so the court found that a fact issue existed as to whether defendant violated plaintiff's FMLA notice rights, which precluded summary judgment.

2. Rights and Responsibilities Notice [Amended Heading Title (Formerly "Individual Notice")]

Greenwell v. Charles Mach. Works Inc., 2011 WL 1458565 (W.D. Okla. Apr. 15, 2011)

Plaintiff was discharged from his job as a test engineer and filed suit alleging FMLA retaliation and interference against his former employer. The employer filed for summary judgment. To make out a *prima facie* claim for FMLA interference, a plaintiff must establish:

(1) that he was entitled to FMLA leave; (2) that some adverse action by the employer interfered with his right to take FMLA leave; and (3) that the employer's action was related to the exercise or attempted exercise of his FMLA rights. The employer challenged only the second element, on the ground that the employee never provided it with notice that he wished to take FMLA leave.

The district court found that even though the employee did not specifically request FMLA leave, a fact issue existed as to whether the employer was on notice that the employee qualified for FMLA benefits because of the employee's complaints regarding his condition and the employer's knowledge of his surgeries and recovery periods. If the employer was put on notice, it had a duty to notify the employee that FMLA coverage may apply. The employee's evidence indicated the employer did not notify him of his possible entitlement to FMLA leave. As such, the court found that the employee presented sufficient evidence with respect to the second element of his interference claim to make out a *prima facie* case and withstand summary judgment.

With respect to the employee's FMLA retaliation claim, the district court ruled that the employee established a *prima facie* case. In the Tenth Circuit, temporal proximity can satisfy the causation requirement if the protected activity and termination are close enough in time. The court found that although the question was close, the six-week period between the time plaintiff returned to work and his discharge was sufficiently close in time to create a material issue as to causal connection. Thus, the court denied the employer's motion for summary judgment as to the both the FMLA interference and retaliation claims.

Suchanek v. University of Kentucky, 2011 WL 3045986 (E.D. Ky. July 25, 2011).

Plaintiff worked at the University of Kentucky from October 1998 until she resigned on April 25, 2009. Plaintiff developed breast cancer and took leave for her surgery. Defendant classified the leave as temporary disability leave with pay. After her surgery, she underwent radiation treatments during her lunch hours, not missing any work for those treatments. Plaintiff claimed in her lawsuit that she would have preferred the leave to be classified as FMLA leave, and she would have preferred to take intermittent leave for her radiation.

Plaintiff claimed defendant denied her rights under the FMLA because it "failed to meet the statutory requirements for an employer to provide written notice of rights and obligations." Defendant provided information to its employees regarding FMLA leave during new-employee orientation, in its staff handbook, and through its online listing of policies and procedures. However, plaintiff claimed she was not specifically informed of her FMLA rights at the time she requested leave. The court noted that defendant's providing "general notice" regarding FMLA rights did fall short of the FMLA's statutory notice requirement; the regulations also require specific, individual notice of rights when "the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason." However, the court granted summary judgment to defendant because plaintiff failed to show defendant's failure "effectively interfered" with plaintiff's rights because she was able to take paid leave and she returned to her position without diminution in salary. Further, the court rejected plaintiff's argument that defendant interfered with her FMLA rights by failing to provide her notice of her right to take intermittent leave, reasoning that plaintiff's actions — completing the radiation on her lunch hours — proved that the treatments did not render her incapacitated, or "unable to perform the functions of the position."

Further, plaintiff's having to intermittently utilize lunch hours to attend medical appointments was not a sufficient "concrete injury" to sustain an FMLA claim.

Summarized Elsewhere:

Armfield v. Key Plastics, LLC, 2011 WL 3022253 (N.D. Ind. July 22, 2011)

3. Designation Notice [Renumbered and Amended Heading Title (Formerly IV.D.1, "Designation")]

James v. James Marine, Inc., 2011 WL 3417102 (W.D. Ky. Aug. 4, 2011)

In December 2006, plaintiff had surgery to remove a malignant brain tumor. He subsequently returned to work in February 2007 and worked without incident until January 2008, when he suffered a seizure at work. In March 2008, plaintiff's doctor released him to return to work. In May 2008, plaintiff experienced and sought medical treatment for back pain. Although plaintiff's doctor released him to return to work two business days later, defendant required plaintiff to have a complete physical with its medical provider before allowing him to return work. During this physical, defendant's medical provider learned about plaintiff's prior brain surgery and seizure and informed plaintiff he would not be released to return to work until he could be certified as seizure-free for six months. Although plaintiff provided two letters from his doctor, dated August 4, 2008, and August, 30, 2008, defendant's health provider concluded that the notes did not satisfy the certification requirement and did not allow him to return to work. Plaintiff remained in contact with his supervisors and on several occasions unsuccessfully attempted to contact defendant's human resources personnel.

In December 2008, when plaintiff inquired about his year-end bonus, he was told that his employment had been terminated effective August 7, 2008, when his FMLA leave had expired. Plaintiff commenced an action alleging, among other things, that defendant had failed to provide him with notice that his leave had been designated as FMLA leave as required by the FMLA.

Both plaintiff and defendant filed cross-motions for summary judgment. The court granted defendant's motion for summary judgment with respect to plaintiff's lack of notice claim. The court held that putting aside whether it had been proper for defendant to place plaintiff on FMLA leave, defendant's failure to provide him with notice that his leave had been designated as leave under the FMLA had not interfered with plaintiff's rights. The court noted that defendant had provided plaintiff with 12 weeks of FMLA leave and that, while plaintiff had asserted that he was healthy enough to return to work and that his seizure history did not constitute a "direct threat," notice that he was on FMLA leave would not have changed his situation because the evidence established that defendant still considered him a direct threat and unable to return to work long after his 12-week FMLA period had expired.

The court found a question of fact precluded summary judgment as to whether plaintiff had a right to be restored to his position with defendant because it was unclear whether plaintiff was returning from an FMLA leave in May 2008. Although defendant had prepared documentation indicating that plaintiff's FMLA leave had commenced in May 2008, plaintiff

had only been absent for work for two days and it was unclear if he had notified defendant he was taking FMLA leave for those absences.

Stone v. St. Vincent Hospital and Healthcare Center, 2011 WL 5593683 (S.D. Ind. Nov. 17, 2011)

The employee took leave to care for her daughter who had a serious health condition. She was discharged when she did not return to work after twelve weeks' leave. The employer moved to dismiss under Rule 12(c). The court declined to dismiss the interference claim because defendant had not given plaintiff any notice that it considered her leave to fall under the FMLA, or any notice that if she did not return to work after a twelve week leave, her employment would be terminated. This lack of notice plausibly prejudiced plaintiff. Had she known that her employment was in jeopardy, she might have made arrangements for outside help to care for her daughter and returned to work at the end of the twelve weeks.

The retaliation claim, however, was dismissed. Since she was not eligible for leave at the time of her discharge, plaintiff was no longer engaging in a protected activity and retaliation could not be established.

Summarized Elsewhere:

McCalla v. Avmed, Inc., 2011 WL 3918538 (S.D. Fla. Sept. 6, 2011)

V. MEDICAL CERTIFICATION AND OTHER VERIFICATION

- A. Initial Certification [Renumbered Heading (Formerly V.B.)]

- B. Content of Medical Certification [Renumbered Heading (Formerly V.A.)]

Fischbach v. City of Toledo, 798 F. Supp. 2d 888 (N.D. Ohio 2011)

In February and March 2006, plaintiff requested four days of FMLA leave to care for his son. These requests were denied. Plaintiff again took leave on March 20 through 22, 2006, and April 5, 2006, and again requested FMLA leave based on a doctor's diagnosis that he had suffered an acute stress reaction. His employer denied his requests for leave, and as a result, plaintiff was discharged for exceeding his permitted sick leave time. As plaintiff was a member of a union, his termination was subject to a grievance proceeding, which resulted in an arbitrator ruling that he be reinstated with back pay, seniority, and retroactive benefits. The arbitrator reduced plaintiff's back pay by eight weeks, reasoning that given his prior need for leaves to deal with recurring problems, it could not be fairly assumed that he would have been continuously available to work after his termination. Plaintiff contended his employer interfered with his FMLA rights by discharging him and retaliated against him for seeking his FMLA rights after he was reinstated.

The court denied defendant's motion for summary judgment on the interference claim, finding among other things that the certification from plaintiff's doctor that he was suffering from an acute stress reaction was sufficient to create a genuine issue of material fact as to whether he had a serious medical condition. Under the FMLA, a doctor's certification of a serious health condition is sufficient if it states the date on which the condition began, the probable duration, the appropriate medical facts within the provider's knowledge, and a statement that the employee is unable to perform his job duties. This establishes a presumption of validity if signed by the provider, though an employer may overcome this presumption by showing that the certification is invalid or inauthentic. As the certification here met all of the requirements for the presumption, and the employer had presented no evidence of invalidity, nor informed plaintiff of any alleged deficiencies in the certification, it was sufficient to survive summary judgment. Further, there was sufficient evidence that defendant had denied plaintiff FMLA benefits to which he was entitled, and that he was prejudiced thereby because his employment may not have been terminated had he been granted the leave he requested.

The court granted defendant's summary judgment motion as to the retaliation claim, finding that plaintiff had failed to provide sufficient evidence of an adverse effect. Although defendant had filed an allegedly "groundless" challenge to the arbitrator's award, which resulted in a delay in plaintiff's reinstatement, this did not constitute adverse action because a delay in promotion is not actionable, and there was no evidence that the challenge was in fact groundless. Further, although plaintiff had applied for a promotion and defendant had delayed filling the position, he had not actually been denied the promotion as the position remained open. Plaintiff's remaining allegations of retaliation, based on grievances he had filed since he had been reinstated (relating to "false charges" against him, being passed over for overtime, and denial of funeral leave), were insufficient to show an adverse employment action because the grievances had not yet been finally decided.

Greer v. Cleveland Clinic Health System East Region, 2011 WL 590223 (N.D. Ohio Feb. 10, 2011)

Plaintiff was discharged for attendance issues. He alleged that his employer interfered with his FMLA leave by failing to notify him of his FMLA approval and denying his request for intermittent leave despite a certification from his doctor. The employee also alleged that his employer retaliated against him for taking FMLA leave by imposing disciplinary action and terminating his employment. Both parties moved for summary judgment on these claims.

With respect to the failure to notify plaintiff of his FMLA approval, the employer argued, and the court agreed, that even if the employee had known of the approval, it would not have permitted him to take leave for a condition to which the medical certification did not extend. Because the employee made no claim that the employer interfered with his right to take FMLA for the condition that was approved, his FMLA interference claim failed. As to the employee's claim that the employer denied his request for intermittent leave, the court found that the employee presented no evidence that his doctor certified him for intermittent leave. Because the employee was not certified for intermittent leave, the employer's denial of such leave was not interference. The court granted summary judgment on the issue of FMLA interference to the employer.

The district court held that on the issue of FMLA retaliation, the only causation evidence the employee provided was temporal proximity, which is not enough in the Sixth Circuit to establish a causal connection between a protected activity and an adverse employment action. However, the district court reasoned that even if the temporal proximity raised a triable issue, the employee's retaliation claim still failed because his mere conclusory allegations or temporal proximity were not sufficient to rebut the employer's legitimate, non-discriminatory reason for the termination, his attendance policy violations. Therefore, the district court granted summary judgment to the employer on the issue of FMLA retaliation.

***Herco v. Southeastern Pennsylvania Transportation Authority*, 2011 WL 294493 (E.D. Pa. Jan. 25, 2011)**

Employee sought intermittent leave to care for his mother, who had a serious health condition. The certification from his mother's health care provider was incomplete, failing to state the anticipated duration of her disease flare-ups each month. Rather than communicate with the employee or the physician about the missing information, the employer's third party administrator designated the duration of leave not to exceed one day per month. The administrator informed plaintiff in writing that his leave had been approved and also that his leave was limited to one day per month. However, plaintiff did not read the entire notice and was unaware of the one-day per month limitation. From April 1, 2009 through April 26, 2009, the employee took leave from work to care for his mother, believing his leave had been approved. He was fired when he failed to return to work after his one approved day of leave. The employee challenged his dismissal and sued his employer for interference with his FMLA rights and retaliation.

The district court denied the employer's motion for summary judgment. The certification contained both incomplete entries and vague responses, and was therefore "incomplete" under FMLA, the court said. Regulations require an employer to notify an employee if the certification is incomplete and to provide additional time for supplementation, the court said, citing 29 C.F.R. § 825.305(c). This employer did not do so, and thus violated the regulations. Such a violation, the court said, constituted interference with FMLA rights. The court declined to find that the employee asserted a retaliation claim based on these same allegations, explaining that retaliation claims are distinct from interference claims. Because the complaint was devoid of any mention of retaliation, plaintiff could not raise a retaliation claim in his opposition to defendant's motion for summary judgment.

***Lewis v. United States*, 641 F.3d 1174 (9th Cir. 2011)**

After plaintiff requested FMLA leave, defendant required her to submit a medical certification. Plaintiff submitted the partially completed form, along with a prescription from her psychiatrist and a letter from her medical doctor. However, none of these documents provided a summary of the medical facts underlying plaintiff's diagnosis; therefore, defendant informed plaintiff that her documentation was insufficient. Plaintiff refused to submit additional information based on her doctor's assertion that the submitted documents fulfilled FMLA requirements. Based on plaintiff's refusal, defendant classified plaintiff's leave as unauthorized and terminated her employment.

After exhausting her administrative remedies, plaintiff ultimately appealed the Merit Systems Protection Board's ("MSPB") decision to the Ninth Circuit on the grounds that defendant: 1) failed to give her adequate time to provide medical certification of her serious health condition; 2) improperly disqualified her from FMLA leave; 3) unlawfully requested more documentation regarding her condition than was mandated under the FMLA; and 4) incorrectly classified her absence as AWOL instead of as FMLA-qualified leave, and that all of these actions were based on discriminatory and retaliatory motives in violation of the FMLA.

The Ninth Circuit affirmed, reasoning that the district court's decisions were supported by substantial evidence. Specifically, plaintiff failed to show she was suffering from a serious health condition since her medical documentation did not meet the minimum statutory requirements because neither plaintiff's certification nor her doctor's letters contained a statement of "the appropriate medical facts within the healthcare provider's knowledge" to support the FMLA claim. The court further held that the need for second or third opinions is triggered only when an employer has reason to doubt the *validity* of the certification, not the *sufficiency* of the information provided.

Lastly, the court held that defendant's request for more documentation of plaintiff's alleged serious health condition than the FMLA required was harmless error here. Since plaintiff failed to submit the minimal mandated medical certification required by law, the court reasoned that plaintiff could not show any harm arising from defendant's request for more information than required under the FMLA. Accordingly, the court concluded that defendant acted within its discretion in terminating plaintiff's employment.

Probasco v. Department of the Air Force, 413 Fed.Appx. 263 (Fed. Cir. 2011)

Plaintiff was employed as an aircraft mechanical parts repairer by the U.S. Air Force. Plaintiff requested FMLA leave and completed an FMLA form. A supervisor called the physician's assistant ("PA") who purportedly signed the FMLA form because of the similarities between the PA's signature and plaintiff's. The PA denied signing the form and plaintiff was discharged.

Plaintiff argued that the Air Force violated Office of Personnel Management regulations when it denied his leave and when it contacted the PA without his permission. As an initial matter, defendant never denied plaintiff's leave; thus, plaintiff's first claim had no merit. Regarding defendant's verification of the signature, the administrative law judge ruled, and the Federal Circuit agreed, that while regulations prevented the agency from contacting the healthcare provider without plaintiff's permission to verify the validity of the medical condition, nothing prohibited the agency from verifying the validity of the underlying leave form. Accordingly, the Federal Circuit affirmed the administrative decision denying plaintiff's FMLA claims.

Summarized Elsewhere:

Beem v. Providence Health & Services, 2011 WL 4852301 (E.D. Wash. Oct. 13, 2011)

Weeks v. Oshkosh Truck Corp., 2011 WL 5877105 (E.D. Wis. Nov. 23, 2011)

C. Second and Third Opinions

Harnan v. University of St. Thomas, 776 F. Supp. 2d 938 (D. Minn. Mar. 8, 2011)

The court denied defendant's motion for summary judgment on plaintiff's interference and retaliation claims under the FMLA because defendant failed to request a third medical certification to confirm the second opinion that plaintiff was able to immediately return to work. Accordingly, the court held that a genuine issue of fact existed as to whether plaintiff was entitled to an FMLA benefit denied to her and, therefore, whether plaintiff was exercising FMLA rights when she was discharged, a necessary element of plaintiff's retaliation and interference claims.

Weeks v. Oshkosh Truck Corp., 2011 WL 5877105 (E.D. Wis. Nov. 23, 2011)

Plaintiff was disciplined and discharged after numerous late-appearances and absences that she attributed to primary hypersomnia, a chronic condition characterized by frequent oversleeping and an inability to wake up normally. The employee requested that the absences be considered FMLA leave. After a protracted certification process, including clarification and second and third opinions from health care providers, the employer denied the FMLA leave request. Plaintiff filed suit under the FMLA and defendants filed a motion for summary judgment.

The court denied defendants' motion. The court held that defendants improperly denied FMLA leave for plaintiff's diagnosis tests to determine whether she had a serious health condition. They also made improper "clarification" inquiries to plaintiff's health care provider by asking impermissible questions and by not giving plaintiff a reasonable opportunity to cure the claimed deficiency. Defendants asserted that they properly denied plaintiff's leave because the third certification established that her absences were not caused by a serious health condition. The court held that defendants had a right to obtain a second certification because they had reason to doubt the validity of the first one. They also had a right to obtain a third certification because the first two were in conflict. The third certification, however, did not request the information on the DOL medical certification form, and did not state an opinion concerning plaintiff's serious health condition. The third certification stated that plaintiff was not disabled but, as the court observed, "saying she was not disabled is not the same as saying that she did not have a medical condition that intermittently prevented her from coming to work." The certification indicated that plaintiff would require some absences, so summary judgment was denied.

Additionally, defendants claimed that plaintiff had other non-FMLA absences that provided an independent justification for her discharge. The court held, however, that these absences might not have justified discharge under their policies if plaintiff had not been on probation. Since the probation was at least partly based on defendants' prior mishandling of plaintiff's FMLA leave, the court held that a jury might conclude that her efforts to exercise her rights were a factor in her discharge and denied summary judgment.

- D. Recertification
- E. Fitness-for-Duty Certification

Summarized Elsewhere:

Chaney v. Providence Health Care, 2011 WL 6354648 (Wash. Ct. App. Dec. 20, 2011)

Matejik v. State, 2011 WL 3586126 (N.J. Super. App. Ct. Aug. 17, 2011).

- F. Certification of Continuation of Serious Health Condition
- G. Certification Related to Military Family Leave [New Topic]
 - 1. Certification of Qualifying Exigency [New Topic]
 - 2. Certification for Military Caregiver Leave [New Topic]
- H. Other Verifications and Notices [Renumbered Heading (Formerly V.G.)]
 - 1. Documentation of Family Relationships [Renumbered Heading (Formerly V.G.1)]
 - 2. Notice of Employee's Intent to Return to Work [Renumber Heading (Formerly V.G.2)]
- I. Consequences of Failure to Comply With or Utilize the Certification or Fitness-for-Duty Procedures [Renumbered and Amended Heading Title (Formerly V.H, "Consequences of Failure to Comply With or Utilize the Medical Certification or Fitness-for-Duty Procedures")]
 - 1. Employee [Renumbered Heading (Formerly V.H.1)]

Blakley v. Schlumberger Technology Corp., 2011 WL 3503318 (8th Cir. Aug. 11, 2011)

Plaintiff claimed defendant interfered with her FMLA rights and retaliated against her for exercising her FMLA rights. Plaintiff went out on leave on October 25, 2007, providing a doctor's note excusing her from work from then until January 2, 2008. While out on leave, plaintiff notified defendant that she intended to take parental leave beginning January 3, 2008. Defendant requested medical certification for plaintiff's requested leave but neither plaintiff nor her doctor ever submitted it. Defendant then eliminated plaintiff's position and discharged her after determining that other employees and a third-party contractor could absorb plaintiff's duties.

The court granted the employer's motion for summary judgment on plaintiff's FMLA interference and retaliation claims, concluding that plaintiff could not show that she was entitled

to FMLA benefits because she never provided medical certification. Alternatively, the court held that defendant had a legitimate reason for discharging plaintiff, the elimination of her position.

The Eighth Circuit affirmed the district court's grant of summary judgment in favor of defendant. On appeal, plaintiff attempted to create a factual dispute as to whether she provided the requested medical certification, but she failed to challenge the district court's alternative conclusion that defendant discharged plaintiff for a reason not related to her leave of absence.

Robert v. Bd. of County Comm'rs of Brown County, Kansas, 2011 WL 836729 (D. Kan. Mar. 3, 2011)

Plaintiff alleged that defendants terminated her employment in retaliation for her exercise of her FMLA rights. The court assumed, without deciding, that plaintiff established a *prima facie* case based on defendants' providing different reasons for plaintiff's discharge. Defendants' initial stated reason for the discharge was plaintiff's inability to return to work at 100% performance and defendants' desire not to set a precedent of allowing employees to take unpaid leave in excess of twelve weeks. Defendants later stated that plaintiff was discharged for her failure to return to work with the requisite certification before her FMLA-covered leave expired.

The court found that FMLA regulations and case law thereunder consistently allow an employer to discharge an employee who has notice of a uniformly applied release-to-work policy but fails to provide such release before her FMLA leave expires. The court rejected plaintiff's argument that defendants must also show that they informed plaintiff she would be discharged if she did not provide the requisite certification. The court concluded that because defendants provided plaintiff notice of a uniformly applied policy and plaintiff failed to comply with that policy, defendants' termination of plaintiff's employment for violating that policy was a legitimate, nondiscriminatory reason.

Plaintiff's tried to prove pretext by arguing that defendants offered inconsistent reasons for her discharge. The court found that where there are multiple decision makers, multiple reasons for a termination that are neither inconsistent nor contradictory, as was the case in plaintiff's situation, do not raise a factual question of pretext. Plaintiff also argued pretext existed because an individual defendant told her that her employer fired plaintiff because it did not want other workers to expect to be able to take unpaid leave in excess of FMLA leave, yet another employee was permitted to exceed her FMLA leave, as was plaintiff during a previous year. The court found this evidence was insufficient to overcome defendants' motion for summary judgment, explaining, "[t]he fundamental problem with Plaintiff's claim is that the law governing FMLA retaliation claims, unlike the law governing other retaliation claims, specifically allows an employer to terminate an employee for engaging in protected activity ... so long as certain requirements are satisfied." Because the employer uniformly applied its policy requiring a release to return to work, of which plaintiff had notice and by which she failed to abide, plaintiff's FMLA retaliation claim failed and defendants were granted summary judgment.

Summarized Elsewhere:

Dooley v. United Industries Corp, 2011 WL 3759731 (S.D. Ill. Aug. 24, 2011)

Lewis v. United States, 641 F.3d 1174 (9th Cir. 2011)

Mason v. Potter, 2011 WL 3154907 (S.D. Ind. July 26, 2011)

O’Keefe v. Charter Communications, LLC, 2011 WL 2457658 (E.D. Mo. June 16, 2011)

Pantoja v. Monterey Mushrooms, Inc., 2011 WL4737407 (C.D. Ill. Oct. 6, 2011)

Probasco v. Department of the Air Force, 413 Fed.Appx. 263 (Fed. Cir.)

Rivera v. Rochester Genesee Reg’l Transp. Auth., 761 F. Supp.2d 54 (W.D.N.Y. 2011)

2. Employer [Renumbered Heading (Formerly V.H.2)]

Chaney v. Providence Health Care, 2011 WL 6354648 (Wash. Ct. App. Dec. 20, 2011)

Plaintiff, an interventional radiologic technologist, took extensive leaves of absence to care for his wife who was ill. Later, he was temporarily suspended after he received two written warnings for failing to show up for an on-call procedure and appearing unfit for duty. As a condition of his return to work, his employer required a medical release from his doctor. Plaintiff’s personal physician provided a full release. Following his return, the employee showed numerous signs of fatigue and possible drug use. Plaintiff tested positive for methadone, which he was prescribed for chronic back pain. The employer asked that plaintiff undergo a fitness-for-duty evaluation with a physician retained by the company. The evaluation revealed that plaintiff had a long history of chronic back pain and anxiety, and that he was taking numerous medications which could adversely affect his concentration and decision making abilities. The retained physician provided a limited release returning plaintiff to work as a general x-ray technician. The employer asked plaintiff to sign a full release of his medical records so that it could gather more information to better understand the doctor’s restriction. Plaintiff refused, and was issued a letter stating, among other things, that he must obtain a release to return to full duties as an interventional radiologic technician by the time his leave expired or his position would not be held. Plaintiff’s personal physician completed the certification and stated that plaintiff could return to work “as soon as Employer allows.” The employer did not ask the physician for clarification, and subsequently terminated plaintiff’s employment, citing the retained physician’s opinion as grounds therefore.

Plaintiff filed suit alleging wrongful discharge in violation of public policy and violation of the FMLA. At trial on the issue of liability, the jury returned a verdict in favor of the employer. Plaintiff appealed on the grounds that the trial court should have granted his judgment as a matter of law. Essentially, plaintiff argued that his employer had an obligation under the FMLA to return him to work following receipt of his personal physician’s certification clearing him to return to work. The employer argued it was entitled to rely on the retained physician’s report. Alternatively, it argued that the personal physician’s return-to-work authorization was

qualified by the words “as soon as the Employer allows,” and pointed back to the conflicting opinion issued by its retained physician.

The court found in favor of plaintiff, and held that he was entitled to be restored to his position based on his personal physician’s certification. It noted that “once an employee submits a statement from [his] health care provider which indicates that [he] may return to work, the employer’s duty to reinstate [him] has been triggered under the FMLA.” *Brumbalough v. Camelot Care Ctrs., Inc.*, 427 F.3d 996, 1004 (6th Cir. 2005). Further, it clarified that the employer may not request additional information, but may only seek clarification for the serious health condition for which FMLA was taken. It also reasoned that the “Secretary of Labor did not intend to make an employee’s job security subject to the nuances of the language in a doctor’s note.” Also of note, the court explained that “the FMLA protects the employee’s medical privacy by having the employer deal with the employee’s own health care provider first.”

Summarized Elsewhere:

***Weeks v. Oshkosh Truck Corp.*, 2011 WL 5877105 (E.D. Wis. Nov. 23, 2011)**

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

2. Types of Leave

a. Paid Vacation and Personal Leave

b. Paid Sick or Medical Leave

In re Tp. of Parsippany-Troy Hills, 17 A.3d 834 (N.J. Super. App. Ct. 2011)

In *Tp. of Parsippany-Troy Hills*, an employee of the Township wanted to use paid sick leave rather than unpaid family FMLA leave when taking time off from work to care for a sick relative. The employee told the Township that he did not wish to take FMLA leave, but the Township nonetheless sought to require the employee to complete the FMLA medical certification. The employee's union filed an unfair practice charge with the New Jersey Public Employment Relations Commission (PERC), claiming that the Township could not require the employee to fill out an FMLA form if the employee chose not to use FMLA leave.

The New Jersey PERC decided that the Township had neither a statutory nor a managerial right to require employees to complete an FMLA medical certification if they decline FMLA leave. The Township appealed to the New Jersey Superior court, which affirmed the PERC decision. The court held that the FMLA medical provider form, clearly intended for FMLA leave, could not be required when an employee requested extended sick leave, not FMLA leave. However, the court pointed out that employer had a managerial prerogative to require sick leave verification pursuant to its established policy.

c. Paid Family Leave

d. Workers' Compensation or Temporary Disability Benefits

e. Compensatory Time

C. Limits on the Employer's Right to Require Substitution of Paid Leave [New Topic]

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

Cooper v. Smithfield Packing, Inc., 2011 WL 3207912 (E.D.N.C. July 27, 2011)

Plaintiff brought a *pro se* lawsuit alleging defendant terminated his health insurance while he was on FMLA leave. The matter came before the district court on defendant's motion to dismiss. The court found that the allegations in the complaint, taken together and construed liberally in deference to plaintiff's *pro se* status, suggested plaintiff's group health insurance was terminated while he was out on FMLA leave. The court found this suggestion was sufficient to state a claim under the FMLA.

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

Lampley v. IMS Management Services, LLC, 421 Fed. Appx. 932 (11th Cir. 2011)

Plaintiff worked as a maintenance technician. While on FMLA leave, plaintiff's health care policy was cancelled because plaintiff failed to pay his share of the premiums, although defendant continued to pay its share. The court of appeals sustained the district court's summary judgment for the employer since defendant's only obligation was to maintain plaintiff's health care coverage under the same conditions that it would have had plaintiff not been on leave. According to the facts before the court, plaintiff was obligated to pay a share of the premiums, just as defendant.

The court further found that plaintiff was restored to the same and/or equivalent position to the one he occupied prior going on FMLA leave. The restored position had the same title, pay,

and benefits. The only difference was the location. Accordingly, the court of appeals also sustained the district court's judgment on this claim.

- d. "Key Employees"
 - e. Other Circumstances
6. Rules Applicable to Multi-employer Health Plans
- B.** Employer's Right to Recover Costs of Maintaining Group Health Benefits
- 1. When an Employer May Do So
 - 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 [New Topic]

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
3. Equivalent Terms and Conditions of Employment

Barton v. Zimmer, Inc., 662 F.3d 448 (7th Cir. 2011)

Prior to plaintiff's medical leave, his supervisor had removed most of plaintiff's job duties, leaving him with only two short-term projects. While plaintiff was on medical leave, defendant fired his supervisor for poor management and for discriminating against plaintiff on the basis of his age. Upon his return, because of his former supervisor's discriminatory acts, plaintiff did not have any job duties. The new supervisor assigned plaintiff new duties. When the supervisor critiqued his performance in these duties, plaintiff suffered a psychological break. Plaintiff exhausted his remaining FMLA leave and then took both short-term and long-term disability leave. At the end of this period, plaintiff accepted a retirement package from defendant.

On motion for summary judgment, plaintiff and defendant argued only one point – whether defendant had denied plaintiff benefits due to him under the FMLA. Plaintiff argued that defendant had not reinstated him to his prior position. Defendant argued that they assigned plaintiff the same job duties he would have received had he not taken leave. Affirming the district court's grant of summary judgment, the appeals court noted that, throughout the period of his leave and upon his return, plaintiff had maintained his pay, benefits, title, and rank. The court characterized the change in plaintiff's job duties as "inevitable," given the circumstances of his prior supervisor's departure and his lack of job duties upon return. The court held that, based upon the evidence, the change in job duties would have occurred whether or not plaintiff had taken leave.

Breeden v. Novartis Pharmaceuticals Corp., 646 F.3d 43 (D.C. Cir. July 8, 2011)

Plaintiff worked in a sales position for defendant. In November 2004, plaintiff notified defendant that she was pregnant and would need FMLA leave in the spring. Defendant had decided to realign its sales force in September 2004 but did not implement its plan until January 2005. At that time, defendant changed plaintiff's sales territory to hospitals that she considered to be less prestigious. In 2008, defendant created a new sales territory and combined two existing territories, one of which was plaintiff's, to free up funds to staff the newly-created

territory. This restructuring led to plaintiff's position being eliminated in 2008. Plaintiff then filed suit, alleging that defendant interfered with her FMLA rights by failing to return her to a substantially equivalent position after her maternity leave in 2005. Plaintiff also alleged that the 2005 realignment of her accounts was retaliatory and that it caused her discharge in 2008.

The court upheld summary judgment in favor of defendant on the interference claim, finding that plaintiff had the same job title and compensation after the 2005 realignment that she had previously. In addition, she actually performed better and received more substantial salary increases after the realignment. Lastly, her complaint that she had less prestigious hospitals in her new territory did not impact tangible or measurable parts of her job. The court also upheld summary judgment for defendant on the retaliation claim, finding that there was no "continuous succession of events" between the 2005 realignment and the 2008 discharge. Defendant did not decide to discharge plaintiff until after a new manager was hired to oversee the sales force and that manager hired a consultant to recommend changes to the sales structure. The court found that these intervening events, and not the 2005 realignment, led to plaintiff's discharge.

Duchateau v. Camp Dresser & McKee, Inc., 2011 WL 4599837 (S.D. Fla. Oct. 4, 2011)

Plaintiff worked for defendant, an engineering consulting firm as a "project lead" in its Management Consulting Division. Plaintiff had been considered for a project management role in mid-2008 for a "Go Green" project for one of defendant's client. In August 2008, plaintiff announced her intention to take maternity leave in January 2009 – the approximate time "Go Green" would be implemented. Around the same time, plaintiff overheard a manager tell another employee that plaintiff was "irresponsible" for getting pregnant when she was supposed to be managing the "Go Green" project. Plaintiff was not taken off the project, but because of her planned leave, defendant reevaluated its proposed management team. Defendant hired another woman to take plaintiff's place. At that time, defendant determined that plaintiff would work as deputy project manager under the new hire, without any impact on her compensation or benefits. A male employee was assigned to serve as interim deputy project manager while plaintiff was out on leave. The assembled team worked on the project during the fall of 2008, prior to plaintiff's leave. During that time, plaintiff and the project leader disagreed about various aspects of the project. In December 2008, defendant informed plaintiff that she had been removed from the project. After a subsequent, confrontational discussion with others on the project, plaintiff stated that she would never work on another project for that particular client. The project manager considered plaintiff to have resigned from the project.

In January 2009, plaintiff started her maternity leave. At the same time, plaintiff's division experienced a significant decrease in workload. Defendant laid off employees in plaintiff's division, including the interim deputy director of the "Go Green" project. Plaintiff had not been laid off, and she returned to work at the end of her leave. Plaintiff's hours, though, continued to drop in connection with her division's continued decrease in workload. She later received and accepted a job offer from one of defendant's competitors. Defendant and plaintiff thereafter mutually agreed that she would be voluntarily laid off so that she could receive a severance payment.

Plaintiff sued alleging interference with her FMLA rights and retaliation for taking FMLA leave. Defendant moved for summary judgment. Noting that plaintiff conceded that she

had returned to the same position at the conclusion of her leave with a normal workload until the division suffered a slow down overall, the court concluded that her removal from the “Go Green” project was not a change in position, but merely a change in project assignment that had no impact on her compensation, benefits, or terms of employment. As such, defendant, according to the court, did not interfere with plaintiff’s right of reinstatement.

Regarding her retaliation claim, plaintiff argued that defendant retaliated against her by removing her from the “Go Green” project prior to her commencing leave and keeping her off the project after she returned. The court concluded that she established a triable issue of fact as to whether she suffered an adverse employment action and whether a causal connection existed between it and her FMLA leave. Applying the Supreme court’s decision in *Burlington Northern & Santa Fe Railroad Co. v. White*, the court concluded that plaintiff’s removal from the “Go Green” project was an adverse employment action for purposes of her retaliation claim under the FMLA. Further, the court concluded that the temporal proximity between plaintiff’s announcement of her plan to take leave and the decision to remove her from the project – just over a week – creates an inference of causation. The court also found that plaintiff was able to demonstrate a fact dispute over whether defendant’s reason for removing her from the project – that her performance was substandard – was pretext because she introduced evidence that she had performed to expectations on other similar projects, that others expressed a desire to have her on the project, and the other employee’s negative comments upon learning of her pregnancy “reflect[ed]...disapproval of [plaintiff’s] pregnancy.” Consequently, the court granted in part and denied in part defendant’s motion for summary judgment.

Laing v. Federal Express Corporation, 2011 WL 4102155, (W.D.N.C. Sept. 14, 2011)

Plaintiff worked as a courier for defendant for over 20 years. Plaintiff had a disciplinary history, including an overturned discharge for falsifying company documents. In 2008, plaintiff requested leave under the FMLA to treat pneumonia. At first, the station manager denied plaintiff’s request for FMLA leave and requested that she report to work, before reviewing the paperwork plaintiff submitted. After reviewing the paperwork, defendant granted her request. About a month after her request, plaintiff severely injured herself while making a delivery. Plaintiff’s injury required her to attend physical therapy. Plaintiff’s manager requested her to postpone the therapies until they found someone to cover her route. Although plaintiff began attending physical therapy during her lunch time, she did not request leave time for her injury. After four weeks of physical therapy, defendant requested her to discontinue attending therapy during her lunch breaks because it was interfering with her work. After several months, plaintiff requested leave for surgery and defendant granted the leave. Notwithstanding, before she went on leave, two managers made comments regarding her job security. When plaintiff returned to work, her route had far fewer stops than her normal route. On the same day, she was notified that she was placed on paid investigative suspension for falsification of company records. Plaintiff was discharged a few weeks later.

In dismissing plaintiff’s FMLA claim that defendant failed to restore her to her previous position, the court reasoned that plaintiff did not prove that defendant failed to provide plaintiff with the same or equivalent position when she returned to work. Specifically, the court reasoned that plaintiff’s employment history supported defendant’s assertion that plaintiff was reinstated

to a full time position. Additionally, the court took into consideration that plaintiff received full time pay from the day she returned from FMLA until her termination.

The court found that plaintiff's claims based on her pneumonia and physical therapy were time-barred. The FMLA imposes a two year statute of limitations unless it is shown that defendant willfully violated the act. If plaintiff proves willful violation, a three year statute of limitation is imposed. In the case at hand, the court reasoned that, at most, defendant was negligent when it asked plaintiff to return to work before reviewing the medical records, but no evidence was shown that the manager willfully violated plaintiff's FMLA rights. In regards to the physical therapy, the court found that plaintiff did not request leave to attend therapy, and when she was informed that she could not continue attending physical therapy during her lunch time, she did not request an accommodation. In finding that defendant did not willfully violate the FMLA, the court turned to defendant's history of granting plaintiff's requests for leave, both prior to and after the physical therapy situation. Defendant's failure to suggest intermittent FMLA leave to plaintiff did not rise to the level of willful misconduct.

Summarized Elsewhere:

Lampley v. IMS Management Services, LLC, 421 Fed. Appx. 932 (11th Cir. 2011)

III. CIRCUMSTANCES AFFECTING RESTORATION RIGHTS

A. Events Unrelated to the Leave

1. Burden of Proof

Summarized Elsewhere:

Cox v. Wal-Mart Stores Inc., 2011 WL 2632086 (9th Cir. July 6, 2011)

Wellington v. Lane County, 2011 WL 6019216 (9th Cir. Dec. 5, 2011)

2. Layoff

Coon v. Central Washington Hospital, 2011 WL 5025269 (E. D. Wash. Oct. 21, 2011)

Former administrative assistant brought suit alleging defendant interfered with her FMLA rights when it terminated her employment during a reduction in force. Defendant filed a motion for summary judgment and moved to strike the portion of the decision-maker's deposition testimony discussing her treatment of and interactions with several employees who took FMLA leave during their employment with defendant. The district court denied the motion to strike finding that, although evidence of the decision-maker's treatment of others was not admissible as evidence of a pattern of conduct, it was admissible to show intent of a common decision-maker.

The court, however, ultimately granted defendant's motion for summary judgment. As an initial matter, the court rejected defendant's assertion that there was no failure to reinstate

because plaintiff had been reinstated following her leave. Because plaintiff was taking intermittent FMLA leave at the time of her discharge, the court found she was in the posture of an employee seeking to vindicate her right to reinstatement under the FMLA and, as a result, defendant bore the burden of proving there was a legitimate reason to deny reinstatement by laying off plaintiff. The court found, however, that defendant met this burden because undisputed evidence demonstrated plaintiff would not have been reinstated regardless of her intermittent FMLA leave. Specifically, the evidence showed defendant was in financial distress, the decision-maker was resistant to laying off anyone from her department, including plaintiff, and her undisputed rationale for choosing the administrative assistant position was that it would have less of a negative impact than the elimination of any other position in the department.

Gutierrez v. Grant County, 2011 WL 1654548 (E.D. Wash. May 2, 2011)

Plaintiff was laid off while on FMLA leave, allegedly due to budget cuts. The employee brought a claim against the employer for FMLA retaliation and interference, and the employer filed a motion for summary judgment.

With respect to plaintiff's failure to reinstate claim, the employer argued that its budget cuts were a legitimate reason to deny the employee's reinstatement and asserted that her discharge was not related to her leave. The district court, however, found that the employee presented sufficient evidence that would allow a fact-finder to conclude that defendant considered the employee's FMLA leave as a negative factor when eliminating her job. Specifically, the court found that the employer did not provide specific details regarding the justification for plaintiff's discharge and that the evidence regarding the details of the employer's financial state did not clearly support a layoff.

Moreover, the court noted that the elimination of the position occurred during the employee's leave and found that close temporal proximity between protected leave and a decision to eliminate a position may alone be enough to prevent summary judgment. Further, the court noted that the employee was not offered another available position, even though a temporary employee, for which the employer had to pay a fee, was hired. The court found that these factors combined to constitute enough evidence to raise an issue of material fact, precluding summary judgment as to the employee's FMLA interference claim.

The court dismissed plaintiff's retaliation claim, finding that she asserted only an interference claim since the Ninth Circuit limits retaliation claims to those "where an employer is accused of discriminating against an employee for opposing practices made unlawful by the FMLA, or for instituting or participating in FMLA proceedings or inquiries." Because plaintiff did not oppose her discharge until after it her employment ended, the employer could not have retaliated against her for her opposition.

Packard v. Massachusetts, 2011 WL 4549199 (D. Mass. Sept. 28, 2011)

Prior to plaintiff's leave, Defendant Boyce was appointed as Director of Massachusetts Emergency Management Agency ("MEMA"), and he announced that he was re-organizing MEMA. At that same meeting, he thanked plaintiff for her years of services even though she

was merely going on leave. MEMA was re-organized, plaintiff's position was eliminated, and she was discharged because there was no comparable position for her. Plaintiff was the only person who was discharged in the re-organization. Shortly before plaintiff's leave ended, though, MEMA created the position of Associate Director of Technical & Support Services, which entailed 60% of plaintiff's former duties. She did not formally apply for the position, allegedly because Boyce made it clear that she was not returning to MEMA.

Plaintiff alleged MEMA violated her right to be reinstated to a comparable position. The court dismissed this claim noting that there was no comparable position. The court also noted that Boyce had made it clear he was re-organizing the Agency prior to her going on leave and that there was no evidence the re-organization was a pre-text for her discharge.

However, the court found that plaintiff had presented sufficient evidence to call into question whether MEMA's refusal to consider her for the new Associate Director position was retaliation. The court was persuaded by the fact that Boyce had told plaintiff that the re-organization could not await her return, but did not fill the position for months after plaintiff would have returned from leave. In addition, a peer whose position had been eliminated in the reorganization was allowed to take an interim position for several months, whereas plaintiff, who was just months shy of being vested for retirement, was not allowed to do the same. Defendant offered a legitimate, nondiscriminatory reason for plaintiff's discharge, claiming plaintiff did not have the qualifications or experience necessary for the new position. The burden of persuasion then shifted back to plaintiff to establish that this reason was pre-text for discrimination. The court held that plaintiff had satisfied the last stage of the burden shifting analysis, noting that MEMA misjudging plaintiff's qualifications could be probative of pretext.

Winterhalter v. Kykhuis Farms, Inc., 2011 WL 2148524 (W.D. Mich. May 31, 2011)

Plaintiff worked for a pork producer that had multiple farms and herds. Plaintiff performed poorly, but better than two other employees who worked with a certain herd. After plaintiff fell in one of defendant's barns, he needed surgery. He left on approved FMLA leave on October 12, 2009, and returned January 4, 2010. Just before his return, his supervisor called asking when he would return. Defendant fired plaintiff on the day he returned, stating they had downsized the herd and eliminated his position. Defendant also criticized plaintiff's performance.

Plaintiff claimed defendant interfered with his right to reinstatement by firing him. Defendant had the burden of proof to show that plaintiff would have been fired even if he had not been on FMLA. Defendant's reduction of its herd and elimination of staff was due to a long-term financial crisis. With the herd size reduced at the farm where plaintiff worked, two employees were sufficient to complete the work. Plaintiff was paid the highest and the work could be completed adequately by the other two employees at that location. Thus, the court found there was no genuine issue of material as to whether Plaintiff would have been fired if he had not taken leave.

The court also granted summary judgment to defendant on plaintiff's retaliation claim, despite that he established a *prima facie* case of retaliation, because defendant had a documented, legitimate, non-discriminatory reason for his discharge, job elimination in response to a

reduction-in-force, and plaintiff had no reasonable proof that defendant's reason was pretext for discriminatory conduct.

Wolpert v. Abbott Labs., 2011 WL 4073508 (D.N.J. Sept. 12, 2011)

Plaintiff alleged defendant violated her right to reinstatement under the FMLA when it included her in a reduction-in-force ("RIF") and terminated her employment while she was on maternity leave and failed to offer her an equivalent position with the company. Defendant moved for summary judgment, arguing that the employee was not entitled to reinstatement because the evidence established that she would have been included in the RIF regardless of whether she was on leave.

The court noted that under the FMLA, an employee returning from a qualified leave is entitled to resume her former position or an equivalent position with the employer. Under 29 U.S.C. § 2614(a)(3)(B), however, the FMLA does not entitle an employee to a right, benefit or position to which she would not have been entitled had she not taken the FMLA leave. The court rejected plaintiff's argument that defendant needed to prove *both* that: (i) she would have been discharge even if she had not been on the FMLA-covered leave; and (ii) at the conclusion of her leave, it had offered to reinstate her to an equivalent position. The court held that defendant only needed to establish that it would have included plaintiff in the RIF and reasoned that if plaintiff, simply by virtue of being on an FMLA-covered leave, could demand an equivalent position upon returning from that leave, she would receive a benefit that was unavailable to the other employees who had been included in the RIF, which would violate 29 U.S.C. § 2614(a)(3)(B). Accordingly, the court granted defendant summary judgment, finding defendant had met its burden of establishing that it would have included plaintiff in the RIF even if she had not been on leave.

Summarized Elsewhere:

Blakley v. Schlumberger Technology Corp., 2011 WL 3503318 (8th Cir. Aug. 11, 2011)

3. Discharge Due to Performance Issues

Furtado v. Standard Parking Corporation, 2011 WL 5101332 (D. Mass. Oct. 27, 2011)

Plaintiff alleged defendant interfered with the exercise of his rights under the FMLA and retaliated against him for exercising his rights under the FMLA. Plaintiff – who had had an extensive history of disciplinary issues, including incurring exorbitant bills on his employer-provided mobile phone that resulted in a three-day suspension just prior to the events in question – met with a physician, who completed a "Certification of Health Care Provider" form pursuant to the FMLA, which stated that plaintiff's psychological issues prevented him from working and that he would benefit from a three-month leave to receive intensive treatment. Plaintiff showed this form, as well as additional medical documentation, to his supervisor. Upon presentation of the medical documentation, the supervisor suggested that plaintiff take a two-week paid vacation while the supervisor looked into plaintiff's options under the FMLA, and plaintiff followed this

suggestion. While plaintiff was on this vacation, his supervisors discovered that plaintiff had once again incurred exorbitant charges on his employer-provided mobile phone, including during prior periods of suspension. As a result, plaintiff was discharged during his two-week vacation.

Defendant moved for summary judgment on all plaintiff's claims, which the court granted. On plaintiff's FMLA interference claim, the court held that the parties disputed only whether defendant could have discharged plaintiff even though he was on leave at the time. The court further held that plaintiff had failed to raise a genuine issue of material fact as to the causal relationship between his request for leave and his subsequent discharge, despite plaintiff's speculation that his dismissal was due to his request for FMLA leave.

On plaintiff's FMLA retaliation claim, the court noted that the employer had already taken an adverse employment action – the three-day suspension – against plaintiff before he had ever asked for leave. As a result, the court held plaintiff failed to establish that his employer's decision to terminate his employment was made because he sought protection under the FMLA.

Harris v. HIP Administrators of Fla., Inc., 2011 WL 1103753 (S.D. Fla. Mar. 24, 2011)

Plaintiff was placed on a performance improvement plan which required her to meet a sales goal in order to keep her job. On the last day of the plan period, plaintiff left work early, visited her doctor, and notified defendant that she would be taking an FMLA leave. Defendant discharged plaintiff shortly thereafter because her sales report showed her achievement of 98 sales fell short of the 111 sales required under the plan.

Plaintiff filed suit, claiming her discharge while on FMLA leave interfered with her rights under the FMLA, and that she was entitled to reinstatement to her position and a reasonable amount of time to complete her performance improvement plan. Plaintiff relied on 29 C.F.R. § 825.215(b), which provides: "If an employee is no longer qualified for a position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work." The court found that plaintiff was discharged because she failed to make a certain number of sales within a certain time period, after receiving several warnings, and not because she was purportedly unqualified due to lack of training or licensure. Thus, her interference claim failed. For the same reasons, the court found that defendant had a legitimate, nondiscriminatory reason for discharging plaintiff. Consequently, plaintiff's retaliation claim failed as well. Accordingly, the court entered summary judgment for defendant.

Pearson v. Unification Theological Seminary, 785 F. Supp. 2d 141 (S.D.N.Y. 2011)

Plaintiff, suffering from bipolar disorder, brought an FMLA retaliation claim against her employer. The employer claimed plaintiff had been terminated after disruptive behavior, property damage, and threats of harm addressed to her supervisor after building security called the police and emergency services on plaintiff, which transported plaintiff to a hospital for 72 hours of observation. Plaintiff argued they fired her after her hospitalization for bipolar disorder, which qualified her for FMLA leave. Defendant moved for summary judgment.

The court ruled that either a retaliation or an interference theory, plaintiff could not raise an issue of material fact. Assuming that Pearson's stay at the hospital constituted FMLA leave, the court found plaintiff would have been terminated regardless of that leave and the employer was not liable for "interfering" with plaintiff's FMLA leave. Further, the court found that even if plaintiff could make out a *prima facie* case of retaliation, she did not provide any evidence a reasonable fact finder could use to conclude that the employer's explanation for discharging her was pretext.

4. Other

Eason v. Berrien County School District, 2011 WL 901083 (M.D. Ga. Mar. 14, 2011)

Plaintiff was employed by the Berrien County School District as an assistant manager of the high school cafeteria. In early 2008, Ms. Eason requested and was granted a six week leave under the Family Medical Leave Act ("FMLA") in order to undergo surgery. When she returned from her leave on April 21, 2008, she was informed that she was being demoted from assistant manager to cook. Plaintiff brought both interference and retaliation claims against defendant, alleging it had violated her FMLA rights by failing to restore her to the same or equivalent position after taking an FMLA leave.

Defendant moved for summary judgment and the court granted the motion. In support of its motion defendant produced evidence that while plaintiff was out on leave, others had discovered that she had failed to properly perform the inventory duties of an assistant manager on numerous occasions. Additionally, plaintiff had been warned about certain problems with her work performance before she went out on leave, and plaintiff admitted these deficiencies.

The district court explained that the right of an employee to be reinstated to the same or an equivalent position after taking FMLA leave is not an absolute right. Rather, an employer can deny reinstatement to the same position if it can demonstrate that it would have taken the same action had the employee not been on FMLA leave. Following Eleventh Circuit precedent, the district court explained that even where there have been no reported problems with an employee's work performance before going out on a protected leave and such problems come to light only after the employee is on leave, an employer is still within its rights to discharge and/or demote an employee. Thus, the court held that the fact that the employer did not discover the full extent of the inventory problems until plaintiff was on leave did not alter the court's analysis, and it granted defendant summary judgment.

Rodriguez v. Univ. of Miami, 2011 WL 3651224 (S.D. Fla. Aug. 19, 2011)

Plaintiff alleged defendant interfered with her rights under the FMLA and retaliated against her for exercising her rights. Specifically, plaintiff alleged she was demoted and then fired for taking FMLA leave. The court held that both claims failed because plaintiff failed to show that she was denied reinstatement and discharged because she took leave under the FMLA.

As to the interference claim, the court noted that the right to reinstatement is not absolute. If an employee would have been demoted or fired even if she had not taken FMLA leave, she is not entitled to maintain her pre-leave position. The evidence demonstrated that plaintiff had experienced friction with her supervisor and work performance problems before taking FMLA leave. The court found that because of plaintiff's record of poor work performance pre-dating her leave, plaintiff would not have been entitled to retain her job had she not taken leave. Accordingly, the court entered summary judgment for defendant dismissing the interference claim.

As to the retaliation claim, the court found no evidence of a causal link between plaintiff's FMLA leave and the adverse employment action. The only connection between plaintiff's FMLA leave from October 2009 to January 4, 2010, and her separation from employment on February 15, 2010, was the temporal proximity between the two. The court held, however, that close proximity in time between the protected activity and the adverse employment decision does not, standing alone, establish a causal connection. The court found that even if there were a causal connection, defendant had a legitimate reason for its actions: prior to plaintiff's FMLA leave there was a long history of friction with her supervisor. Even if a jury believed all of plaintiff's factual evidence, the facts did not support any inference that defendant discharged plaintiff because she took FMLA leave. Accordingly, the court entered summary judgment for defendant.

Summarized Elsewhere:

James v. James Marine, Inc., 2011 WL 3417102 (W.D. Ky. Aug. 4, 2011)

Partridge v. City of Cincinnati, 2011 WL 5878388 (S.D. Ohio Nov. 23, 2011)

B. No-Fault Attendance Policies

Bell v. Dallas County, 2011 WL 2672224 (5th Cir. July 8, 2011)

A disease intervention specialist who suffered from allergic rhinitis and ceruminosis (excessive earwax secretions) was frequently absent from work before he became eligible for FMLA. He was repeatedly warned about these excessive absences. After he became eligible for FMLA, the Dallas County Department of Health and Human Services granted him intermittent leave. Thereafter, the employee continued to miss multiple work days. His employer warned that if it continued, he would be placed on full-time FMLA unless his physician approved his return to work on a full-time basis. His physician did so. However, the employee's absences continued. His employer then notified him he had been placed on full-time leave. He responded in a letter that he did not request to use his FMLA leave and that he had no "need to exhaust" his FMLA leave "at this time." In reply, his employer informed him that all future absences would then be treated as unexcused and would result in disciplinary action. Shortly thereafter, he missed five days of work and was discharged for violating the attendance policy.

Both parties moved for summary judgment on plaintiff's FMLA claims. Defendant argued that plaintiff had failed to properly raise an interference claim. The district court only

discussed plaintiff's FMLA retaliation claim, but granted defendant summary judgment on all "claims." The Fifth Circuit affirmed the decision on the retaliation claim, reasoning that plaintiff was not fired because he sought or used FMLA leave; instead, he was discharged for violating the attendance policy. However, because the district court did not squarely rule on plaintiff's alleged interference claim, that issue was remanded.

Summarized Elsewhere:

Anderson v. Nissan North America, Inc., 2011 WL 4625647 (S.D. Miss. Sept. 30, 2011)

C. Employee Actions Related to the Leave

1. Other Employment

Edward v. San's West, Inc., 2011 WL 3957531 (D. Utah Sept. 7, 2011)

In February of 2008, plaintiff was granted a medical leave pursuant to the FMLA for persistent problems with his back. Mr. Edwards had taken FMLA leave from Sam's Club on five previous occasions, three times in 2005 and twice in 2006. Before going on leave, he signed a 2008 Leave of Absence Request attesting that he fully understood defendant's "Leave of Absence Policy."

In addition to working for defendant, plaintiff also maintained part-time self-employment where he provided tax return and accounting services and assisted individuals in obtaining mortgages. When defendant learned that plaintiff was engaged in outside employment while on his 2008 FMLA leave, it launched an investigation. Plaintiff admitted he had been working on an outside business and his employment was then terminated. Plaintiff brought a lawsuit alleging violations of the FMLA for wrongful interference with his FMLA rights and for defendant's wrongful failure to reinstate him following his leave.

Defendant moved to dismiss plaintiff's FMLA claims on a motion for summary judgment and the court granted that motion. Plaintiff made two arguments in opposition to that motion. First, he claimed he had not been physically given defendant's full policy containing the provision prohibiting other employment during leave when he went out on his 2008 medical leave. Second, he maintained that his employer had not previously penalized him for working at another part-time job while out on his previous FMLA leaves of absence. In addressing these two arguments the district court held first that the FMLA did not contain a specific requirement that an employer print out and hand over to an employee its full written leave of absence policy if it made clear to the employee that the full policy could be obtained through the Company's intranet and employees were trained on how to use that system. Second, the court found that the reason his employer had not previously enforced the "no outside work" rule against plaintiff during his previous leaves was because it was unaware of his other employment until his most recent leave.

2. Other Activities During the Leave

Campbell v. Verizon Virginia, Inc., 2011 WL 4073143 (E.D. Va. Sept. 13, 2011)

After approximately ten years of employment, plaintiff began to gamble. Soon thereafter, plaintiff began to suffer from severe depression, migraines, and stress-related anxiety. He applied and was approved for intermittent leave from work. The approval document did not contain any explicit limitations on how plaintiff was to spend his time during intermittent leave periods. In August 2009, plaintiff invoked his intermittent FMLA leave, stayed at Caesars Atlantic City Hotel & Casino for three days, and spent at least some of that time gambling. The company discharged him when it learned that he was gambling at a time during which he had invoked his pre-approved FMLA leave.

The court held that the temporal proximity in time between the two events -- plaintiff was discharged just days after he returned from FMLA leave -- was sufficient to establish a causal link for purposes of establishing a *prima facie* case.

However, the court granted the company's motion for summary judgment, holding that "neither the FMLA, nor common sense, can authorize an employee to ... enjoy what amounts to a vacation while telling his employer that he is sick and incapacitated." In doing so it rejected plaintiff's argument that the company could not prohibit his use of FMLA leave to gamble because it had placed no restriction on what plaintiff could or could not do during his leave. The court found that plaintiff's argument ignored the "obvious, inherent limitation that the absence in question must relate from the *approved FMLA purpose* -- in this case, to address medical or mental conditions, such as migraine headaches, severe depression, and anxiety." The court further held that "taking time off to enjoy a mini-vacation gambling is not conceivably within the bounds of FMLA leave" and that it was within the company's right to guard against such abuse.

Pelegriano v. Communications Workers of America, AFL-CIO, CLC, 2011 WL 1930607 (W.D. Pa. May 19, 2011)

Plaintiff brought an FMLA interference claim against her employer. Plaintiff travelled to Cancun Mexico during her FMLA leave for recuperation after surgery. She was discharged since this violated the employer's leave policies. Defendant filed for summary judgment. Plaintiff argued the travel restrictions in the leave policy were not explained clearly to her, the travel was not inconsistent with her recovery, and there were genuine issues of material fact. The court ruled for defendant and granted summary judgment. The court found that there was evidence that the employer disseminated its policies to its employees, and she violated a legitimate workplace policy.

Summarized Elsewhere:

Danek v. County of Cook, 2011 WL 5979880 (N.D. Ill. Nov. 29, 2011)

Tillman v. Ohio Bell Telephone Co., 2011 WL 2682405 (N.D. Ohio July 11, 2011)

3. Reports by Employee

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

Tillman v. Ohio Bell Telephone Co., 2011 WL 2682405 (N.D. Ohio July 11, 2011)

Plaintiff suffered from a chronic back condition that resulted in two to three days of pain each month. His doctor determined that it was impossible to predict when those episodes would occur. After approving intermittent leave, plaintiff's employer noticed that he frequently took leave adjacent to days off and holidays. In addition, he began to inform his supervisor in advance of the need for leave despite his doctor's opinion that the episodes could not be predicted. A private investigator hired by the employer observed plaintiff working in his yard and garage, driving his family around, bending, and lifting wood on days he was using intermittent leave. After reviewing the footage and consulting with a physician, the employer fired plaintiff.

The court determined that plaintiff's claim was subject to the honest belief rule. In order to survive summary judgment, plaintiff was required to put forth evidence that demonstrated that the employer did not honestly believe in the proffered non-discriminatory reason for the adverse employment action. The question was whether the employer made a reasonable and informed decision before taking the adverse employment action. An employer does not violate the FMLA if it honestly believes based on particularized facts that the employee abused his leave.

In this case, the court held, the employer made a reasonable and informed decision when it terminated plaintiff's employment for abusing his leave after reviewing the private investigator's finding and consulting with a physician. Defendant's motion for summary judgment was granted.

Summarized Elsewhere:

Campbell v. Verizon Virginia, Inc., 2011 WL 4073143 (E.D. Va. Sept. 13, 2011)

Hayes v. Ill. Dept. of Corrections, 2011 WL 4946751 (C.D. Ill. Oct. 18, 2011)

D. Timing of Restoration

IV. INABILITY TO RETURN TO WORK WITHIN 12 WEEKS

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011)

In early August 2008, plaintiff notified her employer that she needed surgery on her ankle stemming from a previous injury, and she requested short-term disability and FMLA paperwork. Soon after, her supervisor issued a written disciplinary notice to plaintiff relating to an incident in which plaintiff had placed a speed restrictor on a patient's wheelchair. In October 2008, plaintiff had to request the FMLA paperwork a second time because she had not yet received it. The day before her scheduled FMLA leave, she learned that the employer had not yet submitted her paperwork, which meant she would receive no income following her surgery. In addition,

when the paperwork was submitted, it allegedly contained some errors that reduced her benefits. Plaintiff began her FMLA leave in late November. In early February, plaintiff advised her employer that she was able to return to work at a schedule of four hours per day and submitted a doctor's note stating that she could increase her hours over a period of six weeks. The next day, her supervisor and Human Resources Director informed her that because she was unable to work eight hours per day, she was going to be discharged at the end of her FMLA leave. In response, plaintiff obtained a note from her doctor stating that she could work a full eight hours if she had a break every hour. Regardless, her employment was terminated. Among other claims, plaintiff sued her employer for interference and retaliation under the FMLA, and defendants moved to dismiss.

The court dismissed plaintiff's interference claim, but only to the extent it was based on allegations that defendant denied her reasonable accommodation or discharged her during her last week of leave. The FMLA does not require an employer to make any reasonable accommodation for a returning employee. Further, if an employee is unable to perform an essential function of the position, the employee has no right to reinstatement. Because plaintiff admitted that she could not return to work without an accommodation - either working four hours per day or taking a break every hour - she was not entitled to reinstatement and her interference claim failed in that respect. However, the court refused to dismiss her interference claim as to allegations relating to the unwarranted discipline and delays in processing the paperwork, as an employee may allege denial of benefits by showing her employer "chilled" her desire to take FMLA leave.

The court also refused to dismiss her retaliation claim, both in relation to her discharge and disciplinary action. As to her discharge, the court refused to accept defendants' argument that, where a plaintiff cannot return to work without accommodation and thus has no right to reinstatement, termination is not an adverse action for purposes of an FMLA claim. The court reasoned instead that the focus in a retaliation case is on the subjective motive of the employer in denying reinstatement. The court explained that the fact that an employer has a legal right to terminate employment in such cases is not a complete defense to a retaliation claim, as unlawful considerations may have nevertheless played a role. As to the disciplinary action, the court held that such discipline could constitute adverse employment action for purposes of a retaliation claim because it could dissuade a reasonable worker from exercising her rights under the FMLA. Thus, dismissal was improper.

Haynes v. The Community Hospital of Brazosport, 2011 WL 43315 (S.D. Tex. Jan. 5, 2011)

Plaintiff's employment was terminated when she failed to return to work after exhausting her FMLA leave and her extended medical leave. Plaintiff was a long-time employee of defendant hospital and had consistently received favorable performance reviews and promotions. In 2005, plaintiff married and moved to a city that required a three-hour commute. Her subsequent request for a modified three-day work schedule was initially granted, but then reversed when the hospital came under new leadership. Plaintiff soon after requested and received FMLA leave. Defendant offered plaintiff part-time work but plaintiff rejected this accommodation. After plaintiff exhausted her FMLA leave, she was placed on an extended medical leave. After plaintiff exhausted the extended medical leave, she failed to return to work and was then discharged. Plaintiff brought suit, claiming that her discharge was in retaliation for

exercising her rights under the FMLA and for demanding a reasonable accommodation. Defendant moved for summary judgment.

The court stated that plaintiff's FMLA claim must fail because she exhausted the time that the statute allowed and then refused to return to work. Defendant's reason for discharging plaintiff rested on plaintiff's failure to accept the proffered accommodation and her failure to return after she exhausted her benefits. Each of these reasons was a legitimate nondiscriminatory basis for terminating plaintiff's employment, and plaintiff failed to show that either were pretext. Accordingly, the court entered summary judgment for defendant on this issue.

Hearst v. Progressive Foam Technologies, Inc., 641 F.3d 276 (8th Cir. 2011)

Plaintiff, who had been on medical leave for nearly four months at the time he was fired for job abandonment, brought action against defendant, alleging interference and retaliation based on plaintiff's FMLA leave. Defendant had mistakenly granted plaintiff ten weeks of FMLA leave before plaintiff reached his one-year anniversary eligibility date, so defendant counted those ten weeks in plaintiff's total FMLA entitlement when it discharged plaintiff. Employee claimed those initial ten weeks could not be counted against his twelve-week FMLA entitlement, thus his discharge constituted FMLA interference. The district court held that plaintiff's failure to notify defendant of his continued unavailability once his 12 weeks of FMLA leave were exhausted gave defendant an independent reason to discharge plaintiff.

The Eighth Circuit affirmed summary judgment for defendant on the FMLA retaliation and interference claims, finding that under either calculation, plaintiff failed to show that he had been prejudiced by the discharge since he was still on medical leave well past the 12-week expiration of his leave.

Heidger v. Gander Mountain Co., 2011 WL 3665155 (E.D. Mich. Aug. 22, 2011)

Plaintiff, a gunsmith for Gander Mountain, lost the use of his left hand. He stopped working in July 2009, had surgery in December, and was ready to return to work in mid-February 2010. Plaintiff never applied for FMLA leave, but his doctor did so on his behalf and without his knowledge. He also never received the letter granting him leave through late October 2009. When his leave expired, the employer found a replacement gunsmith who started in early February 2010. Plaintiff sued for interference and retaliation under the FMLA after he was not rehired. The district court granted the employer's summary judgment motion.

The court was persuaded by the fact that plaintiff agreed that he was unable to return to work at the time his FMLA leave expired in October. Plaintiff argued that the employer nevertheless interfered with his rights under the FMLA when it failed to inform him of his leave. The court held this an insufficient basis for an interference claim. Further, the court questioned how an employer could interfere with an employee's right to leave when it gave the employee more than twice the amount of leave required by law, even though the employee did not fulfill his own obligation to provide notice to the employer that he intended to take FMLA leave. Plaintiff's retaliation claim was dismissed because he could not demonstrate a causal connection between his leave and the decision to terminate his employment.

Lapidhoth v. Telcordia Technologies, Inc., 22 A.3d 11 (N.J. Super. Ct. 2011)

Plaintiff requested a six-month maternity leave in accordance to company's policy on maternity leave. Defendant approved her leave of absence. Close to the conclusion of her six-month leave, plaintiff requested a second six-month leave, which was also approved. When her return date approached, plaintiff informed defendant of her plans to return to work. Due to budgetary constraints, defendant decided to stay with only one full-time manager and informed plaintiff that she was discharged.

In finding that defendant did not violate the FMLA by not reinstating plaintiff to her former or equivalent position, the court determined that the FMLA requires reinstatement at the end of a leave only when the leave was twelve weeks or less. According to the court, plaintiff's 12-month maternity leave was not covered by the FMLA.

Santiago-Marra v. CSC Holdings, Inc., 2011 WL 3930290 (D. Conn. May 11, 2011)

Plaintiff worked as a lead customer relations coordinator for the employer. During her employment plaintiff took FMLA and non-FMLA leave. She took more than fifteen block leaves of absence totaling approximately twenty months, as well as numerous intermittent leaves. Beginning March 12, 2006, plaintiff took a leave of almost six-months that ended in her discharge. Prior to the leave she had exhausted all of her FMLA leave, but the employer allowed employees two months of leave above and beyond the FMLA period if the request is properly documented. Plaintiff requested a non-FMLA leave, but she did not respond timely to the employer's multiple requests for documentation related to her need for the leave. Ultimately, prior to her discharge her doctor indicated he had not seen her in a month, she had no future appointments scheduled and that he could not certify her need for medical leave. Plaintiff stated under oath that she was unable to return to work due to her disability until June 2008.

Plaintiff sued her employer, alleging it terminated her employment in violation of the FMLA. The employer filed a motion for summary judgment, which the court granted. The court found that plaintiff had no right to return to her position if she was unable to return to her position at the end of 12 weeks of FMLA leave. As the employer had no legal obligation to grant additional leave, the claim failed as a matter of law. The claim was also time barred, as it was not brought within two years of plaintiff's discharge. Plaintiff's claim for FMLA retaliation failed because plaintiff could not present any facts connecting her discharge to her exercise of rights granted by FMLA. In addition, she had been returned to her position after many FMLA leaves without penalty. Further, her retaliation claim was also time barred.

Walker v. Adronics/Elrob Manufacturing Corporation, 2011 WL 6740546 (D. Kan. Dec. 22, 2011)

The court granted the employer's motion for summary judgment on the employee's FMLA interference claim. There was no material issue of fact concerning plaintiff's physical inability to perform the actual duties of her position at the end of her FMLA leave, and defendant had no obligation under the FMLA to restore plaintiff to a part-time position with restrictions

Summarized Elsewhere:

Henry v. United Bank, 784 F. Supp. 2d 68 (D. Mass. 2011)

Jackson v. Simon Property Group, Inc., 795 F. Supp. 2d 949 (N.D. Cal. 2011)

Kenney v. Bethany Home of Rhode Island, 2011 WL 1770537 (D.R.I. May 9, 2011)

V. SPECIAL CATEGORIES OF EMPLOYEES

A. Employees of Schools

Summarized Elsewhere:

Welsh v. State of Louisiana, 2011 WL 2473003 (E.D. La. June 22, 2011)

B. Key Employees

1. Qualifications to Be Classified as a Key Employee
2. Standard for Denying Restoration

Kenney v. Bethany Home of Rhode Island, 2011 WL 1770537 (D.R.I. May 9, 2011)

Plaintiff worked as a director of nursing for twenty years. In September 2007, plaintiff was informed she had elevated blood pressure. A few days later, she left work early because she was not feeling well. The next day, she called defendant, spoke to the receptionist, and told the receptionist she was taking a medical leave and would fax a doctor's note. That same day, the doctor's note was faxed to defendant, which indicated that plaintiff could not work for six weeks. Two days later, plaintiff was notified of her FMLA rights, that she was deemed a "key employee," and that defendant intended to deny plaintiff restoration of employment at the conclusion of the FMLA leave. Plaintiff took the full amount of FMLA leave, but did not return to work because she was not medically able to return to work at the end of her leave period.

Defendant argued plaintiff could not assert an interference claim or retaliation claim because plaintiff was unable to return to work upon expiration of her leave. Plaintiff argued that defendant's argument was irrelevant in cases where a "key employee" is denied job restoration. The court found that "key employee" status did not alter the analysis because, in the end, plaintiff could not return to work. The court found that an FMLA plaintiff's inability to return to work forecloses an interference claim premised upon job restoration. Accordingly, summary judgment was proper on the interference claim. Further, although there was evidence in the record that defendant's notice of "key employee" status may have either caused or exacerbated the injury, this did not alter the analytical framework for FMLA claims.

In regard to the retaliation claim, the court held that there was no prerequisite that plaintiff have to show she could return to work. The focus is on whether defendant retaliated against plaintiff for exercising FMLA rights. The court found that plaintiff established a *prima*

facie case because defendant had to provide a reasonable amount of time in which plaintiff could try and return to work after receiving the “key employee” notice, which defendant did not. Further, plaintiff established that defendant did not make a good-faith determination as to whether restoring plaintiff would cause a substantial and grievous economic harm because it did not calculate or quantify the extent of its economic injury. Accordingly, summary judgment was denied on the retaliation claim.

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

Lowenstein v. Catholic Health East, 2011 WL 5069396 (E.D. Pa. Oct. 26, 2011)

Shortly after being hired, plaintiff requested a reasonable accommodation for her autoimmune disorder that would occasionally require her to miss work. Plaintiff continued to request approval for her absences under the ADA but defendant never responded to her request. In the meantime, plaintiff received numerous warnings about her absences. As plaintiff's one year anniversary neared, defendant asked her to apply for FMLA and informed her that the application was necessary to approve accommodations for absences. Plaintiff submitted the application but was discharged for absenteeism before her application could be approved.

Defendant contended that its failure to consider plaintiff's FMLA application could not constitute failure to accommodate under the ADA because the rights under each Act are separate and distinct. The court disagreed, finding that if defendant mishandled plaintiff's FMLA requests, that evidence could be used to support plaintiff's ADA claim.

Summarized Elsewhere:

Etheridge v. Fedchoice Federal Credit Union, 789 F. Supp. 2d 27 (D.D.C. June 2, 2011)

Maldonado-Ortiz v. Lexus de San Juan, 775 F.Supp. 2d 389 (D.P.R. 2011)

b. Covered Employers and Eligible Employees

c. Qualifying Events

i. Serious Health Conditions and Disabilities

Larkin v. Methacton School Dist., 773 F. Supp. 2d 508 (E.D. Penn. 2011)

The fact that defendant granted plaintiff's request for FMLA leave connected to her alcohol addiction treatment did not support her claim that defendant recognized that she was disabled under the ADA. The court recognized that although some parallels between the ADA

and FMLA exist, the ADA regulations defining “disability” under the ADA are conceptually different from FMLA’s “serious health condition” criteria.

- ii. Triggering Events for Leave of Absence Rights
- d. Nature of Leave and Restoration Rights
 - i. Health Benefits
 - ii. Restoration

Summarized Elsewhere:

Roehlen v. Ramsey County, 2011 WL 4640888 (D. Minn. Oct. 5, 2011)

- iii. Light Duty

Summarized Elsewhere:

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011)

- e. Medical Inquiries and Records

Armendariz v. Afni, Inc., 2011 WL 1770533 (W.D. Tex. May 6, 2011)

Plaintiff worked as a customer care consultant for defendant. She requested, and received, an accommodation for her attention deficit disorder, panic attacks, depression, and anxiety. Initially, defendant approved intermittent FMLA leave, permitting plaintiff to work split shifts and take extended breaks or days off when needed. Subsequent documentation from plaintiff’s doctor, however, indicated that she was unable to perform the essential functions of her job. Over plaintiff’s objection, defendant approved continuous leave pursuant to the doctor’s advice, advised plaintiff that she would need a doctor’s release before returning to work, and informed plaintiff that absences beyond her exhausted FMLA leave would count against her attendance record.

Plaintiff sued defendant for disability discrimination by failing to accommodate her requested work schedule. She alleged that the lack of accommodation caused her to exhaust her leave entitlement under the FMLA and sought restoration of her FMLA hours, lost wages, and compensatory damages for emotional distress.

The magistrate judge recommended that the court grant summary judgment for defendant. She stated that defendant was entitled to rely on the recommendations of plaintiff’s treating doctor, instead of accommodating plaintiff’s request. The magistrate noted that, in the “amorphous world of mental disability,” health-care providers are best positioned to diagnose the employee’s disabilities, limitations, and possible accommodations.

Matthews v. Bank of Am., 2011 WL 6884795 (E.D. Mo. Dec. 29, 2011)

Plaintiff worked for defendant as a bank teller. On or around April 9, 2008, plaintiff began missing work due to teeth problems; later being diagnosed with abscessed teeth and found to need teeth extracted. Plaintiff was absent from work from April 21, 2008 through April 25, 2008, and again on May 15, 2008, and May 16, 2008. The following week, plaintiff asked about applying for intermittent FMLA leave, and was put in touch with the administrators of defendant's FMLA program. Plaintiff's absences continued, but she did not follow up with her doctor to see if he had sent in the necessary FMLA certification paperwork to the administrator. Next, plaintiff was absent for over a week when she applied for short term disability through the administrator. The administrator attempted to collect the needed medical information, but informed plaintiff that it was unsuccessful.

Plaintiff was told to arrange for her healthcare provider to complete the needed paperwork and provide an expected return to work date. A day later, plaintiff opened a second FMLA claim for a block of time off. At this time, while the administrator received notes regarding plaintiff's treatment, the FMLA certification and short term disability paperwork were not included. Plaintiff was informed that both her FMLA leave and short term disability requests were denied due to her failure to provide the proper paperwork. When Plaintiff returned to work, she was provided with a letter regarding her insufficient medical documentation, and was provided another chance to submit the needed documentation. While plaintiff did eventually provide the necessary documents, the form from her healthcare providers showed she had never asked about not going into work and listed only seven dates of medical appointments. After again extending the deadline to submit the necessary paperwork and plaintiff again failing to provide proper documents, plaintiff's employment was terminated. After filing suit for failure to accommodate her disability under the American's with Disabilities Act, defendant filed for summary judgment.

The district court granted defendant's motion for summary judgment on several grounds, including that plaintiff's FMLA leave request was not a valid request for an accommodation as she failed to comply with defendant's request for documentation. Plaintiff's failure to provide the FMLA certification and other needed medical documents was found to be a failure on the part of plaintiff to take part in the interactive process to determine a reasonable accommodation. Also, the court held that defendant is not to be held responsible for the failures of plaintiff's doctors in properly submitting the needed medical documentation. As such, defendant had a legitimate non-discriminatory reason for terminating plaintiff when it followed its attendance policy.

f. Attendance Policies

2. COBRA
3. Fair Labor Standards Act
4. 42 U.S.C. § 1983

5. Title VII of the Civil Rights Act
6. Uniformed Services Employment and Reemployment Rights Act
7. IRS Rules on Cafeteria Plans
8. ERISA [New Topic]

Farhner v. United Transportation Union Discipline Income Protection Program, 645 F.3d 338 (6th Cir. May 3, 2011)

Plaintiff requested a leave of absence for personal reasons and his supervisor informed him that he would be required to submit a doctor's note in order to determine if the leave qualified for FMLA. Plaintiff submitted a note from his doctor that stated he would need to be off for three months for medical reasons. Defendant informed him that the note was not sufficient and that he would instead need documentation that indicated the date of treatment, diagnosis, nature of treatment, prognosis, and a potential return date. Defendant discharged plaintiff after he failed to provide the requested information.

Prior to his discharge, plaintiff applied for benefits under his union's Discipline Income Protection Program. Plaintiff was denied these benefits because it was determined that he was discharged due to insubordination and that was not covered under the plan. Plaintiff sought judicial review of the benefit denial pursuant to ERISA, contending that his actions were protected by the FMLA. The court upheld the denial, finding that it was supported by the language of the plan and that the plan administrator was only required to examine this language. The administrator was not required to look outside the plan and consider whether his discharge violated the FMLA to determine whether plaintiff was entitled to benefits.

9. Government Contract Prevailing Wage Statutes [New Topic]
10. Railway Labor Act [New Topic]

Summarized Elsewhere:

Thompson v. Air Transport International Limited Liability Company, 664 F.3d 723 (8th Cir. 2011)

11. NLRA and LMRA [New Topic]
 12. Genetic Information Nondiscrimination Act of 2008 [New Topic]
 13. Social Security Disability Insurance [New Topic]
- C. State Laws
1. State Leave Laws

a. General Principles

Hamed v. Macy's West Stores, Inc., 2011 WL 1935937 (N.D. Cal. May 20, 2011)

Plaintiff worked as a sales associate for defendant for nearly 20 years. Plaintiff claimed that she had poor night vision and requested that defendant schedule her for shifts that ended before sunset. Plaintiff claimed that defendant required her to trade shifts so she could leave before dark. Two months after her early shift request, plaintiff took ten days of leave for cataract surgery. After returning from leave, plaintiff requested intermittent leave so that she could work earlier shifts without having to trade. Around this same time, plaintiff's co-workers complained to management that she was giving out unauthorized store coupons. Defendant conducted an investigation, learned that plaintiff had violated defendant's coupon policies, and subsequently discharged plaintiff. Plaintiff alleged she was wrongfully discharged in violation of the California Family Rights Act ("CFRA"), a statute modeled on the FMLA.

Defendant moved for summary judgment. The court found that plaintiff established a *prima facie* case of retaliation based the temporal proximity between her ten-day leave, her request for intermittent leave and defendant's adverse employment action. However, it found defendant provided a legitimate, non-discriminatory reason for the action by stating that plaintiff's discharge was based on her repeated and admitted violations of defendant's coupon policies. Because plaintiff failed to provide "specific or substantial evidence" that the reason defendant gave was pretext, the court granted summary judgment in favor of defendant.

Rogers v. County of Los Angeles, 198 Cal. App. 4th 480 (Cal. Ct. App. Aug. 16, 2011)

Rogers was a personnel officer for the county of Los Angeles, with 36 years of experience in various positions. In early 2006, she discussed retirement with her coworkers, and met with her employer's retirement plan coordinator to discuss her options. In April 2006, Rogers suffered from work-related stress and took approved leave under the FMLA and the California Family Rights Act ("CFRA"). During Rogers' leave, a new executive officer was appointed. While interviewing for the appointment, the executive conveyed her intention to reorganize the county in order to improve its efficiency. In May 2006, after Rogers had been on leave approximately one month, the executive hired a new personnel officer from outside the county, replacing Rogers in order to bring some "fresh eyes" and independence to the county. The county transferred Rogers to a new position in a different, larger department within the county. The executive denied that Rogers' performance or leave played a part in her decision.

After 19 weeks of leave, Rogers' doctor released her to return to work. On her first day back, Rogers was informed of her transfer. She became visibly upset and believed she was being demoted. Rogers left work early that day, and called in sick the remainder of the week. On the date her transfer was to become effective, Rogers informed the county she was retiring.

Rogers sued the county alleging various claims, all of which were dismissed except her CFRA interference and retaliation claims. After trial, the jury found for Rogers and awarded her \$356,000 in damages. The county moved for judgment notwithstanding the verdict, and the trial court denied the motion. The court found that, even though the county put forth "undisputed evidence" that the reassignment decision was motivated only by the executive's reorganization

plan, the jury may have discounted the executive's testimony as not credible. The county appealed.

The California court of Appeals held that Rogers' interference claim was barred because, as a matter of law, she was not entitled to reinstatement upon returning from a leave that exceeded the CFRA's 12-week leave entitlement. In so deciding, the court noted (1) the CFRA's statutory protections expressly covered only a 12-week leave; (2) other obligations under the CFRA referenced a 12-week leave; (3) other courts interpreting the CFRA and the FMLA have found that protection only covers a 12-week period; and (4) the public policy underlying the CFRA endorsed protection for employers as well as employees.

The court also reversed the trial court's decision with respect to Rogers' CFRA retaliation claim. It held that Rogers provided no evidence in response to the county's legitimate, nondiscriminatory reason for her transfer, particularly considering she had been on leave only a month at the time of her transfer and the new executive officer did not know how long Rogers was going to be on leave. Accordingly, Rogers failed to establish the requisite causal connection between her leave and transfer.

Summarized Elsewhere:

Bakhit v. Polar Air Cargo, 2011 WL 3443629 (N.D. Cal. Aug. 5, 2011)

- b. Effect of Different Scope of Coverage
 - i. Employer Coverage
 - ii. Employee Eligibility
- c. Measuring the Leave Period
- d. Medical Certifications
- e. Notice Requirements

Gay v. Blount, 2011 WL 2420368 (D. Or. Apr. 28, 2011)

Plaintiff had been cited for poor attendance in late 2008. In early 2009, plaintiff advised her supervisor that she was pregnant, and that her pregnancy was high-risk and would require several doctor's visits. Plaintiff's supervisor advised plaintiff to use vacation time to cover her absences, in light of plaintiff's poor attendance record. On February 24, 2009, plaintiff requested and was given Friday, February 27, 2009, as a vacation day in order to attend a doctor's appointment. At that appointment, plaintiff's doctor requested that she check into the hospital because of complications due to her condition. Plaintiff remained in the hospital over the weekend.

On Monday, March 2, 2009, at plaintiff's request, a hospital employee called plaintiff's supervisor to explain that plaintiff was in the hospital and would not be in to work that day. The

following morning, plaintiff herself contacted her direct supervisor to inform her that she was still in the hospital, but hoped to be released that afternoon and to be back at work the following day. Plaintiff, however, was not discharged that day. On the morning of March 4, 2009, plaintiff asked one of her nurses to contact plaintiff's supervisor and inform her that plaintiff had not been discharged, though it was not clear that such call was ever placed. Later that afternoon, plaintiff was discharged and was provided with a doctor's note releasing her from work through Monday, March 9, 2009. When plaintiff spoke with her employer's human resources manager on March 6, 2009, she was informed that her employment had been terminated because she had not called in since March 3, 2009.

Plaintiff alleged interference with her Oregon Family Leave Act ("OFLA") rights, which is construed, to the extent possible, consistently with the FMLA. The court granted summary judgment to plaintiff on her claim of interference with her OFLA rights. Specifically, the court noted that while federal regulations require an employee seeking FMLA leave to provide "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave," the employer also "should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken." Under the OFLA, the employer's duty to so inquire is mandatory.

Because it was undisputed that plaintiff had notified the employer that she was hospitalized due to her high risk pregnancy, the court concluded that no reasonable juror could conclude that the employer did *not* have "reason to believe" that plaintiff's continuing absence from work between March 4, 2009 and March 6, 2009 might qualify as OFLA leave. Furthermore, it was undisputed that no representative of the employer requested information concerning plaintiff's continuing absence; rather, the employer automatically discharged plaintiff in violation of the OFLA requirement that the employer make further inquiries regarding plaintiff's continuing absence.

Hansen v. Robert Half International, 796 N.W.2d 359 (Minn. Apr. 19, 2011)

Plaintiff worked as a division director, which involved placing applicants into permanent job openings, for defendant. Defendant granted plaintiff's request for maternity leave and while she was out on leave, the need for permanent placement services decreased dramatically due to the economic downturn in 2008. The day after plaintiff returned from leave, defendant informed her that her position was being eliminated. Plaintiff then filed suit, claiming that her discharge violated the Minnesota Parental Leave Act ("MPLA"). The lower court granted defendant's motion for summary judgment and plaintiff appealed.

The court affirmed the lower court, finding that plaintiff's leave was granted pursuant to the FMLA and not the MPLA. The court found that unlike the FMLA, the provisions of the MPLA are invoked only upon a specific request for leave under that Act. Because plaintiff presented no evidence that she informed defendant that she was taking leave under the MPLA, the lower court correctly concluded that her MPLA claim failed as a matter of law. The court also noted that plaintiff took 13 weeks of leave and that the MPLA only provides six weeks of leave. By classifying plaintiff's leave as FMLA instead of MPLA leave, the court found that defendant provided plaintiff with the longest amount of time off available and allowed plaintiff

to take advantage of continued health insurance coverage, which is required under the FMLA but not the MPLA.

f. Fitness-for-Duty Certification

Matejik v. State, 2011 WL 3586126 (N.J. Super. App. Ct. Aug. 17, 2011).

Between 2004 and 2006, while working for the State's Treasury Department (the "Department"), Matejik sought treatment for migraine headaches. Although her annual performance ratings were uniformly "exceptional" during this period, her supervisor and a human resources representative counseled her numerous times about her unprofessional and insubordinate conduct in the workplace. Matejik was on leave for much of April 2006, and four days after returning to work, she exhibited "extremely concerning" and disruptive behavior in the office. Accordingly, the Department referred her for a fitness for duty certification, which she attended. Matejik then took FMLA leave based on a medical certification from her primary care physician.

The independent doctor's fitness for duty report found Matejik was suffering from several mental disorders and was unfit for duty. The Department met with Matejik to discuss the report and told her it would require her to take the summer off. Its subsequent letter to Matejik, however, simply indicated that it would extend her leave until September and allow her to apply to use donated leave time. Matejik was subsequently cleared to return to work and requested to return on June 23. The Department sent her for another fitness for duty examination, and ultimately returned her to work, but not until August 23.

The Appellate Division flatly rejected the Department's argument that Matejik was on involuntary leave, and not FMLA leave. The court further recognized that an employer can generally only delay an employee's return to work if an employee fails to comply with fitness-for-duty requirements and then only do so if it requests the fitness-for-duty certification in its initial notice of rights and obligations to the employee. Because the Department failed to timely make its request, the court found that the Department delayed plaintiff's return to work under circumstances not authorized by the FMLA. The Department, however, argued that a state regulation authorized it to send Matejik for an independent fitness for duty examination as a condition of returning to work, pointing to 29 U.S.C. § 2114(a)(4), which allows an employer with a uniform policy to require a "certification form a health care provider ... that the employee is able to resume work and provides "that nothing in this paragraph shall supersede a valid State or local law ... that governs the return to work of such employees."

The court explained that the state regulation the Department relied upon also required agencies to avoid "undue delay" in returning employees to work, noting that the court did not take the view that 2114(a) provided a safe harbor for an employer who had failed to comply with state law governing an employee's return to work. Thus, the court remanded the case for a factual determination of whether the delay was unlawful considering the following factors: the date plaintiff made her request to return to work; the date her employer received the request; the date her employer sought to schedule the evaluation; plaintiff's unavailability and its impact on

the scheduling; and the time that lapsed between the fitness determination and the first date the employer permitted plaintiff to report to work. The Appellate Division upheld the trial court's grant of summary judgment on Matejik's retaliation claim, finding no link between the fitness for duty examination and Matejik's use of FMLA leave.

g. Enforcement

Nocera v. State Dept. of Developmental Services, 2011 WL 3200289 (Conn. Super. June 28, 2011)

The court dismissed Plaintiff's claim of interference with his right to take leave pursuant to a Connecticut statute providing state employees family and medical leave. A similar statute provides leave to private employees and that statute contains an enforcement provision, allowing employees to file a claim with the xxx. However, the statute applicable to state employees affords no enforcement procedures. Plaintiff claimed that no express enforcement provision should afford him, by necessary implication, the right to proceed directly to Superior court with a claim of interference. The court rejected Plaintiff's argument, holding that statutory construction rules provided state sovereign immunity waivers must be express or by necessary implication. Such a waiver was not intended by the legislature in this statute. Thus, Plaintiff had no enforcement rights against his state employer.

h. Paid Family Leave Laws [New Topic]

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 [New Topic]

Cheadle v. Genco I, Inc., 2011 WL 5597262 (S.D. Ohio Nov. 17, 2011)

Plaintiff-employee made a request for FMLA leave to care for her husband's serious health condition and was later disciplined and discharged. She asserted claims against her employer for violations of the FMLA and wrongful termination of public policy. The employer moved for partial judgment on the pleadings, under Fed. R. Civ. P. 12(c), arguing there was an absence of law to support plaintiff's wrongful termination claim.

The court held that plaintiff's wrongful termination claim was not "viable because the statutes upon which she cites provide a full array of remedies to protect against wrongful conduct that is prohibited by that legislation." Further, it noted that the public policy plaintiff sought to invoke was codified in the FMLA, which "provides adequate remedies to protect and vindicate Ohio's public policies against unlawful employment discrimination for legitimate medical leave."

Fischer v. City of Roslyn, 162 Wash. App. 1039 (Wash. App. Div. 3 July 7, 2011)

Plaintiff was employed by defendant as a street superintendent with a history of behavioral problems when he was discharged in March 2007 for gross insubordination, inability to get along with other employees, and failure to follow previous corrective action orders. A few months prior to his termination, plaintiff alleged he had informed the city mayor, who was his supervisor, he was saving up medical leave and vacation time to take the summer of 2007 off for knee surgery and recuperation. The mayor denied plaintiff had ever informed her of his intent to take leave. Plaintiff filed suit against defendant, alleging wrongful termination in violation of public policy. The lower court granted defendant's motion for summary judgment on the wrongful discharge claim, and plaintiff appealed.

Plaintiff's wrongful termination claim was based on his allegation that his employment was terminated in violation of the public policy established by the FMLA, the Washington Family Leave Act ("WFMLA"), and state labor and industries statutes. The court found that the FMLA and WFMLA established Washington's clear mandate of public policy protecting an employee's right to reasonable medical leave. Even though defendant was not actually subject to the FMLA due to its size, the statute established such a strong public policy entitling *all* employees to take reasonable medical leave that the public policy existed even if the statute did not technically apply. Thus, plaintiff established the first element of the claim of wrongful termination in violation of public policy, the existence of a clear public policy. However, plaintiff failed to show evidence sufficient for the remaining elements: jeopardy, causation, and absence of justification. Plaintiff failed to establish the causative element by failing to show he was discharged because he engaged in protected conduct. Specifically, he failed to show he was discharged because he intended to take extended medical leave, rather than his misbehavior. As a result, the court affirmed summary judgment in favor of the employer.

Hagler v. True Mfg Co. Inc., 2011 WL 4036672 (Mo. Ct. App. Sept 13, 2011)

Plaintiff, while on intermittent FMLA leave, was discharged because she failed to call-in on two consecutive days in violation of defendant's policy. She appealed the Missouri Labor and Industrial Relations Commission's ("Commission") decision denying her unemployment benefits due to misconduct for violating defendant's attendance reporting policy. On appeal, plaintiff argued that defendant's policy requiring plaintiffs on intermittent FMLA leave to call in daily and give a reason for any absence so defendant could classify the absence as approved FMLA leave did not apply to her, thus the Commission's misconduct determination was erroneous.

The court noted that FMLA regulations provide that a defendant may require a plaintiff on FMLA leave to report periodically on her status and intent to return to work. Accordingly, the

district court upheld the Commission's decision, because plaintiff's absences were not supported by an approved FMLA updated medical certification, plaintiff was not approved for block leave absence, and defendant instructed plaintiff to call in daily to report her absences.

Harris v. Div. of Employment Security, 2011 WL 4549389 (Mo. Ct. App. Oct. 4, 2011)

The Missouri Court of Appeals reversed the Labor and Industrial Commission's decision denying unemployment benefits to plaintiff whose position was filled after she had problems getting her doctor to provide a specific return-to-work date on her medical release after her FMLA leave was exhausted, because plaintiff's failure did not amount to misconduct.

Kunz v Smith's Food & Drug Centers, Inc., 2011 WL995895 (D. Ariz. Mar. 21, 2011)

Plaintiff argued he was wrongfully discharged in violation of the Arizona Employment Protection Act ("AEPA"), which allows employees to sue for wrongful termination in several situations, including when an employer terminates employment in violation of a state statute. In dismissing plaintiff's cause of action, the court explained that FMLA violations are not within the parameters of the AEPA's protections. Thus, to the extent plaintiff's AEPA claim was based on a violation of FMLA, he failed to state a claim upon which a relief may be granted.

Lloyd v. Made-Rite Company, 2011 WL 846105 (E.D. Tex. Feb. 9, 2011)

Defendant moved to dismiss, alleging that plaintiff's two state court counts were preempted by his federal claims and that "bottom-up" preclusion also applied because the state law claims were "gap-filler" torts. Defendant argued that since the same alleged wrongdoing was covered under FMLA and ADEA claims, the "gap-filler" claims were precluded. The court declined to apply "top-down" preclusion to preempt the state law claims because the Fifth Circuit had not yet decided whether such an argument could apply to private employers. The court did apply "bottom-up" preclusion, and held that the actions underlying the state law claims were the same as the ADEA and FMLA claims, thereby preempting those "gap-filler" torts. The court then dismissed plaintiff's two state law claims.

Milwaukee Police Ass'n v. Flynn, 801 N.W.2d 466 (Wis. Ct. App. 2011)

The union and plaintiff-police officer appealed from an order of the state district court determining that the officer was not entitled to a "just cause" due process hearing when he was placed on an unpaid leave of absence under the FMLA. The officer repeatedly fell asleep on the job due to prescription medication he took to relieve a work-related spinal injury. The police department scheduled him for a fitness for duty exam, which determined he was unable to work. The department placed the officer on FMLA leave, and the officer then requested a due process review of his FMLA leave. The department refused because he had not been suspended or placed on leave due to a disciplinary rule violation. The officer argued he was constructively disciplined for "idling and loafing," and that the report outlining his FMLA leave stated his police powers were "suspended." The court agreed with the department's interpretation of the statute, that a "just cause" due process hearing is required only when an officer has been discharged, suspended, or disciplined. Since the officer was placed on FMLA leave due to the fitness for duty exam, he was not entitled to an appeals hearing.

Molloy v. Delta Home Care, Inc., 2011 WL 2633254 (E.D. Mo. July 5, 2011)

Plaintiff claimed that after being diagnosed with cancer, her former employer refused to reasonably accommodate her condition, reduced her pay, did not allow her to seek medical attention, and discharged her. Plaintiff filed a lawsuit, alleging that her discharge amounted to wrongful termination under Missouri common law based on her asserting rights under the FMLA. Plaintiff filed suit in state court but defendant removed the case to federal court based on the FMLA claim. Plaintiff contended the federal court did not have subject matter jurisdiction over her claim because she did not seek damages or equitable relief under the FMLA, but instead her attempt to exercise rights under the FMLA contributed to the discharge decision in violation of public policy in the state of Missouri.

The court dismissed the public policy claim and remanded the case to state court for consideration of plaintiff's other state law claims. The court concluded that claims based on public policy violations must be based on a policy that has no statutory remedy. Because the FMLA provides the exclusive remedy for claims arising out of FMLA violations, plaintiff could not succeed on her wrongful termination claim.

Tenge v. Washington Group Int'l, Inc., 2011 WL 1630823 (E.D. Mo. April 29, 2011)

In *Tenge*, a former employee filed suit alleging that he was discharged for asserting his FMLA rights, which he claimed was in violation of Missouri public policy. The employer moved to dismiss the claim, arguing that it was precluded by the exclusive remedies of the FMLA. The employer contended that a private cause of action exists under the FMLA, but plaintiff chose not to seek relief under the FMLA.

The court agreed with the employer. The court observed that Missouri law recognizes a public policy exception to the employment-at-will doctrine in which employees may not be terminated from their jobs if the discharge is based on a well-established and clear public policy. However, plaintiff's public policy discharge claim was based entirely on violations of the FMLA. The court dismissed the claim, reasoning that the FMLA provides the exclusive remedy for public policy discharge claims which are based on violations of the FMLA.

Summarized Elsewhere:

Averette v. Diasorin, Inc., 2011 WL 3667218 (W.D.N.C. Aug. 22, 2011)

Cantrell v. Equity Trust Co., 2011 WL 4944317 (N.D. Ohio Oct. 17, 2011)

D. City Ordinances [New Topic]

III. INTERRELATIONSHIP WITH EMPLOYER PRACTICES

A. Providing Greater Benefits Than Required by the FMLA

B. Employer Policy Choices

1. Method for Determining the “12-Month Period”
2. Employee Notice of Need for Leave

Mason v. Potter, 2011 WL 3154907 (S.D. Ind. July 26, 2011)

Mason suffered a serious neck injury on duty in April 2004 that required physical therapy. Following his injury, he applied for and was granted FMLA leave through December 2004 and again from July 2005 through March 2007. In 2007, Mason’s new supervisor, who was aware of Mason’s prior on-the-job injury, suspended him for 14 days in accordance with the USPS’s progressive discipline policy for abuse of FMLA leave and poor job performance. From October 2007 through May 2008, Mason missed work more than thirteen times, and the USPS ultimately terminated his employment. Mason filed suit, alleging FMLA and Title VII violations.

The USPS moved for summary judgment, contending that Mason did not provide adequate notice of his intent to take FMLA leave. USPS policies required employees who had unscheduled absences to either have a medical certification on file related to intermittent leave or to provide medical documentation within 15 days of the unscheduled leave. The undisputed evidence demonstrated that for much of 2007 and early 2008 when he repeatedly missed work, Mason neither had a medical certification on file nor did he submit the required medical documentation after the unscheduled leave. Citing Seventh Circuit precedent, the district court noted that it was “well established that an employer may deny FMLA if an employee fails to properly notify the employer of the need for FMLA,” and granted the USPS summary judgment on Mason’s FMLA claim.

The court similarly granted summary judgment on Mason’s FMLA retaliation claim. Mason attempted to demonstrate retaliation through direct evidence, but the court found no causal connection between Mason’s circumstantial evidence and the USPS’s actions. Indeed, the court held that Mason’s contentions were “entirely unsupported by the record,” particularly in light of his ineligibility for FMLA leave in 2007 and 2008.

Summarized Elsewhere:

Danek v. County of Cook, 2011 WL 5979880 (N.D. Ill. Nov. 29, 2011)

3. Substitution of Paid Leave

McCalla v. Aymed, Inc., 2011 WL 3918538 (S.D. Fla. Sept. 6, 2011)

In *McCalla*, plaintiff took FMLA leave to care for her son’s serious health condition. After plaintiff exhausted this leave, defendant terminated her employment. She sued for FMLA interference and retaliation. Both plaintiff and defendant moved for summary judgment. The court granted defendant’s motion and dismissed plaintiff’s claims with prejudice. Plaintiff asserted several arguments in support of her FMLA interference claim. First, she argued that she

had not exhausted her 12 weeks of leave because the initial part of this leave was also designated as Paid Time Off (“PTO”) leave. In rejecting this claim, the court noted that the FMLA and its regulations specifically authorize an employer to require an employee to substitute paid leave for any part of her 12-week leave entitlement and for the paid leave to run concurrently with the unpaid leave. *See* 29 U.S.C. § 2612(d)(2)(A); 29 C.F.R. § 825.207(a). Moreover, defendant’s policy required the concurrent use of paid time off and FMLA leave. Finally, the employer provided plaintiff with at least 4 separate documents disclosing this policy.

Second, plaintiff argued that the initial part of her leave was improperly designated as FMLA leave because the leave was approved after it began. Again, the court rejected this argument, finding that the regulations, as well as the employer’s policy, allow for approval of FMLA leave after the employee has started the leave. *See* 29 C.F.R. § 825.300(d). Third, the court rejected plaintiff’s claim that that her initial leave was retroactively classified as FMLA leave. The court held that the employer’s designation of the leave as PTO, when it had not yet received the necessary medical certification to designate it as FMLA leave is permissible. Fourth, plaintiff argued that the employer led her to believe that the initial period of her leave was designated as PTO leave because that she was told that she could track her FMLA leave by looking at her pay stubs. According to plaintiff, the pay stub notations led her to believe that her initial leave was classified as PTO rather than FMLA leave. Because plaintiff could not present any evidence that FMLA leave could be tracked through pay stubs or identify the person who had allegedly made this statement to her, summary judgment was granted on the claim. Fifth, the court held that, when taking intermittent leave, the FMLA regulations place the burden on the employee, rather than the employer to request information about how much leave has been exhausted. *See* 29 C.F.R. § 825.300(d)(6). Plaintiff claimed that she had at some undisclosed date and time contacted a benefits/human resources specialist and was assured that she had “enough days.” The court found this testimony insufficient evidence that she had made such a request. Finally, the court found plaintiff’s claim that the employer interfered with her FMLA rights by failing to inform her about its non-FMLA leave policy unpersuasive because the policy specifically put the onus on plaintiff to request additional leave and, in this case, she had not. Thus, the employer was entitled to summary judgment on the interference claim.

Plaintiff premised her FMLA retaliation claim on two arguments: (1) defendant discharged her; and (2) defendant fought her claim for unemployment compensation. The court initially held that the proximity between plaintiff’s FMLA leave and her discharge was insufficient to establish the requisite causal link for her *prima facie* case. Even assuming that she had made out a *prima facie* case, however, the court held that the employer’s explanation that plaintiff had exhausted her FMLA leave and was unable to return to work met its burden to proffer a legitimate, non-discriminatory reason for her discharge, and plaintiff failed to present evidence that this reason was pretextual. The court also held that plaintiff could not establish that the employer’s actions regarding her unemployment compensation claim were retaliatory because unemployment compensation is not a right guaranteed by the FMLA. Thus, the court reasoned, the employer could not be held accountable for alleged interference with her right to unemployment compensation. Again, the court granted summary judgment on this claim.

4. Reporting Requirements

Dooley v. United Industries Corp, 2011 WL 3759731 (S.D. Ill. Aug. 24, 2011)

In August 2009, an employee threatened to kill plaintiff after plaintiff accused the other employee of stealing his company-issued laptop. The other employee had a criminal rap sheet, including being a suspect in one homicide. Plaintiff reported the matter to his supervisor, visibly shaken. Shortly thereafter, plaintiff submitted a doctor's note to defendant, indicating that he had to be off work until September 10, 2009, due to stress and anxiety that he had experienced as a result of the August incident. Defendant's Human Resource ("HR") director sent plaintiff FMLA paperwork, which he received on September 10, 2009. The paperwork, which plaintiff did not read, instructed him to complete and return the enclosed forms within 15 days, inform HR of any changes in his status, and to provide a fitness for duty certification prior to returning to work. Five days later, plaintiff returned to work but without the fitness for duty release. He was sent home to retrieve it. Instead of returning to work, plaintiff disappeared for several days without explanation. Six days later, plaintiff contacted his supervisor and accused the other employee who threatened him of being a "murderer." Plaintiff did not return to work until September 24, 2009. Meanwhile, because plaintiff had been cleared to work since September 10, 2009, and did not report subsequent absences for at least three consecutive days, defendant discharged him under its absenteeism policy, by letter dated September 23, 2009. When plaintiff showed up to work on September 24, 2009, he submitted another doctor's note in an attempt to excuse his previous unexcused absences.

On December 18, 2009, plaintiff filed alleging interference with his FMLA rights. Defendant moved for summary judgment, which the court granted. More specifically, the court "disposed" of his claim "quickly due to binding precedent from the Seventh Circuit court of Appeals." Citing to the Seventh Circuit, the court explained that the FMLA does not permit employees on leave to leave their employers "in the dark" about when they might return. Because plaintiff did not provide defendant adequate notice of his whereabouts under the company's policies, according to the court, he was not protected by the Act. According to the court, although he had 15 days to submit the FMLA paperwork to take FMLA leave, plaintiff "still had to comply with [the company's] usual and customary notice requirement."

Hayes v. Ill. Dept. of Corrections, 2011 WL 4946751 (C.D. Ill. Oct. 18, 2011)

Plaintiff claimed that his FMLA rights were violated when defendant disciplined him for engaging in personal activities during a day of FMLA leave, for which he gave only seven hours notice. In response to plaintiff's FMLA claims, defendant moved for summary judgment.

The court determined that plaintiff could not succeed on his interference claim because he did not comply with FMLA leave requirements. Employees are required to comply with an employer's usual and customary notice and procedural requirements for requesting leave. When an employee fails to comply with such mandatory policies, he fails both to exercise FMLA rights and to provide sufficient notice of the intent to take leave and, therefore, cannot state a valid interference claim. The court found that the doctor's appointment attended on the day of absence was not an emergency such that defendant's 24-hour advance notice requirement should be excused. The court also found that plaintiff's prior instances of approval did not show that

defendant had inconsistently applied its 24-hour advance notice policy since there was no indication that these prior absences were not emergency in nature.

The court also determined that plaintiff could not succeed on his interference claim because defendant had an honest suspicion that plaintiff used FMLA leave for an unintended purpose. An employer who honestly believes that it is firing an employee for misusing FMLA leave is not liable for violating the FMLA even if the employer was mistaken in its belief. The court found that discipline was appropriate based on defendant's honest suspicion that plaintiff was abusing FMLA leave, given the video evidence of plaintiff's appearance at court on the day he called in sick, the fact that he appeared there on personal business unrelated to a medical condition, and that multiple witnesses corroborated his presence and purpose at the courthouse. Accordingly, the court entered summary judgment for defendant on this issue.

Millea v. Metro-North R.R. Co., 658 F.3d 154 (2d Cir. 2011)

Plaintiff had a panic attack after a heated phone call with his supervisor. Plaintiff immediately left work to see his doctor. Because the encounter with his supervisor caused the panic attack, he informed the Lead Clerk about his need to take unforeseen FMLA leave and asked the Clerk to inform his supervisor, instead of informing the supervisor directly. He called in the next day and again asked the Lead Clerk to tell the supervisor he was taking another day of FMLA leave. The employer's leave policy provides that "if the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible." Because he did not notify his supervisor *directly*, the supervisor told payroll to log the absences as non-FMLA. Plaintiff was received a formal Notice of Discipline in his personnel file for one year.

Plaintiff asserted claims against the employer alleging interference and retaliation under FMLA. Plaintiff requested the court instruct the jury on the definition of a "materially adverse employment action" using the standard articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (an action is materially adverse when it "would have been likely to dissuade or deter a reasonable worker in plaintiff's position from exercising his legal rights"). The court refused since this case was an FMLA case and not a Title VII case, and gave a more narrow definition of "materially adverse." The jury returned a verdict for plaintiff on his FMLA interference claim and awarded \$612.50 in damages, but found in favor of the employer on FMLA retaliation. The court awarded \$18,643 in costs but only \$204 in attorney fees, based on a proportion of the \$612.50 in damages awarded for FMLA interference. Plaintiff appealed based on (a) the court's failure to give a jury instruction on the FMLA retaliation claim based on *Burlington*, and (b) the court's failure to calculate attorneys' fees in conformity with lodestar method. The employer appealed, claiming there was no legal basis on which the jury could have found interference, arguing the discipline was justified as a matter of law by his failure to comply with its internal leave policy.

The Second Circuit rejected defendant's appeal, finding the company's policy conflicted with the law, which permits indirect notification when then employee is unable to do so personally, citing 29 C.F.R. § 825.303(a). The Second Circuit vacated and remanded for a new trial on the FMLA retaliation claim, holding the district court's rejection of the *Burlington Northern* jury instruction was erroneous and prejudiced plaintiff, noting the purpose of the

FMLA's anti-retaliation provision has the same underlying purpose as Title VII. The court joined the Seventh, Tenth, Fifth, Third, and Fourth Circuits in ordering such an instruction. The court of Appeals also vacated the award of attorneys' fees and remanded for recalculation in conformity with lodestar method, noting the district court reduced the initial figure of \$144,792 due to impermissible factors.

Summarized Elsewhere:

Chappell v. Bilco Co., 2011 WL 9037 (E.D. Ark Jan. 3, 2011)

Hagler v. True Mfg Co. Inc., 2011 WL 4036672 (Mo. Ct. App. Sept 13, 2011)

Righi v. SMC Corp., 632 F.3d 404 (7th Cir. 2011)

Twigg v. Hawker Beechcraft Corp., 659 F.3d 987 (10th Cir. 2011)

5. Fitness-for-Duty Certification

Summarized Elsewhere:

James v. James Marine, Inc., 2011 WL 3417102 (W.D. Ky. Aug. 4, 2011)

6. Substance Abuse
7. Collecting Employee Share of Group Health Premiums
8. Other Benefits
9. Other Employment During FMLA Leave

Summarized Elsewhere:

Edward v. San's West, Inc., 2011 WL 3957531 (D. Utah Sept. 7, 2011)

10. Restoration to an Equivalent Position for Employees of Schools

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 [New Topic]

***Cureton v. Montgomery Cty Bd. Of Educ.*, 2011 WL 5118416 (D. Md. Oct. 25, 2011)**

Plaintiff claimed that after her car accident in 2006 and her return to work, defendant did not provide her with modifications to her work schedule in April 2007. The district court noted that in order to bring an interference claim, plaintiff needed to show that she had a serious health condition and had provided her employer with timely and adequate information to put the employer on notice of such. Here, while plaintiff pointed to her 2006 automobile accident and subsequent medical treatment, there was no evidence she had a serious health condition. Furthermore, simply informing an employer of a need to attend a medical appointment is not sufficient notice, absent notice that the appointment is in connection with a qualifying condition. Here, not only did plaintiff not provide such information, she failed to do so despite repeated warning. Thus, defendant was granted summary judgment.

***Figueroa v. Merritt Hospitality, LLC*, 2011 WL 439585 (E.D. Pa. Sept. 21, 2011)**

Throughout her employment with defendant, plaintiff suffered from various health issues and periodically took time off work due to these ailments. After plaintiff had been employed for a year, she qualified for the protections of the FMLA. Soon after, the director of Human Resources (“HR”) requested that she fill out an FMLA certification form and provide documentation from her physician regarding what time she might miss in the future due to her health issues. He informed plaintiff that she could not return to work until she had complied with this request. Plaintiff inquired when she could return to work and explained that she was fully able to work, but might need days off in the future if her medical conditions flared up. The HR director responded that he interpreted her request for future leave as a request for "intermittent" leave, and again requested that she have her physician complete FMLA and leave of absence forms verifying that she had a serious health condition. Plaintiff filed suit against Embassy Suites and the HR director, alleging that by involuntarily placing her on medical leave and then refusing to reinstate her, to engage in an interactive process with her, or to give her, in writing, their detailed expectations and obligations in accordance with the FMLA, they had interfered with her FMLA rights.

The district court granted defendants' motion to dismiss, finding that plaintiff had failed to state a claim under the FMLA because she had not shown she was entitled to leave under the FMLA, a required element of an interference claim. The court reasoned that in order to be eligible for FMLA leave due to a serious health condition, an employee must have a serious health condition *that makes the employee unable to perform the functions of the position of such*

employee. Because plaintiff had alleged in her pleadings that she was fully capable of working at the time she was placed on allegedly involuntary leave, she admitted that she was not at that time entitled to FMLA leave. As she was not entitled to FMLA leave, she was not entitled to the protections of the FMLA at that time.

The court briefly discussed defendants' characterization of plaintiff's claim as one of "involuntary leave," a novel cause of action in the Third Circuit. The court pointed to the Sixth Circuit's interpretation of this type of interference claim, explaining that in order to prove an involuntary leave claim, plaintiffs must allege both that defendant-employer forced them to take FMLA leave when they did not have a serious health condition that precluded them from working and that the employees sought and were denied FMLA leave at a later date because they were wrongfully forced to use FMLA leave in the past. However, the court declined to further discuss this argument, instead granting dismissal solely on plaintiff's failure to show she was entitled to FMLA leave.

Franklin v. MIO Logistics, LLC, 2011 WL 3205774 (D. Kan. July 28, 2011)

Plaintiff's supervisor began to document attendance issues with plaintiff when she requested time off to take and pick up her 18-year-old daughter from drug and alcohol rehabilitation. Defendant approached plaintiff about taking FMLA leave to care for her daughter but plaintiff rejected this offer. Plaintiff was then counseled about attendance issues. Shortly after, defendant began monitoring plaintiff's email and internet usage after her supervisor expressed concern regarding plaintiff's output and overall work performance. This monitoring revealed that plaintiff had violated defendant's conflict of interest and computer usage policies by sending personal emails and offering a customer a discount because they had a personal relationship. Plaintiff was then discharged for these policy violations.

Plaintiff then filed suit, claiming that defendant interfered with her right to take FMLA leave by disciplining her for attendance issues. The court granted summary judgment in favor of defendant on the interference claim because plaintiff failed to establish any of the three elements of a *prima facie* case of interference. Plaintiff did not establish that she was entitled to FMLA leave because she failed to produce evidence that her 18-year-old daughter was incapable of self-care. In addition, the court found that the attendance counseling did not constitute an adverse action that interfered with her taking FMLA leave because it was not disciplinary and she did in fact take the time off she requested. Even if she could demonstrate an adverse action, the court determined that plaintiff could not establish the attendance counseling was related to her time off because it was prepared before plaintiff made her request.

Plaintiff also claimed that defendant retaliated against her when she was disciplined, monitored, and then discharged. The court also granted summary judgment in favor of defendant on the this claim because it found that plaintiff did not engage in protected activity. In addition, defendant established legitimate reasons for each of its actions, and plaintiff could not demonstrate pretext because the actions were consistent with defendant's policies and practices.

Grant v. Walgreen Co., 2011 WL 2079923 (E.D. Mich. May 24, 2011)

Plaintiff inquired about FMLA leave to care for her husband to her supervisor and alleged her supervisor told her she must give 30 days notice and take all FMLA leave continuously at one time. She argued that she never pursued FMLA leave because of the incorrect information her supervisor told her.

District courts in the Seventh Circuit consider “interference” to include violating the FMLA, refusing to give FMLA leave, discouraging an employee from taking FMLA, and manipulating the workforce to avoid FMLA responsibilities. To make a *prima facie* case of FMLA interference, the employee must establish that (1) she was an eligible employee; (2) defendant is an employer subject to the FMLA; (3) she was entitled to leave under the FMLA; (4) she gave the employer notice of her intention to take FMLA leave; and (5) she was denied the FMLA benefits to which she was entitled.

The district court found that the employee’s interference claim failed because the employee did not give required notice of her intent to take FMLA leave. The court found that the employee only expressed an interest in learning about FMLA for the future, which, as a matter of law, is not sufficient notice. Moreover, the court noted that she never contacted human resources or asked anyone other than her supervisor about the leave. Accordingly, the court held that the employee failed to give sufficient notice. The court further held that even if she gave proper notice, she did not establish that she was ever discouraged from taking FMLA leave because she received FMLA forms with all the correct information she needed to take leave. Therefore, her claim of interference failed and the court granted summary judgment to the employer on the claim of FMLA interference.

With respect to the employee’s retaliation claim, the district court ruled that she could not establish such a claim because she failed to put forth any evidence that her termination was causally related to her alleged exercise of FMLA rights. As such, she failed to establish a *prima facie* FMLA retaliation claim and the court granted defendant summary judgment.

Jones v. Omega Cabinets, Ltd., 2011 WL 1233192 (N.D. Iowa Mar. 31, 2011)

Pro se plaintiff began FMLA leave on March 10, 2008, and was discharged on May 1, 2008, when defendant miscalculated the amount of leave plaintiff had remaining. The undisputed facts showed that plaintiff was not able to return to work even as late as October 2010.

Plaintiff asserted that defendant interfered with her FMLA rights and retaliated against her by terminating her employment. Defendant moved for summary judgment alleging that plaintiff had failed to show that she had suffered recoverable damages under the FMLA, which is a required element of her *prima facie* case. In granting defendant’s motion, the court found that plaintiff’s FMLA leave — even if it had been correctly calculated — would have expired long before she was able to return to work. Consequently, plaintiff’s interference claim failed because she had not suffered damages.

In granting defendant’s motion for summary judgment on plaintiff’s retaliation claim, the court noted that mere temporal proximity between the protected act and the adverse employment

action could be enough to establish a causal connection in certain circumstances. In this case, however, approximately seven weeks passed between the first day of plaintiff's leave and her discharge, which was insufficient to establish the requisite causal connection though temporal proximity alone.

Kaul v. Brett Robinson Gulf Corp., 2011 WL 1669057 (S.D. Ala. May 3, 2011)

Plaintiff was discharged for poor performance before she had been employed for 12 months. Prior to her discharge, plaintiff had requested a schedule change in order to spend time with her mother, who was dying of lung cancer. At the time plaintiff made this request, she had not been employed with defendant for 12 months and therefore, was not eligible for FMLA leave. Because of this, the court granted defendant's motion for summary judgment on plaintiff's FMLA interference claim.

Pagel v. Tin, Inc., 2011 WL 2173667 (C.D. Ill. June 2, 2011)

On January 1, 2006, plaintiff began reporting to a new supervisor. At this same time, defendant instituted a policy requiring supervisors to formally review all sales associates based upon quantity and quality of sales activities, volume of product sold, and the number of new customers acquired. Plaintiff took off August 4, 2006 through August 7, 2006 to undergo a stress test. On August 24, 2006, the supervisor gave plaintiff written notice of poor performance because his sales volume had dropped and he had identified no new customers for two years. The notice also set plaintiff's accounting goals for 2006.

Plaintiff was hospitalized from August 29, 2006 through August 30, 2009 for an angioplasty. From September 6 through September 8, plaintiff again was hospitalized after becoming ill at work. On September 8, the supervisor phoned plaintiff to inform him that he wanted to accompany plaintiff on sales calls the following day. They went on three sales calls and all three were non-productive. On October 4, 2006, defendant fired plaintiff for poor job performance. Plaintiff then sued alleging defendant had interfered with his right to FMLA leave and had discharged him in retaliation for taking leave.

Defendant moved for summary judgment on plaintiff's FMLA claims. In analyzing plaintiff's interference claim, the court reviewed whether (1) plaintiff was entitled to FMLA leave, (2) plaintiff provided sufficient notice of his intent to take FMLA leave, and (3) defendant denied plaintiff's FMLA benefits. The court found that plaintiff was entitled to FMLA leave, but that there was a genuine issue of fact whether he had provided sufficient notice. The court further held that there was sufficient evidence for a jury to find that defendant interfered with plaintiff's FMLA rights by not accounting for the days that plaintiff was out sick when determining whether he had met his sales goals. However, the court then applied the shifting-burden-of-proof analysis and determined that defendant had legitimate non-discriminatory grounds for concluding that plaintiff was not meeting its standards. The court therefore granted summary judgment on plaintiff's claim of interference.

Although plaintiff offered evidence that there was a causal connection between his leave and his discharge, the court agreed that defendant had a legitimate, non-discriminatory reason for

discharging plaintiff. The court rejected plaintiff's argument that the reason was pretextual because the record failed to show that his supervisor had treated plaintiff any differently than other sales associates. Last, the court found that plaintiff's contention that his performance "wasn't that bad" was insufficient to show pre-text.

Palmer v. Cacioppo, 2011 WL 2558860 (6th Cir. June 28, 2011)

The district court granted the employer summary judgment on plaintiff's unlawful interference claim because there was no evidence plaintiff suffered from a serious health condition. The fact that she was on medical leave was irrelevant, as not all approved medical leave is FMLA qualified leave. Because plaintiff could not prove that she suffered from a serious health condition, the district held she was not entitled to FMLA leave. Thus, plaintiff failed to demonstrate that she was denied her any benefit she was owed, and the appellate court upheld summary judgment in favor of the employer.

Sanders v. City of Newport, 657 F.3d 772 (9th Cir. 2011)

Plaintiff sued her employer, City of Newport when it refused to reinstate her after she took an approved medical leave under the FMLA and the Oregon Family Leave Act ("OFLA"). The trial court instructed the jury to consider whether "plaintiff prove[d] by a preponderance of the evidence that defendant, without reasonable cause, failed to reinstate her after she took leave." This instruction put the burden of proof on plaintiff to show that the employer had no reasonable cause for failing to reinstate her. The appeals court found that it is clear from other regulations that the burden rests with the employer to establish whether the employee can perform the essential functions of the job and that the burden is on the employer to show that he had a legitimate reason to deny an employee reinstatement. This error was not harmless as it erroneously added an extra element to plaintiff's burden of proof.

The court also noted that the FMLA requires the employer to reinstate the employee after taking leave; it does not allow the employer to interfere with the employee's right to reinstatement for "reasonable cause," as the given instruction stated. Thus, the reasonable cause instruction given went beyond the five elements required for a *prima facie* right to reinstatement claim. The elements of a *prima facie* case where the employer fails to reinstate the employee are: (1) employee was eligible for the FMLA's protections, (2) the employer was covered by the FMLA, (3) the employee was entitled to leave under the FMLA, (4) the employee provided sufficient notice of intent to take leave, and (5) the employer denied the employee FMLA benefits to which the employee was entitled.

Schmidli v. City of Fraiser, 784 F. Supp. 2d 794 (E.D. Mich. 2011)

Plaintiff sued her employer, City of Frasier, after she was terminated from her position as Director of the Fraser Public Library. After receipt of employee complaints, plaintiff was placed on leave and asked to consult with the Employee Assistance Center ("EAC"). She did not go to the EAC and instead applied for FMLA leave. When she wished to return from FMLA leave, she was discharged. Plaintiff filed suit, alleging her discharge was in violation of the FMLA and state law, and defendant moved for summary judgment.

For the entitlement or interference theory, plaintiff was required to show: (1) she was an eligible employee, (2) defendant was an employer as defined under the FMLA, (3) she was entitled to leave under the FMLA, (4) she gave the employer notice of her intention to take leave, and (5) the employer denied the employee FMLA benefits to which she was entitled. In addition, the dismissal must be harmful. In other words, if the discharge would have occurred regardless of the FMLA request, the employee does not receive relief. Applying this test, the court relied on defendant's legitimate reasons to discharge plaintiff that were unrelated to her FMLA rights, including numerous complaints about plaintiff that indicated highly questionable behavior. Her behavior included using a seal puppet to talk to employees, wearing a brassiere in front of other employees instead of a shirt, and discussing her sex life with employees.

Under the retaliation theory, plaintiff argued that the proximity of the adverse action and her FMLA leave was indirect evidence of a causal connection. Defendants provided legitimate nondiscriminatory reasons for her termination, particularly in the form of employee complaints. Plaintiff failed to show this reason was pretextual because there were a multitude of employee complaints and she refused to attend the EAC as requested by defendants. The court concluded a fair minded juror could not find in her favor given the complaints, her unprofessional behavior and refusal to attend the EAC.

Spakes v. Broward County Sheriff's Office, 631 F.3d 1307 (11th Cir. 2011)

Plaintiff called in sick for two days. She returned to work on Monday and informed her supervisor on Tuesday that she needed to take leave to receive treatment for an infection. On Friday, she submitted her FMLA leave request. The following Monday, defendant terminated her employment for performance issues. Plaintiff filed suit, alleging defendant interfered with her rights under the FMLA and retaliated against her. A jury found for plaintiff on both FMLA claims, finding defendant discharged plaintiff because of her request for FMLA leave and would not have discharged her but for the request.

On appeal to the Eleventh Circuit, defendant argued the district court erred in failing to give an instruction requiring the jury to find a causal nexus between plaintiff's leave request and her discharge. The Eleventh Circuit held that a plaintiff is not required to prove a causal connection to establish a *prima facie* case of FMLA interference; however, a defendant may raise its reasons for the adverse action and lack of such a causal connection as an affirmative defense. Although the district court instructed the jury that the defense applied only to plaintiff's retaliation claim, the Eleventh Circuit found that the failure to give the instruction with respect to the interference claim was harmless error because the jury rejected the defense in its special verdict.

Thomsen v. Stantec, Inc., 785 F. Supp. 2d 20 (W.D.N.Y. 2011)

Plaintiff Thomsen sued his employer, Stantec, for FMLA interference and retaliation. The district court granted summary judgment against both claims. Thomsen's novel interference theory was that Stantec interfered with his FMLA rights by terminating his employment, which prevented him from taking further, as-yet-unrequested FMLA leave. The district court held that Thomsen failed to state an FMLA interference claim. As to

Thomsen's retaliation claim, the district court held that Thomsen could not rebut Stantec's legitimate, non-discriminatory reason for terminating his employment: a lessening of demand for the company's products and Thomsen's deficient work performance. The court also noted that during the period of Thomsen's employment, six other employees took FMLA leave and none suffered an adverse employment action, and that temporal proximity between Thomsen's FMLA leave and his discharge was, by itself, not sufficient to carry his burden of proof beyond the *prima facie* stage.

Wellington v. Lane County, 2011 WL 6019216 (9th Cir. Dec. 5, 2011)

The court of appeals reversed the district court's summary judgment for the employer on the employee's claim of FMLA interference. The district court had erroneously required a showing that the adverse employment action was motivated by the employee's exercise of his statutorily protected rights. The court of appeals also held that summary judgment was inappropriate because there was a genuine issue of material fact concerning whether plaintiff was returned to his same or equivalent job at the end of his leave. Finally, genuine issues of material fact also existed as to whether defendant would have reduced plaintiff's job responsibilities and ultimately terminated his employment regardless of whether he took protected leave, particularly in light of the temporal proximity between his return from medical leave and these alleged adverse employment actions.

Yanklowski v. Brockport Central School District, 2011 WL 2473098 (W.D.N.Y. June 22, 2011)

While she was employed by defendant, plaintiff was given FMLA leave on three separate occasions. One leave was due to her son's surgery and two were for plaintiff's own medical condition. After each of these leaves, plaintiff was permitted to return to work. Defendant then disciplined and discharged plaintiff. Plaintiff filed a lawsuit, alleging that defendant interfered with her exercise of rights under the FMLA and retaliated against her for exercising her rights under the Act.

The court granted defendant's motion to dismiss plaintiff's interference claim. The court found that plaintiff did not allege that she was denied any benefit she was entitled to under the FMLA. Instead, her claim that she was disciplined and discharged because she took FMLA constituted only a retaliation claim and not an interference claim.

Summarized Elsewhere:

Ames v. Home Depot U.S.A., Inc., 629 F.3d 665 (7th Cir. 2011)

Bennett v. Wal-Mart Stores, Inc., 2011 WL 1899362 (C.D. Ill. May 19, 2011)

Crawford v. City of Tampa, 2011 WL 940305 (M.D. Fla. Mar. 17, 2011)

Finch v. Pulte Homes, Inc., 2011 WL 3438347 (E.D. Mich. Aug. 5, 2011)

Hayes v. Elementary School District No. 159, 2011 WL 1059890 (N.D. Ill. Mar. 21, 2011)

Jackson v. Gannett Co., 2011 WL 3362154 (D.N.J. Aug. 3, 2011)

Jadali v. Mich. Neurology Assoc., 2011 WL 6848356 (Mich. App. Dec. 29, 2011)

Knight v. Engert Plumbing & Heating, Inc., 2011 WL 3328399 (E.D. Tenn. Aug. 2, 2011)

Marks v. Ohio Bell Telephone Co., 2011 WL 3322594 (N.D. Ohio Aug. 2, 2011)

Sproul v. Washoe Barton Medical Clinic, 2011 WL 5190529 (D. Nev. Oct. 27, 2011)

Wilkes v. T-Mobile, 2011 WL 1113397 (E.D. Tenn. March 24, 2011)

2. Interference Claims [New Topic]

Apostol v. Castro Valley Unified School District, 2011 WL 5104361 (N.D. Cal. Oct. 27, 2011)

The employer moved for summary judgment on plaintiff's interference claim, arguing plaintiff never requested any FMLA leave. Because plaintiff offered evidence that he had submitted a leave request form, it was disputed whether the employer interfered with plaintiff's right to take leave, and the court denied employer's motion for summary judgment.

Armfield v. Key Plastics, LLC, 2011 WL 3022253 (N.D. Ind. July 22, 2011)

Defendant had a written policy of discharging employees who accumulated three unexcused absences. Plaintiff obtained one unexcused absence when she missed work without prior approval. Two days later, her nurse practitioner authorized FMLA leave for anxiety and depression. While plaintiff was absent from work, her nurse practitioner extended her medical leave. However, plaintiff failed to notify defendant that she would not be returning to work when defendant expected her to do so. Plaintiff was subsequently discharged after accumulating three unexcused absences.

Plaintiff alleged FMLA interference in four ways. First, she claimed her discharge for violation of the "three strikes" attendance policy was based on three absences allegedly protected by the FMLA. Second, defendant improperly terminated her employment before the expiration of the fifteen-day window to provide medical certification. Third, defendant failed to notify plaintiff of her eligibility for FMLA leave. Fourth, defendant failed to notify plaintiff of her obligations under the FMLA.

The court denied defendant's summary judgment motion on plaintiff's first theory of interference, finding that there was a genuine issue of material fact as to whether plaintiff's first absence was protected by the FMLA because she may have been suffering from anxiety and depression at that time as well.

The court granted defendant's summary judgment motion on plaintiff's second and third theories of interference. It found that plaintiff's second claim failed because plaintiff could not show she suffered any harm by not having 15 days to return a medical certification because she was discharged for unexcused absences, and not for failing to provide medical certification within the specified time limit. It also found that plaintiff's third claim failed because the regulation requiring eligibility notice was inapplicable in 2006; and in any event, the evidence clearly showed that plaintiff was aware of her eligibility for FMLA leave.

The court denied summary judgment on plaintiff's fourth claim because the evidence showed that defendant did not notify plaintiff of her obligations under the FMLA. In addition, the court dismissed defendant's defense that plaintiff was not entitled to any FMLA leave because she failed to return completed medical certification forms within the required fifteen-day period. Although the conduct of the employee can be an equitable defense to FMLA claims, the court held that this defense fails where the employee's conduct is the result of the employer's failure to notify an employee of her obligations under the FMLA.

Ballato v. Comcast Corp., 2011 WL 2728265 (D. Minn. July 13, 2011)

Plaintiff was properly certified for intermittent leave for chronic fatigue, depression, and weakness. Defendant's leave policy required that individuals on intermittent leave contact defendant's Resource Management Center ("RMC") when the need for leave arose. In addition, defendant's policies consider three consecutive unexcused absences to be a voluntary resignation. After beginning his intermittent leave, plaintiff sent a number of inflammatory and troubling emails to Human Resources, his supervisors, and upper management. In addition, plaintiff failed to contact the RMC regarding his absences on three consecutive work days. Defendant terminated plaintiff's employment as a result of his disturbing emails and unexcused absences.

Regarding plaintiff's interference claim, the court granted summary judgment for defendant because plaintiff could not meet the required showing that a similarly situated person would not have been discharged in the same circumstances. The court also considered whether plaintiff had stated a *prima facie* case of retaliation, finding that plaintiff did not offer any evidence to suggest a causal relationship between his use of medical leave and his discharge. In fact, the evidence indicated that plaintiff was allowed to establish his eligibility for leave and received no "pushback" from defendant. As a result, the court granted defendant's motion for summary judgment.

Chapman v. U.S. Postal Serv., 442 Fed. Appx. 480 (11th Cir. 2011)

Plaintiff appealed the district court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of her harassment, discrimination, fraud, ADA and FMLA claims. The Eleventh Circuit affirmed the decision of the district court, finding that plaintiff failed to adequately state claims for either FMLA interference or retaliation. The court restated the rule that a claim for FMLA interference requires a plaintiff to "allege that she was denied a benefit to which she was entitled under the FMLA." The court then held that plaintiff failed to state a claim for interference because she failed to show she was entitled to any benefit under the FMLA. The court also restated the rule that a claim for FMLA retaliation requires a plaintiff to show adverse action relating to her

engagement in statutorily protected activity.

Cooley v. Board of Education, 761 F. Supp. 2d 808 (N.D. Ill. 2011)

A former school counselor sued the Board of Education and the principal of the school where she had been assigned. She alleged interference with the exercise of her FMLA rights and retaliation in connection with the elimination of her position shortly after she informed the principal of her pregnancy and intent to take maternity leave. The matter came before the district court on defendants' motion for summary judgment.

The court denied the motion and specifically rejected defendants' argument that they could not have interfered with plaintiff's FMLA rights because they granted all the leave she requested, which was only a one-day absence to deal with pregnancy complications. The court explained that defendants' arguments missed the point because the FMLA leave at issue was plaintiff's upcoming expected maternity leave rather than the one day she took for complications. The court found plaintiff's testimony that the principal looked shocked when she indicated her intent to take leave and withheld administrative support, combined with the elimination of plaintiff's position, presented genuine material facts with regard to plaintiff's interference claim and prevented summary judgment for defendants.

Cox v. Wal-Mart Stores Inc., 2011 WL 2632086 (9th Cir. July 6, 2011)

A former employee filed suit against Wal-Mart alleging that Wal-Mart failed to reinstate her at the end of her leave in violation of the FMLA. The court granted summary judgment for the employer, finding the employee did not seek and, therefore, the employer did not deny reinstatement. The U.S. court of Appeals for the Ninth Circuit reversed, finding there was evidence the employee expressed that she wanted to come back to work and this was sufficient to present factual questions as to whether the employee sought reinstatement and whether the employer interfered with her entitlement to it.

Dollar v. Smithway Motor Express, Inc., 2011 WL 1399800 (N.D. Iowa April 13, 2011)

Plaintiff missed work several times in 2006 and early 2007 due to depression and anxiety, of which her direct supervisor was aware. She provided medical excuses for her absences and was never disciplined. On June 10, 2007, plaintiff suffered a severe anxiety attack, causing her to seek treatment at a hospital. Before her June 11, 2007 work shift, plaintiff left a voicemail message with her division manager explaining that she would not be to work and was going to the doctor. Her doctor diagnosed her with depression, prescribed new depression medication, and wrote defendant a note stating that plaintiff was being treated at a health center through June 19, 2007. Plaintiff then left another voicemail message with her supervisor the next day, explaining the situation. Within the next few days, plaintiff's supervisor called her and explained that she would be transferred to another position as a driver recruiter. He also instructed plaintiff to return to work on June 25, 2007. On June 19, 2007, plaintiff's physician extended her leave of absence until July 9, 2007, and plaintiff notified her supervisor, who told

her that if she was to be out for that long he could not guarantee to hold her position. On July 3, 2007, plaintiff submitted another doctor's note extending her time off work to July 30, 2007. Upon receipt of this doctor's note, defendant terminated plaintiff's employment.

Plaintiff sued claiming that defendant retaliated against her and interfered with her FMLA rights. At the time of her discharge, plaintiff was eligible for FMLA-protected leave. Defendant, however, never discussed the FMLA with plaintiff and plaintiff never expressly requested FMLA leave and never actually took FMLA leave. After a bench trial, the court entered judgment in favor of defendant on plaintiff's retaliation claim. The court explained that the crux of plaintiff's claims was interference with FMLA rights, not retaliation for having exercised her rights because she never actually exercised a right under the FMLA.

Regarding plaintiff's interference claim, the court first explained that plaintiff provided adequate notice of her need for leave because her absences were clearly for an FMLA-qualifying reason (treatment of her depression), which she regularly communicated to defendant. Next, the court concluded that when she notified her supervisor that she needed time off on July 6, 2009, due to her qualifying serious health condition, she should have been given time off under the FMLA, but was instead fired. This, according to the court, interfered with plaintiff's FMLA rights.

Further, the court found that defendant failed to restore plaintiff to her driver recruiter job, which she said she could have performed at the conclusion of her requested leave, despite her depression, rejecting defendant's argument that plaintiff never actually worked in that job. According to the court, defendant made it clear to plaintiff that she had been transferred to the driver recruiter position prior to her discharge and, thus, that position was to be analyzed for purposes of her FMLA reinstatement rights, not her previous position, which she could not have performed due to her depression. The court awarded plaintiff back pay, 10 years worth of front pay in lieu of reinstatement, and liquidated damages totaling over \$500,000, plus attorneys' fees.

Etheridge v. Fedchoice Federal Credit Union, 789 F. Supp. 2d 27 (D.D.C. June 2, 2011)

Plaintiff was discharged after she failed to notify defendant as to her return date and failed to return to work when her FMLA leave expired. After her discharge, plaintiff told defendant that she needed additional time off. In response, defendant informed her that it was unable to hold her position beyond the time she was entitled to under the FMLA, though it had never previously notified plaintiff that her leave time was running out. Plaintiff then filed suit, alleging that her discharge violated the FMLA because it constituted unlawful interference and that the FMLA entitled her to receive a reasonable accommodation. Defendant filed a motion for summary judgment, arguing that it did not interfere with her FMLA rights because plaintiff had exhausted the leave time she was entitled to and had informed it that she was unable to return to work. In addition, defendant pointed out that the FMLA does not require employers to provide reasonable accommodations.

The court granted defendant's motion and concluded that defendant had not interfered with plaintiff's FMLA rights because she received all of the time she was entitled to. Further, the court agreed with defendant that the FMLA does not impose reasonable accommodation obligations on employers.

Gardner v. Great Lakes Cheese, 2011 WL 4537894 (N.D. Ohio Sept. 28, 2011)

During her employment with defendant, plaintiff suffered from several medical conditions that limited her ability to attend work and, with defendant's approval, she used FMLA leave intermittently due to her own medical conditions and those of family members. Both plaintiff and defendant kept their own records of plaintiff's FMLA usage, and plaintiff occasionally asked her supervisors for updates on her available FMLA. According to plaintiff, she had asked for such updates on multiple occasions. Although defendant responded to those requests on previous occasions, it failed to do so only a few weeks before she was discharged. Plaintiff thus claimed that she was prejudiced by not receiving the requested information and that defendant had interfered with her right to take FMLA leave.

Both parties moved for summary judgment. The court held that neither party was entitled to summary judgment on plaintiff's claim of interference, as fact issues remained as to plaintiff's reliance upon defendant's FMLA updates and the actual harm, if any, caused by defendant's failure to provide the requested update to plaintiff. Finally, the court granted summary judgment to defendant on plaintiff's claim of retaliation, as (i) plaintiff had exceeded her FMLA leave allotment prior to any adverse action by defendant, (ii) defendant's attendance policy does not envision the taking of any adverse action until an employee has exceeded FMLA or other available leave, and (iii) plaintiff failed to show any causal connection between her protected activity under the FMLA and her termination.

Harris v. Bexar County, Texas, 2011 WL 130235 (W.D. Tex. Jan. 14, 2011)

Plaintiff, a former employee at the Bexar County Sheriff's Detention Center, took FMLA leave in late 2006 through early 2007 due to various medical conditions. In June 2008, plaintiff again took FMLA leave after allegedly suffering an injury caused by an inmate attacking him. Plaintiff exhausted his FMLA leave in September 2008 and in November 2008, defendant discharged plaintiff for excessive absences. Plaintiff then filed a lawsuit, alleging that defendant interfered with his benefits under the FMLA and that he was retaliated against for exercising his rights under FMLA.

Defendant moved for summary judgment, contending that it had provided plaintiff with all of the FMLA leave to which he was entitled and that the claims regarding leave he took in 2006-2007 were barred by the two-year statute of limitations. The court found that plaintiff's interference claims failed because there was no evidence that defendant denied plaintiff FMLA leave. The court also found that plaintiff's retaliation claims failed. The claim related to leave taken in late 2006 through early 2007 was barred by the two-year statute of limitations and the three-year limitations period did not apply because plaintiff did not present any evidence as to willfulness. In addition, plaintiff only alleged that he was counseled for driving on the wrong side of the road and was asked to recertify his 2006-2007 leave, neither of which qualified as an adverse employment action. Lastly, plaintiff's 2008 retaliation claim failed because he did not demonstrate that he was treated differently from other employees who had exhausted FMLA leave.

Hillis v. Larson Engineering, Inc., 2011 WL 2633852 (N.D. Ill. July 5, 2011)

Plaintiff, a staff accountant, was asked by the Chief Financial Officer to alter an engineer's reimbursement rate and did so. She did not contact her supervisors, who were out of the office, before doing so. In a meeting shortly thereafter, she was called to task for not contacting the supervisors before changing the rate. The supervisors claimed that she was insubordinate at the meeting and that she stated she would handle a similar matter the same way – without contacting the supervisors first – if it arose. Plaintiff denied these allegations. Soon after the meeting, she advised that she was going to use her upcoming leave for carpal tunnel surgery and recovery instead of vacation as previously planned. She was discharged about two weeks later. She subsequently sued for violations of the FMLA under both the interference and retaliation provisions. The district court denied the employer's motion for summary judgment.

The employer defended against the interference claim by arguing that the employee was not entitled to leave because she was fired for insubordination and poor performance. The court, however, held that there was a fact question about whether she was actually fired for these reasons since evidence conflicted about whether plaintiff was under a directive to obtain supervisor approval before changing rates. Further, despite the employer's claim that she was a poor performer, her reviews were generally positive. Plaintiff's retaliation claim also survived summary judgment because no documents showed the employer reached its decision to discharge plaintiff before she provided notice of her medical need for leave and the timing of the two events could indicate retaliation.

Kinney v. Century Services Corp. II, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011)

Since November 2008, plaintiff had been continuously treated for depression. On April 27, 2009, plaintiff requested from her supervisor a leave of absence to receive inpatient treatment for depression and thoughts of suicide. Plaintiff alleged that the supervisor responded that it was "ridiculous," that plaintiff was "overreacting," and that the request made the supervisor doubt plaintiff's competence. Nevertheless, the leave was approved. After taking a one day extension of the FMLA leave, plaintiff returned to work but initially forgot her doctor's note for the extra day of leave. She was told she could not work that day, even though plaintiff contended she retrieved the note prior to the start of her shift. In being sent home, plaintiff had the day designated as a paid vacation day.

Plaintiff brought an FMLA interference claim, arguing defendant interfered with her FMLA rights by refusing to reinstate her the day she returned to work from leave. The court found that plaintiff established a dispute as to whether she was improperly denied a right to return to work because her employer would have been required to return her to work if she presented her work release prior to the start of her shift, as plaintiff claimed happened.

Plaintiff also argued defendant interfered with her FMLA rights by failing to provide her FMLA paperwork to designate that day as FMLA leave. Defendant argued that not giving the paperwork was a technical violation. The court found defendant's argument unavailing. By not giving plaintiff the paperwork, she had no choice but to designate the absence as a vacation day. If given the paperwork, plaintiff would not have been forced into that choice. Consequently, the court denied the employer's motion for summary judgment on plaintiff's FMLA interference claim.

Leach v. State Farm Mutual Auto. Ins. Co., 2011 WL 2118723 (11th Cir. May 27, 2011)

On appeal, the court's analysis focused on whether defendant *reasonably believed in good faith* that plaintiff engaged in misconduct, not whether plaintiff actually did so. Defendant presented evidence that plaintiff was under a disciplinary investigation which culminated in defendant's November 12, 2007 decision to discharge plaintiff, made *before* plaintiff went out on FMLA leave, based upon plaintiff's documented history of insubordinate and unprofessional behavior. Further, defendant decided to delay plaintiff's termination of employment until February 23, 2008, in light of plaintiff's FMLA request and to ensure that plaintiff's health benefits would not lapse. Thus, the court affirmed that summary judgment was proper on plaintiff's interference claim, recognizing the well-settled principle that employers are entitled to make credibility decisions regarding employee misconduct. Additionally, the court held that plaintiff failed to present any evidence from which a reasonable jury could conclude that his discharge was in any way related to his FMLA leave. For this same reason, the court agreed that plaintiff failed to prove his retaliation claim.

Maldonado-Ortiz v. Lexus de San Juan, 775 F.Supp. 2d 389 (D.P.R. 2011)

On October 1, 2007, plaintiff wrote a letter to defendant, indicating that she needed another reasonable accommodation. Specifically, she advised defendant that she could not work longer than 8 hours each day and requested an ergonomic chair. A representative in the human resources department at the dealership responded to plaintiff, in writing, and explained that in order to assess her request, defendant needed additional information from plaintiff's doctor, indicating what duties and responsibilities were affected by her condition. Defendant included the forms to request leave under the FMLA with its response. Plaintiff then submitted a medical certificate from her doctor stating that she was not disabled but could not work longer than 8 hours a day and needed an ergonomic chair, because cancer patients should not work longer than 8 hours each day.

Defendant contacted plaintiff's doctor for clarification on plaintiff's request and his conclusion that plaintiff was not disabled. Plaintiff's doctor could not explain why she needed these reasonable accommodations, however, because he was not the doctor who treated her cancer. As such, defendant contacted plaintiff and explained that her doctor had not provided sufficient information to allow it to process her request. Plaintiff responded that she had already provided all of the necessary paperwork and that she was not going to complete the FMLA forms because she did not want to take FMLA. While defendant was evaluating her request, plaintiff purchased an ergonomic chair and brought it to the dealership. Defendant allowed her to use it and offered to reimburse her for the chair if she provided information to defendant concerning the basis for her reasonable accommodation.

On August 21, 2008, the Service and Parts Director admonished plaintiff in writing for her habitual absences over the previous year. Plaintiff responded that all of her absences were the result of medical treatments. On August 27, defendant responded to plaintiff's letter regarding her habitual absences, reminding plaintiff that defendant still needed information concerning the basis for her requests. In addition, defendant asked plaintiff to explore the possibility of requesting FMLA leave so that she could be absent from work for an extended or

intermittent period of time. Plaintiff responded that the Labor Department and her doctor informed her that it was not necessary to fill out the FMLA paperwork and that the information she had submitted thus far was sufficient to justify her reasonable accommodation request.

On August 22, 2008, plaintiff sought treatment at the State Insurance Fund and never returned to work. Although the State Insurance Fund dismissed her case for lack of jurisdiction in June 2009, plaintiff still did not return to work. Consequently, on August 20, 2009, defendant terminated plaintiff's employment and declared her position vacant.

The court found that plaintiff's claims for interference of her FMLA rights were frivolous and summarily dismissed them. Plaintiff's claims that if defendant would have granted her reasonable accommodation request, she would have been able to receive the medical treatment necessary and not forced to incur absences did not persuade the court to find in her favor. To the contrary, the court found that plaintiff failed to properly plead an FMLA claim because she never requested FMLA leave, despite defendant's repeated attempts for her to complete the necessary paperwork. Furthermore, the court found that defendant did not condition her reasonable accommodation on her FMLA forms and merely asked plaintiff to provide additional information regarding the basis for her requests.

Matthews v. The New Jersey Inst. of Tech., 772 F. Supp. 2d 647 (D.N.J. 2011)

In *Matthews*, plaintiff claimed, among other things this his employer interfered with his FMLA rights by: (1) failing to advise him of those rights; (2) requiring that he obtain a medical certification and submit to a fitness for duty exam; and (3) denying his request for FMLA leave.

The court easily rejected plaintiff's first claim because the record established that plaintiff was advised of his FMLA rights and, even if he hadn't been so advised, there was no evidence of prejudice due to the absence of evidence that plaintiff would have acted differently if advised of his FMLA rights. Thus, summary judgment was granted to defendants on the claim. The court also easily granted summary judgment on plaintiff's second claim, finding that requiring a medical certification is expressly permitted by the FMLA and that there was no evidence of any injury resulting from the fitness for duty exam or medical certification. Turning to plaintiff's third claim, there was sufficient evidence to withstand summary judgment. Plaintiff provided evidence that he submitted a completed FMLA certification to his employer and that his employer failed to take action on plaintiff's request.

Montgomery v. Ion Media Management Co., 2011 WL 1791294 (M.D. Fla. May 10, 2011)

Montgomery's daughter had a medical condition that required Montgomery to frequently miss work. Her supervisor, the Director of Finance often asked if her daughter was "sick again?" and asked "what are you feeding that kid?" However, her requests for time off were never refused and she was never penalized for taking time off. Montgomery informally raised an FMLA issue on October 14 with the Senior Human Resource ("HR") Director. The next day, the Senior HR director met with the director of HR and the Chief Executive Officer, and a consensus was reached that Montgomery was no longer needed and Ion was going to replace her with a technically-expert finance professional. Montgomery formally requested FMLA leave on November 18, and was discharged on December 2. She was not replaced, nor did her employer

attempt to replace her. She was granted FMLA leave without any delay or administrative hurdles, but alleged Ion interfered with her FMLA rights by discharging her before she was able to use her FMLA leave.

The federal district court granted defendant's motion for summary judgment on plaintiff's FMLA interference and retaliation claims. The court found Montgomery would have been discharged regardless of her request to take FMLA leave because she did not have the experience necessary to perform successfully in the finance department. The court noted that "Ion was not required to change its course with respect to Montgomery's termination because she sought FMLA leave." Thus, the court found Ion had a legitimate, non-retaliatory reason for her termination. Though Montgomery disagreed with Ion's assessment of her ability, the court refused to second-guess the employer's decision.

Partridge v. City of Cincinnati, 2011 WL 5878388 (S.D. Ohio Nov. 23, 2011)

In *Partridge*, the employee was in the middle of a post-promotion probation period when he took medical leave for surgery. During the leave, the employer informed him that he would be returned to his pre-promotion position at the end of his leave for "failure of probation." Plaintiff sued claiming FMLA interference. Defendant moved for summary judgment claiming that due to plaintiff's inadequate performance during his probation, he would have been demoted irrespective of his medical leave. Plaintiff countered that he should have been given the chance to improve his performance during the balance of his probation, which was tolled during the FMLA leave, and also moved for summary judgment. The court denied both motions, holding that there was a genuine issue of material fact concerning whether plaintiff could have satisfactorily completed his probation after returning from FMLA leave.

Plaxico v. County of Cook, 2011 WL4837287 (N.C. Ill. Oct. 12, 2011)

Plaintiff, a Superintendent with the Cook County Sherriff, was granted intermittent leave to care for his son with mental health issues in 2006, 2007 and 2008 without incident. In 2009, plaintiff filed suit against the County, the County Sherriff, the Executive Director and the Assistant Executive Director of the Department of Corrections over a series of incidents that his lawsuit described as "interference" or "retaliation" in violation of the FMLA. The court was presented with cross-motions for summary judgment and ruled in defendants favor.

The court reviewed each interference allegation and denied each allegation as described below:

- "Entitlement to Leave": the claimed protected leave was outside of the scope of plaintiff's FMLA certification;
- "Transfers": plaintiff's transfer as Superintendent from a maximum security prison with a high maintenance prison population to a low security facility was not an adverse employment action since it did not result in a demotion, reduction in pay or an alteration of job title;

- “Discipline and Demotions”: “While the FMLA gave [plaintiff] certain rights to leave and protected him from interference and retaliation, the FMLA did not protect [plaintiff] from being disciplined for poor work performance.”
- “Conditions on Leave”: defendant’s policy of limiting intermittent leave to five (5) days per month did not interfere with plaintiff’s FMLA leave rights because he did not take leave in excess of this monthly limitation and at the end of the FMLA leave year, he had surplus leave remaining;
- “Notice to Supervisors,” “Substitution of Time,” “Rescinding FMLA Leave”: the court rejected plaintiff’s assertion that the employer’s requirement that he provide his supervisor with advanced notice of his need for intermittent leave or requiring him to substitute available paid leave before using unpaid FMLA leave or refusing to allow him to rescind certain requests for FMLA leave was interference because such restrictions were permitted by the regulations;
- “Reinstatement”: “[Plaintiff] has failed to point to sufficient evidence that indicates that he would have been reinstated if he had not taken FMLA leave or that the decision not to reinstate [plaintiff] was in any way related to his ability to take FMLA leave properly.”

The court also rejected plaintiff’s retaliation claim stemming from his successive demotions from Superintendent to Chief and from Chief to Captain. The court concluded the demotion from Superintendent to Chief was due to poor work performance and from Chief to Captain due to an arrest for Driving Under the Influence, both of which constituted genuine reasons for the demotions. The court rejected plaintiff’s argument that the timing of these demotions, coming after taking FMLA leave, was sufficient evidence to defeat defendant’s summary judgment motion or to go to trial.

Stephenson v. JLG Industries, Inc., 2011 WL 1304625, (M.D. Pa. Mar. 31, 2011).

Plaintiff had been using intermittent leave to care for his wife and his requests to use FMLA leave were always approved. After a couple of weeks, plaintiff’s coworkers reported to defendant that plaintiff was abusing FMLA leave to do things like take his car to the shop for repair. Defendant called the auto repair shop and determined that plaintiff had in fact brought his vehicle in for repair that day. Defendant also called the therapy center where plaintiff’s wife was receiving treatment and inquired as to whether she attended that day. Defendant confronted plaintiff about his use of FMLA leave, but when he insisted he was home taking care of his wife, defendant did not discipline him.

A couple of weeks later, plaintiff’s coworkers reported to defendant that plaintiff smelled of alcohol. Defendant told plaintiff he would need to take a reasonable-suspicion alcohol test under defendant’s drug and alcohol policy. However, plaintiff refused to allow defendant to immediately drive him to the testing facility. Plaintiff was scheduled to go on FMLA leave a couple of hours later to take his wife to her medical appointment, which was in the same building as the testing facility, and he wanted to take the test then. Defendant discharged plaintiff for refusal to test.

Granting defendant’s motion for summary judgment, the court determined plaintiff could not establish the prejudice necessary to support his interference claim because defendant never denied plaintiff FMLA leave. The court rejected plaintiff’s argument that defendant “committed

the ‘ultimate act of interference’ when it terminated his employment which prevented him from taking FMLA leave anticipated subsequent to his termination,” concluding that this claim was more appropriately cast as a retaliation claim. The court also determined as a matter of law that plaintiff could not establish the refusal-to-test termination was a pretext for retaliation. The record did not support plaintiff’s argument that the drug and alcohol policy was inconsistently applied, nor that defendant timed its demand for him to submit to a reasonable-suspicion test so as to interfere with his scheduled FMLA leave.

Wetter v. Aultman Health Foundation et al., 2011 WL 4458678 (N.D. Ohio Sept. 23, 2011)

Plaintiff contended that the employer interfered with her FMLA rights by failing to inform her that she may have consumed her remaining FMLA leave time. The facts were undisputed that plaintiff’s supervisor failed to inform her (on a single occasion) that she had not consumed 100% of her remaining FMLA leave time, which the court found to be a potential interference with plaintiff’s FMLA rights. However, the court granted summary judgment for the employer because the facts were also undisputed that plaintiff had not been prejudiced by the supervisor’s failure. Namely, the court found no prejudice because plaintiff was never denied any request for FMLA leave during her employment.

In response to the employer’s summary judgment motion, plaintiff also contended that she was terminated from her employment in retaliation for plaintiff exercising her FMLA rights and for filing a worker’s compensation claim. The court held that plaintiff waived her FMLA retaliation claim, however, by failing to include an FMLA retaliation cause of action in her complaint.

Welch v. Tri Rivers Consulting Services, Inc. et al., 2011 WL 1656070 (W.D. Pa. Mar. 21, 2011)

After nearly seven years of employment, plaintiff began receiving reprimands for her absenteeism and negative attitude in June 2008. At the same time, plaintiff advised her supervisor that her medical conditions (anxiety, headaches, and difficulty sleeping) had intensified enough that she was taking medication. In July 2008, plaintiff requested and was granted six weeks of FMLA leave. When plaintiff returned to work in late-August 2008, she received multiple reprimands for tardiness and negative comments. Additionally, a non-employee made a harassment complaint against plaintiff to the employer’s human resources department. Plaintiff was suspended and subsequently discharge based on the results of the employer’s investigation.

The court denied summary judgment as to both plaintiff’s FMLA interference and FMLA retaliation claims. As to the FMLA interference claim, the court found a genuine issue of material fact as to whether plaintiff was entitled to intermittent FMLA leave after she returned from her initial FMLA leave. The court specifically noted that it should have been apparent to the employer from plaintiff’s post-leave conduct that plaintiff’s medical conditions were impacting her ability to meet the employer’s work standards. The court pointed out that in response to her final warning, plaintiff advised her supervisor and human resources that she was not ready health-wise to be back at work.

As to the FMLA retaliation claim, the court found an issue of material fact as to whether a causal connection existed between plaintiff's six-week FMLA leave and her termination given the temporal proximity of the two. The court noted that plaintiff was counseled regarding her poor attitude on her very first day back at work and that plaintiff's employment was terminated one month after her return from leave. The court specifically rejected the employer's argument that plaintiff's performance issues predated her FMLA leave. The court also found an issue of material fact as to whether the employer had a non-retaliatory reason for plaintiff's termination based on evidence that the employer was aware of plaintiff's purported harassment well before her FMLA leave and discharge.

Terwilliger v. Howard Memorial Hospital, 770 F. Supp. 2d 980 (W.D. Ark. 2011)

Plaintiff Terwilliger was discharged on the evidence of a video recording that showed her engaging in theft. In response, Terwilliger filed interference and retaliation claims under the FMLA. Before her discharge, Terwilliger had taken FMLA leave in relation to surgery. While she was on leave, her supervisor called weekly to determine when she would return to work. During one such call, she asked if her job were in danger, and was told that she should return to work as soon as she could. Terwilliger testified that these calls made her feel pressured to return to work. She also testified that the hospital's Human Resource director told her not to tell anyone that she had been informed of her FMLA rights. Based on this evidence, the district court held that a reasonable jury could find that the hospital interfered with Terwilliger's FMLA rights and denied summary judgment for the hospital. The court disregarded the hospital's defense that Terwilliger returned to work after her doctor released her without restrictions, and thus she was not denied any FMLA benefit because an interference claim includes the "chill theory," and Terwilliger had a right not to be discouraged from taking FMLA leave.

As to Terwilliger's retaliation claim, the district court held that the hospital's articulated reason for firing Terwilliger – theft – was not pretextual, even though one could not determine from the video if Terwilliger was engaging in theft, or as she claimed, was only moving a trash can. The issue, the district court said, was not whether Terwilliger actually was a thief; it was whether the hospital's reason was pretextual. In the absence of evidence of pretext, the court granted summary judgment against this claim.

Till v. Spectrum Juvenile Justice Services, 2011 WL 3319713 (E.D. Mich. Aug. 1, 2011)

Plaintiff had a history of conflicts with another employee. That employee had filed a complaint against plaintiff accusing her of making racist comments. Defendant found the complaint unsubstantiated. Three months later, the employee filed a grievance against plaintiff accusing her of slander and racist comments. Defendant suspended plaintiff while it was investigating the grievance. Plaintiff suffered a heart attack while she was on suspension and took FMLA leave. While on leave, plaintiff called to speak with a different employee, who claimed that plaintiff yelled profanities at him. As a result of the three complaints received and because defendant decided to implement a reduction in force, defendant decided to eliminate plaintiff's position. Defendant informed plaintiff of her discharge when she called in to inform defendant of her return to work date.

Plaintiff filed suit, alleging FMLA interference and retaliation. In support of her interference claim, plaintiff contended that her former position had not in fact been eliminated. She claimed that another employee was performing plaintiff's former duties and defendant had actually increased their workforce instead of reducing it. In addition, plaintiff produced five affidavits from former employees who stated that defendant's executive director had said in meetings that employees on medical leave should be discharged and their positions should not be held open for them. The court also found that defendant's investigations into the first two complaints were inconclusive and that the nature of the phone call plaintiff made while on leave was also unclear. The court found that this evidence created material issues of fact as to defendant's true motive in discharging plaintiff so denied defendant's motion for summary judgment on the interference claim.

The court also denied summary judgment on the retaliation claim, finding that the five affidavits constitute direct evidence of retaliation. Alternatively, the court found that plaintiff presented circumstantial evidence of retaliation in that the sum of the evidence presented demonstrate that defendant's proffered reason for her discharge was pretext.

Summarized Elsewhere:

Alred v. Eli Lilly and Co., 771 F. Supp. 2d 356 (D. Del. 2011)

Basden v. Professional Transp., Inc., 2011 WL 2940726 (S.D. Ind. July 19, 2011)

Bonzani v. Shinseki, 2011 WL 4479758 (E.D. Cal. Sept. 26, 2011)

Fleck v. Wilmac Corp., 2011 WL 1899198 (E.D. Pa. May 19, 2011)

Greenwell v. Charles Mach. Works Inc., 2011 WL 1458565 (W.D. Okla. Apr. 15, 2011)

Greer v. Cleveland Clinic Health System East Region, 2011 WL 590223 (N.D. Ohio Feb. 10, 2011)

Gutierrez v. Grant County, 2011 WL 1654548 (E.D. Wash. May 2, 2011)

Haitz v. Don Jacobs Imports, Inc., 2011 WL 4743384 (E.D. Ky. Oct. 6, 2011)

Harris v. HIP Administrators of Fla., Inc., 2011 WL 1103753 (S.D. Fla. Mar. 24, 2011)

Heidger v. Gander Mountain Co., 2011 WL 3665155 (E.D. Mich. Aug. 22, 2011)

Herco v. Southeastern Pennsylvania Transportation Authority, 2011 WL 294493 (E.D. Pa. Jan. 25, 2011)

Hillins v. Marketing Architects, Inc., 2011 WL 3901867 (D. Minn. Sep. 6, 2011)

Jackson v. Simon Property Group, Inc., 795 F. Supp. 2d 949 (N.D. Cal. 2011)

James v. James Marine, Inc., 2011 WL 3417102 (W.D. Ky. Aug. 4, 2011)

Kollstedt v. Princeton City Schs. Bd. of Educ., 2011 WL 249496 (S.D. Ohio Jan. 26, 2011)

Penberg v. HealthBridge Management, 2011 WL 4943526 (E.D.N.Y. Oct. 17, 2011)

Rosenfeld v. Canon Business Solutions, Inc., 2011 WL 4527959 (D.N.J. Sept. 26, 2011)

Ruder v. Pequea Valley School Dist., 2011 WL 1832794 (E.D.Pa. May 12, 2011)

Santiago-Marra v. CSC Holdings, Inc., 2011 WL 3930290 (D. Conn. May 11, 2011)

Sottile v. Church Healthcare, LLC, 2011 WL 4528034 (D. N.J. Sept. 28, 2011)

Sorrells v. Lake Martin, Inc., 2011 WL 627049 (M.D. Ala. Feb. 11, 2011)

Wahl v. Seacoast Banking Corp. of Florida, 2011 WL 861129 (S.D. Fla. Mar. 9, 2011)

Walker v. Adronics/Elrob Manufacturing Corporation, 2011 WL 6740546 (D. Kan. Dec. 22, 2011)

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

Butron v. Centerpoint Energy, 794 F. Supp. 2d 687 (S.D. Tex. 2011)

Plaintiff, a senior services representative, brought FMLA claims against his former employer arising out of events occurring during a three-week period preceding his discharge. During that period, plaintiff “began to feel irrational and could not think straight” after learning of his wife’s extramarital affairs. He did not sleep for several days, wandered the streets of Houston, spent at least one night in an abandoned van behind a church, and generally acted erratically. The company had a policy that prohibited vehicles from being “used for personal business of any type without specific permission from the appropriate member of management.”

However, during this period and without permission, plaintiff drove his company-owned truck across the US-Mexico border, parked it at a bus station on the Mexican side, and took a bus to stay with relatives for several days. When the company learned of plaintiff's actions in driving the truck to Mexico without permission, it discharged him.

Plaintiff filed suit alleging that the company had denied or interfered with his entitlement to FMLA leave. Granting summary judgment to the company, the court held that plaintiff was entitled to no greater rights or benefits than he would be entitled to had he not requested or taken FMLA leave. Even assuming plaintiff suffered from an FMLA-covered health condition, he would have been discharged for his unauthorized use of the company truck regardless of any FMLA entitlement. The court held that plaintiff's violations of the company's vehicle use policy, even though they stemmed from the same root cause as his health condition, served as an independent reason for his discharge

Lopez v. St. Paul Public Schools, 2011 WL 13957 (D. Minn. Jan. 4, 2011)

Plaintiff, who had worked for defendant for seventeen years, had constant and repeated issues with tardiness, absenteeism and other inappropriate conduct. Plaintiff was reprimanded numerous times for her tardiness. In 2008, plaintiff's supervisor met with plaintiff to express defendant's concerns over plaintiff's attendance and tardiness. Plaintiff replied that her tardiness was due to her caring for her sick mother. Plaintiff was subsequently suspended for previous absences and rude and disrespectful behavior. Plaintiff then tried to invoke her right to leave under the FMLA and executed the proper forms. Plaintiff's supervisor requested plaintiff to meet with her immediately each morning and to see her right before plaintiff left, so that they could mutually record the time plaintiff arrived and left work. Plaintiff failed to follow this procedure and her supervisor requested plaintiff's discharge two days before her FMLA leave was formally approved. Plaintiff was discharged and subsequently filed suit alleging her employer took into account absences that were protected by the statute.

Defendant filed a motion for summary judgment, which the district court granted. The court reasoned that defendant would have discharged any other employee in the same situation and cited case law which established that an employee requesting FMLA has no greater protection against discharge for reasons unrelated to the FMLA. The court granted the summary judgment, finding that defendant had properly discharged plaintiff regardless of any FMLA protected tardiness.

B. Proscriptive Rights Cases

IV. APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK

A. Direct Evidence

Dockens v. Dekalb County School System, 2011 WL 4472298 (11th Cir. Sept. 28, 2011)

Plaintiff requested FMLA leave and defendant required plaintiff to submit documentation from her doctor before approving the leave and also required a fitness for duty report upon her return to work. Plaintiff submitted some documentation, but defendant was concerned that some

of it was fraudulent. Defendant then sent plaintiff a termination letter by mistake and informed plaintiff that it was sent in error. Thereafter, plaintiff submitted certification from her doctor but never submitted a fitness for duty report and never returned to work.

After plaintiff was discharged, she filed suit alleging FMLA retaliation. Plaintiff claimed that defendant's accusations that she submitted false documentation and the termination letter were direct evidence of retaliation. The court disagreed, finding that discussions about forged documents are not direct evidence of retaliation and that the termination letter did not refer to plaintiff's FMLA leave. The court also found that defendant discharged plaintiff for failing to provide the required fitness-for-duty report and that plaintiff failed to demonstrate that defendant's stated reason was pretextual.

Marks v. Ohio Bell Telephone Co., 2011 WL 3322594 (N.D. Ohio Aug. 2, 2011)

Plaintiff worked for the telephone company as a customer service representative. She sued the company claiming interference with her FMLA rights and retaliation over the termination of her employment. During her employment, plaintiff had been certified for FMLA leave for various reasons, including anxiety, panic attacks, and gastritis problems from gastric bypass surgery. Plaintiff also had an unrelated civil lawsuit and she periodically left work to attend court hearings. On one occasion, she attended a court hearing from 10:00 to 11:00 a.m., and then attended a doctor's appointment later that afternoon. The company gave her two hours of excused leave for her court appearance and four hours FMLA time for her doctor's appointment—leaving two hours of unexcused time. On another occasion, plaintiff had a court date beginning at 9:00 a.m., and then she failed to report to work for the rest of day. When questioned about her full-day absence, plaintiff claimed her court hearing ended at 3:30 p.m. and that she was with her lawyer until 4:45 p.m. Upon further questioning, plaintiff admitted that the hearing ended around 10:30 a.m., which her lawyer confirmed, but she claimed she ate lunch from 11:00 a.m. to 2:00 p.m. and reviewed documents with her lawyer from 3:30 to 3:45 p.m., and then drove home at 4:45 p.m. By that time, it was too late to drive to work because it would have taken an hour and fifteen minutes to make the trip. The company fired plaintiff for dishonesty.

Plaintiff claimed the company interfered with FMLA rights by denying her two hours of FMLA leave on the day she had both the doctor's appointment and the court date. The court granted summary judgment to the company because plaintiff failed to provide any evidence that she was entitled to take FMLA for the two hours in question. She offered no evidence that her need for the two hours of leave was related to any of her conditions necessitating FMLA leave.

The court also granted summary judgment to the company on the FMLA retaliation claim. The court found that a manager's desire to "escalate" the investigation of plaintiff's use of FMLA leave did not amount to direct evidence of retaliation because the manager honestly believed plaintiff was an FMLA leave abuser. The court also rejected as direct evidence the deposition testimony taken in a different case of a former company manager who testified that the company targeted potential FMLA leave abusers for greater discipline because there was no nexus between the testimony and plaintiff's discharge, and because the court would likely exclude the evidence under Federal Rule of Evidence 403. The court ultimately concluded that plaintiff could not rebut the company's reason for her discharge (her dishonesty relating to

second court appearance) and, therefore, she could not raise an inference of discrimination through circumstantial evidence.

Quinn v. Mercy Fitzgerald Hospital, 2011 WL 2982324 (E.D. Pa. July 22, 2011)

Plaintiff missed four days of work because of lower back pain and conjunctivitis. Her physician provided a doctor's note stating "chronic LBP [lower back pain] with flare." Before returning to work, and with the permission of the physician's office, the employee added to the note the words "w/ conjunctivitis." Her employer initially told her she was discharged because of the altered note. Sometime after the termination meeting, however, the human resource manager informed the employee that her termination "really wasn't [because of] the doctor's note. It was FMLA...."

Denying the employer's motion for summary judgment, the court initially rejected the employer's argument that the employee's back condition did not qualify the employee for FMLA leave. The court noted that the employee was evaluated by her physician on at least three occasions and that the condition also had extended over a period of years and caused episodic periods of incapacity. Next, the court found that the *Price Waterhouse* framework applied because the employee introduced direct evidence of FMLA retaliation. The court concluded that a disputed issue of fact existed because the human resource manager essentially told the employee that the stated reason for her termination was pretext for taking FMLA leave.

Summarized Elsewhere:

Till v. Spectrum Juvenile Justice Services, 2011 WL 3319713 (E.D. Mich. Aug. 1, 2011)

B. Application of *McDonnell Douglas* to FMLA Claims

1. *Prima Facie* Case

a. Exercise of Protected Right

Bakht v. Polar Air Cargo, 2011 WL 3443629 (N.D. Cal. Aug. 5, 2011)

Plaintiff aircraft first officer sued his cargo airline employer for violations of various state and federal laws, including claims for retaliation under the FMLA and the California Family Rights Act ("CFRA"). Plaintiff had taken a two-year medical leave from his employer related to a back injury; the leave was granted pursuant to the terms of a collective bargaining agreement ("CBA"). FAA regulations required that, upon his return, plaintiff re-qualify as a pilot. Following a troubled requalification process that ultimately resulted in the suspension of his pilot's license, plaintiff's employment was terminated. Plaintiff alleged that his termination was in retaliation for his medical leave of absence. The court noted that an FMLA claim was only actionable "if plaintiff can establish that he exercised or attempted to exercise his rights under" the statute. Plaintiff conceded that his use of medical leave was pursuant to his rights under the CBA. Moreover, there was no evidence that plaintiff ever made a request for leave pursuant to

the FMLA or the CFRA. As a result, the district court granted defendant's motion for summary judgment on plaintiff's FMLA and CFRA claims.

Breineisen v. Motorola, Inc., 656 F.3d 791 (7th Cir. Sept. 2, 2011)

Plaintiff took 12 weeks of FMLA leave and then took two additional leaves in the following months. Plaintiff did not return from the third leave because he was unable to work and defendant discharged him. Plaintiff claimed FMLA retaliation in his lawsuit, alleging that his supervisor harassed him between his second and third leaves of absence. Plaintiff had exhausted his FMLA leave after his first leave of absence but claimed that he was entitled to recover because his supervisor's harassment caused his condition to worsen and therefore caused him to be unable to work. The district court dismissed plaintiff's claim, finding that he was barred from recovering for time periods when he was unable to work and that conduct that exacerbates an employee's condition is not grounds for recovery under the FMLA.

The Court of Appeals affirmed the district court's dismissals. The court agreed that the cause of plaintiff's injury was irrelevant to his FMLA claim and that he was no longer entitled to protection under the FMLA because he had exhausted his time and was no longer able to work at the time of his discharge. The court also found that the district court had properly excluded medical evidence offered by plaintiff to establish a causal connection between his condition and his supervisor's alleged harassment.

In addition, defendant had settled an FMLA retaliation claim with a second plaintiff by paying double the amount she demanded. That plaintiff then moved to convert the amount to a judgment so she could recover attorney's fees and costs. The district court denied her motion and dismissed her claim as moot. The court found that dismissal of the second plaintiff's claim was proper as well because defendant had satisfied plaintiff's entire demand and an interest in attorney's fees did not constitute a case or controversy.

Carter v. Arbors East, Inc., 2011 WL 1641153 (S.D. Ohio May 2, 2011)

Plaintiff's FMLA request was submitted post-discharge. Because plaintiff submitted her FMLA request only after her discharge, the court reasoned that she had no "protected right" under FMLA. Further, the court held that it would be impossible to show that defendant discharged plaintiff due to her FMLA request, given that the request was submitted after the decision to terminate her was made.

Kennedy v. Bank of America, N.A., 2011 WL 1522380 (N.D. Cal. Apr. 21, 2011)

In November 2007, plaintiff, a banking center manager, developed an abscess on the roof of her mouth. She sought treatment from her dentist on two days. The abscess caused plaintiff a great deal of pain and affected her ability to eat, speak and present well to the public. Because of the abscess, plaintiff did not work from November 29, 2007 to December 10, 2007. She called in each day while out. When her manager found out of the absences, he called plaintiff at home and allegedly was angry at plaintiff, which plaintiff reported.

Nine months after this incident, plaintiff's branch suffered a \$67,500 loss due to a traveler's check being improperly sold. Although other managers were fired for smaller amounts, the manager gave plaintiff a final warning. At the end of 2008, defendant began conducting unannounced visits to the branches to verify employee timesheets and that employees were working full shifts. The manager believed employees at plaintiff's branch were submitting false timesheets and leaving work early. Plaintiff was ultimately discharged in March 2009 because the manager had lost trust and confidence in plaintiff's ability to manage the branch.

In granting summary judgment to defendant, the court found that plaintiff never submitted a request for FMLA leave in connection with her abscess and that she never intended to take such. Therefore, she could not invoke the protection under the FMLA. The court also held that even if plaintiff intended to take FMLA leave, she failed to follow defendant's procedures, which required submitting a doctor's note. The court further found that her discharge taking place fifteen months after the absence negated any inference that the termination was motivated by her earlier leave.

Mackie v. Jewish Foundation for Group Homes, 2011 WL 1770043 (D. Md. May 9, 2011)

Plaintiff worked as a weekend counselor at one of defendant's group homes for adults with intellectual and developmental disabilities or chronic mental illness. One day, plaintiff left work two hours early because she was not feeling well. The following day, she called her supervisor and explained that she had the flu and a cough and needed to stay home. She did not see a doctor; she simply took over the counter medication and rested for a little over one week. When she returned, her employment was terminated based on medication errors and resident complaints.

Plaintiff filed a complaint against defendant, alleging that it violated the FMLA. First, plaintiff claimed that defendant interfered with her right to take FMLA leave. The court granted summary judgment on this claim, however, because plaintiff could not present any evidence she was denied any requested leave. To the contrary, defendant gave her all of the leave that she requested.

Plaintiff also claimed that defendant retaliated against her because she requested FMLA leave. Defendant argued that her claim failed because she did not engage in a protected activity and could not establish a causal connection. The court agreed because plaintiff only had the flu, not a serious health condition as defined by the FMLA. Thus, she was not entitled to FMLA leave. Additionally, the court granted summary judgment on plaintiff's FMLA claims because she did not provide sufficient information to trigger her employer's obligation to provide FMLA leave. Finally, the court found that plaintiff's claims failed because she could not establish a causal link. Defendant claimed that it made the decision to terminate her employment due to the medication errors and complaints *before* she even requested leave for the flu. Moreover, the only person who knew that plaintiff had been out on leave was not involved in the decision to terminate plaintiff's employment. Thus, the court found that defendant had established a legitimate non-retaliatory reason and plaintiff had not provided any evidence that the employment decision was prompted by other motives.

Summarized Elsewhere:

Danek v. County of Cook, 2011 WL 5979880 (N.D. Ill. Nov. 29, 2011)

Deloatch v. Harris Teeter, Inc., 797 F.Supp. 2d 48 (D.D.C. Cir. July 13, 2011)

Gutierrez v. Grant County, 2011 WL 1654548 (E.D. Wash. May 2, 2011)

Stone v. St. Vincent Hospital and Healthcare Center, 2011 WL 5593683 (S.D. Ind. Nov. 17, 2011)

Wierman v. Casey's General Stores, 638 F.3d 984 (8th Cir. Mar. 31, 2011)

b. Adverse Employment Action

Carroll v. Texas Dept. of Public Safety, 2011 WL 1103474 (S.D. Tex. Mar, 23, 2011)

Plaintiff was a female employee that had frequent attendance issues. Plaintiff alleged that her supervisor required her to perform numerous duties not required of her male co-workers, including requiring a medical status report after her surgery to substantiate her FMLA leave. The court found that plaintiff's complaint did not specifically allege an FMLA cause of action and that plaintiff's allegations concerning FMLA leave arose as part of her Title VII claims.

The court held that plaintiff did not plead a *prima facie* case of Title VII discrimination or hostile work environment. Further, the court held that, even if plaintiff intended to assert an FMLA claim as part of the disparate treatment cause of action, there was no *prima facie* FMLA case, because requiring an individual to submit a form is not an adverse employment action and plaintiff could not identify any similarly situated individuals who were not required to submit a medical status form. Finally, the court indicated that, even if plaintiff could state a *prima facie* FMLA retaliation case, defendant could demonstrate a legitimate, nondiscriminatory reason for requiring plaintiff to submit medical status reports (*i.e.* plaintiff's history of attendance problems).

Cham v. Station Operators, Inc., 2011 WL 2181194 (D.R.I. June 3, 2011)

Plaintiff alleged his working hours were reduced because he took FMLA leave. Plaintiff argued the work hour reduction was a material change to his terms and conditions of employment that forced him to resign. Although plaintiff had asserted other discrimination claims, only the FMLA retaliation claim was submitted to the jury. The jury returned a verdict in plaintiff's favor.

In its motion for judgment as a matter of law, defendant argued that plaintiff failed to state a *prima facie* case of FMLA retaliation because a reduction in work hours was not an adverse employment action, where the employer never promised to schedule plaintiff forty hours. Defendant also argued that plaintiff did not show a willful violation, and therefore plaintiff's claim was time-barred because the precipitating event occurred more than two years before he brought the lawsuit. The court denied defendant's motion for judgment as a matter of

law finding that a reasonable jury could conclude that a reduction in work hours could create such an intolerable work environment that plaintiff would be forced to resign. Furthermore, the court held that plaintiff's evidence, while not specifically focusing on willfulness, created sufficient circumstantial evidence for a reasonable jury to find a causal connection between taking medical leave and the reduction in work hours.

The above notwithstanding, the court granted defendant's motion for a new trial. At trial, plaintiff presented testimony regarding comments related to his race and religion which were relevant to his other discrimination claims that were not submitted to the jury. The court found that a reasonable jury could have been confused by such extraneous testimony not related to the FMLA retaliation claim.

Dumas v. New United Motor Manufacturing, Inc., 2011 WL 5006462 (N.D. Cal., Oct. 20, 2011)

Plaintiff, a union worker, worked for defendant in one of its assembly plants. He had been granted several leaves of absence under the FMLA from 1999 to 2010, resulting in approximately 300 days of leave. Plaintiff also had many unexcused absences as an employee. In 2009, plaintiff's supervisor suspended him for five days due to unexcused absences. Shortly thereafter, defendant realized that one of the absences that triggered the suspension may have been FMLA-protected. After defendant rescinded the suspension, plaintiff, without notice or explanation, failed to appear for work. Defendant then notified plaintiff that those unexcused absences were grounds for discharge under the collective bargaining agreement, unless he could provide a satisfactory explanation. Plaintiff did not respond, and defendant placed him on administrative leave pending further investigation. Weeks later, plaintiff sent defendant a letter explaining that some of the absences were FMLA-protected leave, although he provided no documentary support for his assertion. Defendant nonetheless permitted plaintiff to return to work under a last chance agreement. Plaintiff continued working for defendant until April 2010, when it shut down its entire operations. Acting *pro se*, plaintiff sued alleging that his discharge was in retaliation for previously taking FMLA leave.

Defendant moved for summary judgment. Noting that the record was devoid of any facts suggesting that plaintiff had been discharged in 2009 or that his benefits had ever been interrupted during his administrative leave, the court concluded that plaintiff did not suffer an adverse employment action in 2009. Instead, defendant presented evidence that it rescinded plaintiff's discipline. Further, according to the court, plaintiff provided no evidence to suggest that defendant considered his previous use of FMLA leave when it terminated his employment in shutting down its operations, as all hourly employees at the plant, including plaintiff, had lost their jobs.

Freeman v. Koch Foods of Alabama, 777 F. Supp. 2d 1264 (M.D. Ala. Mar. 31, 2011)

Plaintiff requested FMLA leave to receive treatment for breast cancer and defendant allowed her to take 24 weeks of leave. Upon returning from leave, defendant assigned plaintiff to a position in payroll and benefits instead of reinstating her to her former accounts receivable position. Plaintiff was paid the same amount in her new position that she was paid in her former

position. Plaintiff then requested to be placed into an accounts payable position, but defendant did not grant her request because the employee who had been performing plaintiff's duties while she was on leave had already taken the accounts payable position. Defendant transferred plaintiff back into her former accounts receivable position shortly thereafter. Plaintiff then went on vacation and while she was out, someone moved her belongings off of her desk so that a new clerk could use the desk. Plaintiff then filed suit, claiming that defendant failed to reinstate her to her accounts receivable position upon her return from leave and then retaliated against her for taking FMLA leave by denying her the accounts payable position she requested, transferring her out of the payroll and benefits position, and moving the items from her desk.

The court granted defendant's motion for summary judgment on the failure to reinstate claim because plaintiff took 24 weeks of leave and she no longer had a right to reinstatement after her 12 weeks of FMLA leave expired. The court also granted defendant's motion for summary judgment with respect to the retaliation claim because moving plaintiff's belongings did not constitute an adverse employment action. The court also found that denying plaintiff's request to transfer to the accounts payable position was not an adverse employment action. Defendant had filled the position while plaintiff was out on FMLA leave and was not required to hold the position open in case plaintiff was interested in it, particularly because plaintiff had not previously expressed an interest in that position. The court also rejected that transferring plaintiff out of the payroll and benefits position was retaliatory because plaintiff had no payroll and benefits experience while her replacement did.

Keeler v. Aramark, 2011 WL 3608698 (D. Kan. Aug. 12, 2011)

Plaintiff requested FMLA leave for a neck abscess from August 28, 2007 until September 5, 2007. That leave was subsequently extended until September 15, 2007. On September 14, 2007, plaintiff notified defendant that he had a methicillin-resistant staph infection ("MRSA") and could not work until October 31, 2007, unless defendant approved his return. Plaintiff returned to work on November 2, 2007, performing duties similar to those he performed prior to his leave. Although one of plaintiff's FMLA absences was initially marked as unexcused, this error was subsequently corrected. Plaintiff filed suit against defendant alleging that it had interfered with his FMLA rights and retaliated against him for taking leave under the Act.

The court ultimately granted defendant's motion for summary judgment, finding that plaintiff could not set forth a *prima facie* case because he could not show he had suffered an adverse action that a reasonable employee would consider materially adverse. Plaintiff was granted all of the leave he requested and returned to work in a position with similar duties to those he had performed prior to his leave. Defendant's requests for updates on plaintiff's medical condition did not violate the Act because defendant had a right to require plaintiff to obtain a medical release before returning to work. This was especially true where plaintiff worked in food service and had been diagnosed with MRSA, a contagious infection. Finally, plaintiff was not entitled to holiday pay during his leave because he had not worked the last workday prior to the holiday and the first workday after, as required by defendant's policies.

In rejecting plaintiff's claim for equitable relief under the FMLA, the court found that plaintiff — by his own admission — had not been prejudiced by any of defendant's alleged

violations. Absent evidence of prejudice or compelling evidence of future violation, plaintiff was not entitled to injunctive relief.

Keeling v. Horizons Youth Servs., L.C., 2011 WL 2633530 (E.D. Ky. July 5, 2011)

Plaintiff filed an FMLA retaliation claim stemming from leave he took related to a heart condition. Although no disciplinary action had been taken against plaintiff prior to his leave, he had been subject to “needs improvement” performance reviews for several months prior to his leave. When plaintiff returned to work from leave, his schedule had changed slightly, which caused him to miss one of two evenings he had previously devoted to church activity. Plaintiff was also presented with a performance improvement plan (“PIP”), to which he did not object. When plaintiff failed to meet the requirements of the PIP within the allotted 60-day time limit, he was presented with two different PIPs prepared by two different supervisors. Plaintiff never objected to the PIPs or requests that he improve his performance.

Plaintiff alleged that the PIPs and his schedule change were adverse actions taken against him in retaliation for taking FMLA leave. In granting defendant’s motion for summary judgment, the court noted that not every act affecting an individual’s employment can be considered adverse; instead, the act must be material such as a demotion, decrease in benefits, and/or significantly diminished material responsibilities. The court found that plaintiff’s PIPs and minor schedule change were not significant enough to be considered adverse for purposes of establishing a *prima facie* case of FMLA retaliation.

Male v. Tops Markets, LLC, 2011 WL 2421224 (W.D.N.Y. June 13, 2011)

Plaintiff filed a post-termination FMLA-retaliation claim against her former employer alleging that the company provided negative references to plaintiff’s prospective employers in retaliation for taking FMLA leave while employed by the company. In her complaint, plaintiff alleged that when one prospective employer called her former company about plaintiff, a manager or supervisor of the company informed the caller that plaintiff was a good employee for the first couple of years, but thereafter began having personal problems that spilled over into the workplace and that plaintiff missed and was late to work because of personal and medical issues.

The company filed a motion to dismiss the complaint for failure to state a claim under the FMLA. In its motion, the company argued that plaintiff had failed to adequately allege that she experienced an adverse employment action and that any such action was caused by the fact that she had previously taken FMLA leave. The company further contended that the complaint was untimely because it was filed after the two-year statute of limitations under the FMLA.

The district court denied the company’s motion. The court found that the allegations regarding the company’s negative references were sufficient enough to plead that such references constituted an adverse action. Acknowledging that there are no bright lines rules for determining whether a negative inference amounts to an adverse employment action, the court noted that the issue of adverse employment actions in retaliation is highly fact-specific. The court reasoned that plaintiff met her pleading obligations by alleging that the company specifically mentioned the negative impact her medical issues had on her job performance to the caller. For this same

reason, the court decided that plaintiff had sufficiently pled facts supporting causation to pursue a claim. With respect to the company's statute of limitations argument, the court held that because plaintiff had sufficiently alleged willful conduct, she should be allowed to establish evidence through discovery to avail herself of the FMLA's three-year limitations period for willful conduct.

Quinn v. St. Louis County, 653 F.3d 745 (8th Cir. 2011)

Plaintiff reported sexual harassment to her former employer. After reporting sexual harassment to her employer, plaintiff experienced stress, anxiety, and depression, which required her to take FMLA leave. After returning from leave, plaintiff believed that defendant began retaliating against her for reporting sexual harassment and claimed that the retaliation caused her to once again experience anxiety and depression. Plaintiff requested an adjusted work schedule of three days per week, which defendant granted. Plaintiff eventually went out on full time leave and her condition worsened such that she was unable to return to work. Plaintiff then filed a lawsuit alleging FMLA interference and retaliation. Plaintiff proceeded under the theory that she had been constructively discharged.

Finding that plaintiff resigned and was not discharged, the court held that plaintiff did not suffer an adverse employment action and granted summary judgment in favor of defendant on her FMLA claims. On appeal, plaintiff alleged that the district court failed take into consideration the fact that the county had discouraged her from taking FMLA and had refused her requests for leave prior to granting her leave. The court found that summary judgment was properly granted to defendant on both the FMLA interference and retaliation claims. Plaintiff could not succeed on an interference claim because she had received the full twelve weeks of FMLA leave. In addition, because plaintiff could not show that she was constructively discharged, she could not establish an adverse employment action as required to state an FMLA retaliation claim.

Rountree v. City of Portsmouth, 2011 WL 5101761 (E.D. Va. Oct. 26, 2011)

A former administrative staff member sued the City of Portsmouth after she was terminated from her employment. She exhausted her FMLA leave in 2008. Upon returning to work, she experienced irregularities with her paycheck, which defendant claimed occurred because she had run out of annual leave and was being paid on a days-worked basis. Plaintiff filed a grievance with the city, and the grievance panel determined that the employer had adhered to its policies and procedures but could have done a better job communicating the changes to plaintiff's pay.

In mid-2009, plaintiff's supervisor asked plaintiff to perform a task. Plaintiff refused to perform the task, stating that it was someone else's responsibility. She subsequently visited her supervisor's office and referred to a coworker, with whom she had a history of disagreements, as a "bitch." The following day, plaintiff was issued a notice of disciplinary action for engaging in unprofessional work conduct in connection with her refusal to perform a work assignment, and she was notified of the termination of her employment. Plaintiff filed a complaint, alleging, among others, a claim for FMLA retaliation. Defendant moved for summary judgment.

The district court found that the only conduct at issue was defendant's irregularities in plaintiff's pay after her 2008 return from FMLA leave. The court noted that the grievance panel had found the pay irregularities conformed to policy, also noting plaintiff's admission that she had been paid for all work performed. In light of these facts, the court dismissed plaintiff's FMLA retaliation claim.

Weil v. Carecore Nat'l, LLC, 2011 WL 2415791 (D. Colo. June 14, 2011)

Weil, a representative in Carecore's call center, began working for Carecore in October 2006. In January 2007, the company began allowing her to telecommute due to medical conditions, a privilege not afforded other employees. Weil received several disciplinary write-ups in the summer of 2008, including a written warning and verbal counseling, due to poor job performance or failures to follow company policies. That summer, she took FMLA leave due to stress. After exhausting her FMLA leave in September 2008, Weil informed Carecore that her doctor had not released her to work and could not predict when she could return. Carecore removed her from the payroll.

Weil sued alleging an FMLA retaliation claim for the disciplinary actions taken in the summer of 2008. The court held that "no reasonable employee would have found these employment actions to be materially adverse." Citing Tenth Circuit precedent, the court held that the written warning did not constitute a materially adverse employment action since it had "minimal effect" on her employment status. The court observed that Weil had not been demoted, lost pay, or had her job responsibilities changed after the discipline, and had taken FMLA leave just three days later. Because she could not demonstrate a materially adverse employment action, the court granted summary judgment to Carecore.

Summarized Elsewhere:

Duchateau v. Camp Dresser & McKee, Inc., 2011 WL 4599837 (S.D. Fla. Oct. 4, 2011)

Fischbach v. City of Toledo, 798 F. Supp. 2d 888 (N.D. Ohio 2011)

Wilkes v. T-Mobile, 2011 WL 1113397 (E.D. Tenn. March 24, 2011)

c. Causal Connection

Alred v. Eli Lilly and Co., 771 F.Supp.2d 356 (D. Del. 2011)

The court denied employer's motion for summary judgment on plaintiff's FMLA interference and discrimination claims. Plaintiff sued her employer and her former supervisor when she took FMLA leave and was discharged approximately a year later for alleged poor performance.

With respect to plaintiff's claim of FMLA interference, the court held that plaintiff's allegations that her supervisor told her that there were "no guarantees" that she would keep her job if she took FMLA leave and that employees with a "history" of taking FMLA leave were

targeted were sufficient to preclude summary judgment, despite the fact that plaintiff conceded that her FMLA rights were not disrupted.

The court also held that plaintiff had adduced sufficient facts to establish a *prima facie* FMLA retaliation claim. Although temporal proximity was lacking, there was evidence of a causal connection because plaintiff's job duties changed following her leave and plaintiff began receiving poor competency ratings immediately after returning from leave. Although defendants claimed that plaintiff was discharged due to poor performance, the court found that there were genuine issues of material fact regarding plaintiff's performance, particularly because plaintiff ranked in the top third of employees in objective measures despite receiving low subjective ratings and because plaintiff had not received a negative year-end evaluation prior to taking FMLA leave.

***Benz v. West Linn Paper Co.*, 2011 WL 2935396 (D. Or. July 20, 2011)**

Plaintiff worked for defendant in its paper processing department. Defendant's employees were not guaranteed specific jobs, but rather were assigned to different roles periodically based on business need. Plaintiff claimed defendant retaliated against him for exercising his FMLA rights by reassigning him to a different position, by denying him leave for half of a shift, by issuing a Last Chance Agreement after he had an altercation at work, and by terminating his employment. Defendant filed a motion for summary judgment, which was considered by a magistrate judge. The magistrate issued Findings and Recommendations that the motion be granted and plaintiff filed objections. The district court overruled the objections and adopted the magistrate's Findings and Recommendations.

The court found that the reassignment to another position could not constitute an FMLA violation because plaintiff did not suffer economic damages as a result. The court rejected plaintiff's argument that the new position was less desirable, noting plaintiff received the same pay and benefits in the new position. The court reasoned that the damages provision of the FMLA provides only for actual economic damages, which plaintiff did not incur.

The court also found that the denial of leave for half of a shift and issuance of the Last Chance Agreement were not retaliatory. The court found that, on the day he made the request to take off half of his shift, plaintiff and his supervisor jointly agreed that the supervisor would try to arrange for plaintiff to leave early, but plaintiff walked off the job before arrangements could be made. In addition, the court found that the Last Chance Agreement was issued because of plaintiff's ongoing performance problems and the fact that he walked off the job. Finally, the court ruled that plaintiff's discharge was not retaliatory. The court found that plaintiff was discharged because he missed an appointment with an Employee Assistance Program counselor, which was a requirement under his Last Chance Agreement. Thus, the court ruled that there was no causal connection between these incidents and plaintiff's previous use of FMLA leave. As such, defendant's motion for summary judgment was granted.

***Cuturilo v. Jefferson Reg'l Med'l Ctr.*, 2011 WL 2941031 (W.D. Pa. July 20, 2011)**

The court denied defendant's motion to dismiss plaintiff's FMLA retaliation claim. In its analysis, it noted that the Third Circuit has articulated two primary factors relevant to establishing a causal connection between the use of FMLA and an adverse employment action: (1) timing and (2) ongoing antagonism. Although defendant sought to show that the allegations established an absence of sufficient temporal proximity, the district court noted while the complaint did not specify the dates, plaintiff did allege she used FMLA leave twice in between the February 18, 2009 approval of intermittent leave and her April 29, 2009 discharge. Furthermore, plaintiff had alleged receiving complaints about her use of leave.

Hall v. AT&T Mobility Services, LLC, 2011 WL 3425642 (M.D. Fla. Aug. 5, 2011)

Plaintiff failed to meet her assigned sales quotas for several months. As a result, she was disciplined according to defendant's policies. One week after receiving a final warning, plaintiff requested and was granted FMLA leave. While plaintiff was on leave, defendant discovered plaintiff had violated its code of conduct. Upon plaintiff's return from leave, she was discharged for poor sales performance. Plaintiff brought an action against her former employer, alleging her employment was terminated in retaliation for taking FMLA leave.

The court found plaintiff was on notice prior to taking FMLA leave that her performance was unsatisfactory and had been warned of the possibility of her discharge. It further found that defendant had followed its stated performance disciplinary scheme. Therefore, the court did not find a causal connection between plaintiff's FMLA leave and her subsequent discharge, and it granted defendant's motion for summary judgment.

Morrow v. Potter, 2011 WL 663029 (N.D. Ill. Feb. 10, 2011)

Plaintiff, an employee of the United States Postal Service, alleged she was denied FMLA leave in retaliation for making an EEO complaint. The district court granted summary judgment in favor of defendant, finding no evidence the person who made the decision to deny the FMLA leave was aware of her EEO complaint. Furthermore, defendant had a legitimate basis for denying plaintiff's FMLA leave since she lacked the required work hours for the preceding year.

Pantoja v. Monterey Mushrooms, Inc., 2011 WL4737407 (C.D. Ill. Oct. 6, 2011)

Following her vacation to Mexico from July 6, 2009 through July 13, 2009, plaintiff planned to take FMLA leave for one month and remain in Mexico to help her sick mother. Defendant's Human Resource ("HR") Manager told plaintiff that she needed to provide documentation that her mother was seriously ill. The Assistant HR Manager gave plaintiff the papers to complete. Plaintiff allegedly submitted the FMLA certification papers to her mother's doctor for completion and allegedly forwarded them to defendant by fax on July 13, 2009. Defendant never received the fax. When plaintiff's vacation ended on July 13, 2009, and she did not return to work, defendant mailed notice to her home address that she was to return to work and called her home numerous times.

On or about July 27, 2009, plaintiff's brother called plaintiff in Mexico to inform her that she needed to get in touch with defendant because she was "in trouble at work." According to plaintiff, she talked to the HR Assistant who explained that defendant had not received her medical certification. Plaintiff allegedly resent the fax on July 27, 2009, and called defendant several times to see if the fax had been received. Plaintiff's records supported that the calls had been made, but she claimed that no one at the office ever answered the phone. Plaintiff made no further attempt to contact defendant and defendant never received the certification.

On August 5, 2009, defendant mailed a termination notice to plaintiff's home that she received on August 13, 2009, when she returned home from Mexico. Plaintiff went to defendant either August 14, 2009, or August 17, 2009, to discuss the matter. At that time, defendant asked her for the documentation that she had sent in the fax. When she could not supply any, her discharge was upheld.

Plaintiff first argued that the requirement to submit the certification paperwork before the trip should be equitably tolled because she could not file the papers until she went to Mexico and spoke with her mother's doctor. Equitable tolling applies when a plaintiff cannot, under the circumstances, be reasonably expected to act within the deadline. The district court indicated that the circumstances may justify tolling until she spoke to defendant on July 27, 2009, because defendant knew that plaintiff was trying to send the paperwork. However, the district court stated it would be hard-pressed to toll the time for filing her certification past July 27, 2009, when plaintiff had been put on notice that the required paperwork had not been received. The district court noted that even though plaintiff did not receive confirmation that the second fax had been received, she made no further attempt to contact defendant and waited until August 14, 2009, or August 17, 2009, to speak with defendant.

The district court also found that the evidence did not support a claim for equitable estoppel because no evidence showed defendant took any wrongful action to induce plaintiff to violate its FMLA certification policy. Although plaintiff might have initially been confused as to when her certification information was due, there was no doubt that she knew by July 27, 2009 that her certification papers had to be filed immediately. Therefore, there is no evidence to support equitable estoppel past July 27, 2009.

Plaintiff further argued that she need only show a causal connection between her protected activity (which the court found had not occurred) and her discharge by presenting evidence that the FMLA request was a motivating factor in her discharge. The district court noted that in the Seventh Circuit, she must provide proof of "but-for" causation. The evidence was clear that defendant fired plaintiff for not providing the required FMLA certification forms after giving her numerous opportunities to do so. The district court found that plaintiff's contention that defendant was hostile to FMLA requests, based on not engaging in progressive discipline, was undermined by defendant's efforts to contact plaintiff after July 13, 2009, and by giving her numerous opportunities to supply the required information. Last, the court found plaintiff's argument that her efforts were in "good faith" unpersuasive and irrelevant.

Poindexter v. City of Sallisaw, 2011 WL 5330746 (E.D. Okla. Nov. 7, 2011)

Two brothers, who worked as journeyman linemen for the City Electric Department (“City”), took leave to attend their mother’s hip surgery. After this, they were passed over for promotion to a lead man position in the department. They filed suit alleging interference and retaliation FMLA claims. The court granted defendant’s motion for summary judgment. Plaintiffs’ interference claim failed because there was no genuine issue of material fact showing any harm from defendant’s failure to provide them with notice of the difference between paid sick leave and FMLA leave.

The court also found no causation to support a *prima facie* case for plaintiffs’ retaliation claim. Plaintiffs cited three reasons in support of their claim that their failure to be promoted was caused by their FMLA-qualifying leave: (1) that the City tried to discourage employees from taking such days, as evidenced by the fact that the department head talked to the Electric Department employees about abusing sick leave, (2) that after this statement, the department head’s wife complained to plaintiffs’ sister, and (3) that there was temporal proximity between the two events.

The court held that this was not sufficient to establish a causal connection, because the department head’s statement was not specifically aimed at plaintiffs’ leave, his wife’s complaint had nothing to do with plaintiffs’ leave, and the temporal proximity between the two events, nine months, was inadequate. In addition, the court held that the City’s stated reason for not promoting plaintiffs, that the action would violate its anti-nepotism policy, was not a pretext for retaliation. Finally, the court held that under Oklahoma law the City was not equitably estopped by representations to the brothers by their supervisor that the nepotism policy would not apply to plaintiffs because their supervisor was mistaken in his interpretation of the policy.

Roberts v. Florida Gas Transmission Co., L.L.C., 2011 WL 5119520 (5th Cir. Oct. 28, 2011) (aff’ing 2011 WL 1135335 (M.D. La. Mar. 24, 2011))

The Fifth Circuit affirmed the District court’s entry of summary judgment for defendant in plaintiff’s FMLA retaliation claim. Plaintiff alleged he was discharged for applying for FMLA leave. In entering summary judgment for defendant, the district court found there was no causal link between plaintiff’s application for FMLA leave and his discharge, noting that the rule in the Fifth Circuit requires a plaintiff bringing a retaliation claim to show that the adverse employment action would not have occurred but for the protected conduct. Plaintiff claimed that the very close temporal proximity between his request for FMLA leave and his discharge provides evidence of a causal link between his protected activity and the adverse action. The lower court found that plaintiff failed to establish he would not have been terminated but for his FMLA request and also found that he failed to adequately refute defendant’s proffered reason for termination, plaintiff’s repeated non-compliance with company residency and vehicle policies.

The Fifth Circuit affirmed, finding plaintiff could not establish a *prima facie* case of retaliation because he had not demonstrated a causal connection between his protected activity and his discharge. Plaintiff failed to demonstrate defendant was even aware of his FMLA leave requests at the time it decided to terminate him, and stated, “[o]bviously, an employer cannot retaliate against an employee for engaging in a protected activity that it did not know about at the time of the challenged action.”

The Fifth Circuit further concluded that even if plaintiff could establish a *prima facie* case of retaliation, his claim would still fail because he did not show that defendant's legitimate reasons for his discharge were mere pretext in that plaintiff had not shown that his lying and failure to comply with company policy were not the true basis for his discharge.

Summarized Elsewhere:

Ames v. Home Depot U.S.A., Inc., 629 F.3d 665 (7th Cir. 2011)

Ballato v. Comcast Corp., 2011 WL 2728265 (D. Minn. July 13, 2011)

Breeden v. Novartis Pharmaceuticals Corp., 646 F.3d 43 (D.C. Cir. July 8, 2011)

Dumas v. New United Motor Manufacturing, Inc., 2011 WL 5006462 (N.D. Cal., Oct. 20, 2011)

Fields v. Verizon Servs. Corp., 2011 WL 4102087 (D. Md. Sept. 13, 2011)

Gerrard v. Garda Security, 2011 WL 3511481 (C.D. Ill. Aug. 11, 2011)

Grant v. Walgreen Co., 2011 WL 2079923 (E.D. Mich. May 24, 2011)

Heidger v. Gander Mountain Co., 2011 WL 3665155 (E.D. Mich. Aug. 22, 2011)

Knight v. Continental Tire N. Am., Inc., 2011 WL 1155090 (D. Colo. Mar. 29, 2011)

Packard v. Massachusetts, 2011 WL 4549199 (D. Mass. Sept. 28, 2011)

Viramonos v. U.S. Bancorp, 2011 WL 6780644 (N.D. Ill. Dec. 27, 2011)

i. Temporal Proximity

Barton v. G.E.C., Inc., 2011 WL 938153 (M.D. La. Mar. 16, 2011)

Plaintiff's discharge came three and a half weeks following notice of her need for pregnancy-related leave. While plaintiff argued that the discharge was retaliatory, defendant maintained that it was solely as a result of plaintiff's poor performance.

On a motion for summary judgment, defendants argued plaintiff could not show causation for purposes of a *prima facie* case of FMLA retaliation and that plaintiff could not show evidence that defendant's proffered reason for her discharge was pretextual. The court noted that factors to be considered in determining a causal link included plaintiff's prior disciplinary record, whether defendant followed its own leave-related policies and procedures, and the temporal relationship between the employee's protected conduct and the adverse action.

In this case, the district court found that defendant did not follow its own leave-related policies in response to plaintiff's request for pregnancy-related leave; in fact, defendant did not even process plaintiff's application for leave. Coupled with the temporal proximity of the request for leave to plaintiff's discharge, the court determined that this was sufficient to make out a *prima facie* case of FMLA retaliation.

However, in granting defendant's motion, the court held that plaintiff did not offer sufficient evidence, beyond the temporal relationship, to rebut defendant's legitimate, non-retaliatory reason for her termination. Specifically, plaintiff did not show that defendant disfavored pregnancy-related leave, and, in fact, defendant produced evidence to the contrary. Plaintiff also failed to rebut defendant's evidence of her poor performance throughout her employment.

Burrow v. Boeing Co., 2011 WL 1594937 (E.D. Mo. Apr. 27, 2011)

Plaintiff took eight hours of intermittent FMLA leave approximately two months after being issued a performance improvement plan. This performance improvement plan had listed areas of improvement including complying with plaintiff's work schedule and obtaining supervisory approval prior to altering her work schedule. Approximately three months after being issued the performance improvement plan, and a few weeks after taking intermittent FMLA leave, plaintiff was informed she had not made sufficient improvement due to being absent approximately 30% of her scheduled work time. Plaintiff was discharged seven months later.

Plaintiff filed suit against her former employer, alleging retaliation for taking intermittent FMLA leave. The court granted defendant's motion for summary judgment, finding that plaintiff could not establish that a retaliatory motive played a part in defendant's decisions to discipline and discharge plaintiff. The court found that the retaliation claim failed because (1) the performance improvement plan was issued prior to plaintiff's protected activity and (2) the length of time between the protected activity and the discharge precluded a finding of causation.

Camp v. Centru Bank, 2011 WL 2182040 (N.D. Ill. May 31, 2011)

When plaintiff, a former personal banking supervisor, became a mortgage loan originator for defendant, she was specifically told that she was no longer allowed to use Mark IV -- a computerized loan scoring and lending program that allowed for origination, approval, and closing of home equity lines of credit -- due to potential conflict of interest issues implicating security, fraud, and Sarbanes-Oxley. During a February 20, 2008 review, plaintiff's supervisor discovered that plaintiff had continued to use Mark IV at least ten times since expressly being told not to, and had used other people's names to do so. The supervisor discussed the matter with several other members of management and ultimately terminated plaintiff's employment on February 26, 2008. Plaintiff's suit was premised on the fact that she had contacted the company's benefit specialist on February 8, 2008, regarding treatment for cancer, and sent an official FMLA leave request on February 25, 2008.

The court granted the company's motion for summary judgment. In response to plaintiff's request that the court infer that her alleged insubordination in continuing to use Mark

IV was not the reason for her discharge, the court held that it had no evidence suggesting the supervisor's belief was unfounded or not sincerely held. Likewise rejecting plaintiff's suggested inference that the supervisor knew of her FMLA request before discharging her, the court held that the supervisor's actions were part of a process set in motion before plaintiff officially requested FMLA leave and that there was no evidence supporting her theory. Noting that general allegations of suspicious timing, without more, do not create a genuine issue of fact, the court held that plaintiff's theory as to the supervisor's intent was entirely speculative and insufficient to satisfy her burden in opposing summary judgment in light of the supervisor's un rebutted testimony that he did not know about plaintiff's FMLA request until after he had discharged her.

Chavez v. Dakkota Integrated Systems, LLC., 2011 WL 2148373 (W.D. Ky. May 31, 2011)

Plaintiff was provided with an FMLA protected leave of absence from March 27, 2008 through April 16, 2008. In July 2008, plaintiff's employer was forced to reduce its labor and production costs. Plaintiff's job was part of a reduction in force ("RIF") that affected the entire second shift and several other first shift positions. In late July 2008, Plaintiff was informed that his job position was going to be eliminated. In January 2009, the employer was able to reinstate the majority of its second shift employees, though plaintiff was not reinstated.

At the summary judgment stage, plaintiff was unable to prove a prima facie case of retaliation. Specifically, plaintiff was unable to show a causal connection between his FMLA leave and his inclusion in the RIF. Since the temporal proximity between the RIF and plaintiff's request for FMLA leave was not very close in time, plaintiff was required to provide additional evidence to establish an inference of retaliation. Plaintiff's only additional evidence consisted of defendant's praise of a co-worker's perfect attendance earlier in the year. Therefore, the court determined that Plaintiff failed to establish a *prima facie* case of retaliation and granted summary in favor of the employer.

Foster v. Northwestern Medical Faculty Foundation, 2011 WL 2560187 (N.D. Ill. June 28, 2011)

Plaintiff applied for and received FMLA leave to care for her mother for a week in January 2006. In August 2006, plaintiff's supervisor gave her a performance evaluation indicating that she had received an oral warning for attendance and other job performance issues. In November 2006, plaintiff applied for and received a week of FMLA leave for her own medical condition. The day after her request was approved, plaintiff's supervisor issued her a corrective action report that addressed plaintiff falling asleep at her desk. Plaintiff was then approved for intermittent FMLA leave in December 2006. Also in December 2006, plaintiff's supervisor talked with her about making personal phone calls at work. In January 2007, plaintiff was placed on a performance improvement plan.

In May 2007, plaintiff went out on leave again and did not provide defendant with an expected return date. Defendant informed plaintiff that she would exhaust her FMLA leave on June 4, 2007, and advised her that at that point, she could take personal leave. Plaintiff was released to return to work at the end of June, but was told that her position had been filled and that she had to apply for other open positions with defendant. She applied for open positions, but

was not hired and was told with respect to one position that her former supervisor recommended that plaintiff not be hired. Plaintiff was discharged on September 7, 2007, and subsequently filed suit, alleging interference and retaliation under the FMLA. Defendant then filed a motion for summary judgment.

The court granted defendant's motion for summary judgment with respect to the interference claim because plaintiff received all of the leave she was entitled to under the FMLA and was not eligible to return to work when her leave was exhausted. The court found that the supervisor's discouraging actions were not relevant to the interference claim because plaintiff had actually received all 12 weeks of leave she was entitled to. The court also granted summary judgment in favor of defendant with respect to the retaliation claim because it determined plaintiff could not establish a causal connection between her discharge and protected activity. The court determined that the temporal proximity alone was not sufficient to establish the requisite causal connection.

***Knight v. Engert Plumbing & Heating, Inc.*, 2011 WL 3328399 (E.D. Tenn. Aug. 2, 2011)**

Plaintiff worked for defendant plumbing company as a plumber and later as a foreman. He was discharged after 14 years of employment as part of a reduction-in-force ("RIF") due to declining work levels, along with 37 other employees who were either laid off or voluntarily quit during the RIF period. Approximately four months prior to his discharge, plaintiff requested FMLA leave after recently learning that his two daughters had been molested by their uncle several years earlier. The request was denied. Following his discharge, plaintiff sued his former employer asserting multiple claims, including FMLA interference and retaliation claims. Both FMLA claims were dismissed by the district court on defendant's motion for summary judgment.

With respect to the interference claim, the court held that plaintiff was not entitled to FMLA leave in the absence of evidence that his daughters were suffering from a "serious health condition" requiring "continuing treatment by a healthcare provider." Therefore, this claim failed as a matter of law. Plaintiff's retaliation claim was similarly dismissed on summary judgment for lack of evidence. The court held that plaintiff had not shown a causal connection between his request for FMLA leave and his inclusion in the RIF other than temporal proximity, and alone it was not enough. The court also cited the lack of any proof to rebut the employer's evidence that plaintiff was terminated as part of a RIF. In reaching this conclusion, the court specifically noted that plaintiff was just one of 38 employees who were either laid off or voluntarily quit due to declining work levels, which was undisputed.

***Patterson v. Goodyear Tire and Rubber Co.*, 2011 WL 3610095 (D. Kan. Aug. 12, 2011); 2011 WL 2112288 (D. Kan. May 26, 2011); 2011 WL 1484153 (D. Kan. April 19, 2011)**

Plaintiff brought an FMLA retaliation and an FMLA interference claim against his employer, Goodyear. Goodyear claimed it terminated plaintiff after he violated his "last chance agreement" by failing to call a manager to report an absence. Plaintiff was placed on this "last chance agreement" in April of 2006. In the summer of 2006, plaintiff experienced heart problems and took FMLA leave. A strike occurred while plaintiff was on FMLA leave, and he returned to work in January of 2007. In February of 2007, plaintiff missed work and failed to call his manager in accordance with the agreement. He later

brought in a doctor's note providing that he had a sore throat and congestion relating to those absences. He was terminated for violating the "last chance agreement" on February 13, 2007. Plaintiff claimed interference with asserting his FMLA rights for those February absences and claimed FMLA retaliation for taking FMLA leave in the summer of 2006.

In *Patterson v. Goodyear Tire and Rubber Co.*, 2011 WL 1484153 (D. Kan. April 19, 2011), defendant sought summary judgment, which the court granted on plaintiff's interference claim but denied on his retaliation claim. Concerning the interference claim, the court ruled plaintiff did not sufficiently put Goodyear on notice that he was requesting FMLA leave for his February absences. The court denied summary judgment for the retaliation claim under the *McDonnell Douglas* burden shifting analysis. The court found plaintiff engaged in protected activity by taking FMLA leave when he had his first heart attack during the summer of 2006. Defendant then met its burden by proving a legitimate, nonretaliatory reason for discharging plaintiff since he violated of the "last chance agreement." However, there was a factual dispute as to whether plaintiff's termination was pretextual, given the close temporal proximity of his discharge and his return to work. Further, the record was unclear as to whether the employer actually enforced last chance agreements or had an unwritten policy or practice to allow several last chance agreements before discharging an employee.

In *Patterson v. Goodyear Tire and Rubber Co.*, 2011 WL 2112288 (D. Kan. May 26, 2011), defendant filed a motion for reconsideration as to whether the court committed clear error in finding a close temporal proximity existed between plaintiff's protected activity and defendant's adverse employment action, given that his FMLA leave ended months before his discharge. The court denied this motion, since plaintiff was terminated less than one month after returning to work from the union strike that occurred while he was on FMLA leave, evidencing close temporal proximity sufficient to survive summary judgment.

In *Patterson v. Goodyear Tire and Rubber Co.*, 2011 WL 3610095 (D. Kan. Aug. 12, 2011), the court granted defendant's oral motion for directed verdict at trial because plaintiff had failed to present any evidence about defendant's unwritten policy or practice of allowing several last chance agreements before discharging an employee. As a result, plaintiff failed to establish that his employer's reason for discharging him was pretext and defendant was entitled to judgment as a matter of law.

***Peletier v. Macomb County*, 2011 WL 4596051 (E.D. Mich. Sep. 30, 2011) (adopting Mag. J. Report & Recommendation, 2011 WL 3320328, March 25, 2011)**

Plaintiff requested and was granted intermittent FMLA leave to care for her infant son suffering from asthma. Nevertheless, plaintiff claimed interference with her FMLA rights, asserting her employer both failed to provide her with information or answer her questions about the FMLA and failed to follow statutory requirements in processing and timely granting her leave. She also claimed retaliation under the FMLA after she was discharged a few months later. The employer filed for summary judgment.

As to the interference claim, the court ruled that even assuming the actions alleged by plaintiff were supported by fact, plaintiff could not show she was prejudiced by those alleged violations as she received all the leave she requested. The court therefore granted defendant summary judgment on plaintiff's interference claim.

As to the retaliation claim, plaintiff argued she suffered a verbal reprimand, a written reprimand, a suspension and a termination because of her FMLA leave. Because the verbal reprimand referenced plaintiff's FMLA leave and occurred within close proximity to her leave, plaintiff established an issue of fact regarding whether a causal connection existed between her leave and the reprimand. However, defendant offered a legitimate reason for reprimanding plaintiff, which plaintiff could not establish was pretext - plaintiff had accumulated a large number of absences unrelated to her FMLA leave. In regard to the written reprimand, the court ruled its close proximity to plaintiff's leave was insufficient to establish a causal connection between the two given the reprimand's legitimate concerns. Notwithstanding an apparent causal connection between plaintiff's suspension and FMLA leave, the court ruled that the employer had a legitimate reason for suspending plaintiff, namely that plaintiff applied for military leave during specific dates and failed to attend military training during those days. Finally, the court ruled there was no causal connection between plaintiff's discharge and FMLA leave since her discharge was based on unexplained absences subsequent to her FMLA leave expiring. As a result, the court granted defendant's motion for summary judgment.

Pollard v. ALSCO, 2011 WL 1595147 (S.D. Ohio Apr. 27, 2011)

Plaintiff, a truck driver, alleged his employer retaliated against him for taking leave through its failure to promote him on two separate occasions and for terminating his employment. He claimed his supervisor told him he was not promoted because he had taken FMLA leave, though his supervisor denied this.

The court granted the employer's summary judgment motion relating to plaintiff's first failure to promote claim because the position plaintiff sought was filled before plaintiff even considered applying for FMLA leave. Thus, there was no causal connection between his leave and the adverse action.

The court denied the employer summary judgment with regard to the second alleged failure to promote, as well as plaintiff's discharge. Though the court rejected plaintiff's argument that the temporal proximity alone was sufficient to establish his *prima facie* case, it nonetheless held that the factual contradictions in the record regarding defendant's reasoning for not promoting plaintiff and ultimately discharging him, combined with the temporal proximity, were sufficient to withstand summary judgment. The employer justified its non-promotion decision based on customer complaints and its termination decision upon plaintiff's stealing gas. However, no company witness could provide details as to the nature of customer complaints and no company witness was willing to testify that they made the termination decision. Thus, the court found that temporal proximity of denying plaintiff a promotion while on leave and discharging him shortly thereafter, along with the above factual discrepancies, created a causal connection that established a *prima facie* case of discrimination.

Stage v. PPG Indus., Inc., 2011 WL 2532219 (E.D. Tenn. June 2, 2011)

Plaintiff was a territory manager for defendant, which manufactured and sold paint and stain. Her primary responsibility was to visit Lowe's stores to build relationships with the Lowe's managers, train employees on defendant's products, set up product displays and educate Lowe's customers. In March of 2009, plaintiff took FMLA leave to receive treatment for cancer. She returned to work on a half time basis on June 22, 2009, and then returned to full-time status June 30, 2009. In December 2009, defendant placed plaintiff on a performance improvement plan ("PIP") because she failed to spend enough time in Lowe's stores, missed deadlines for reports, had an abrasive tone when communicating with supervisors and took an unscheduled day off without notice. Subsequently, a Lowe's customer made a formal complaint about plaintiff's behavior toward him while she was at a Lowe's store. Due to the customer complaint and feedback that plaintiff's supervisor received from the store manager regarding her attitude and rudeness toward customers, plaintiff's supervisor determined that she no longer was permitted in the store. In December 2010, defendant terminated plaintiff's employment.

In her complaint, plaintiff alleged defendant discharged her in retaliation for taking FMLA leave. The district court granted summary judgment in favor of defendant, finding plaintiff could not show any causal connection between her FMLA protected leave and defendant placing her on the PIP and terminating her employment. Although temporal proximity between protected activity and an adverse action may lead to an inference of retaliation, more than six months passed between plaintiff's leave and the PIP and plaintiff failed to point to anything during the intervening months that would support an inference that either the PIP or her discharge were connected to her leave. The court also held plaintiff was unable to establish pretext.

Summarized Elsewhere:

Been v. New Mexico Dept. of Information Technology, 2011 WL 4565475 (D.N.M. Sept. 30, 2011)

Carter v. Arbors East, Inc., 2011 WL 1641153 (S.D. Ohio May 2, 2011)

Duchateau v. Camp Dresser & McKee, Inc., 2011 WL 4599837 (S.D. Fla. Oct. 4, 2011)

Greenwell v. Charles Mach. Works Inc., 2011 WL 1458565 (W.D. Okla. Apr. 15, 2011)

Leal v. BFT, Limited Partnership, 423 Fed. Appx. 746 (5th Cir. 2011)

Ridner v. Salisbury Behavioral Health, 2011 WL 5089806 (M.D. Pa. Sept. 28, 2011)

Rodriguez v. Univ. of Miami, 2011 WL 3651224 (S.D. Fla. Aug. 19, 2011)

Rogers v. County of Los Angeles, 198 Cal. App. 4th 480 (Cal. Ct. App. Aug. 16, 2011)

Thomsen v. Stantec, Inc., 785 F. Supp. 2d 20 (W.D.N.Y. 2011)

Welch v. Tri Rivers Consulting Services, Inc. et al., 2011 WL 1656070 (W.D. Pa. Mar. 21, 2011)

ii. Statements

Summarized Elsewhere:

Male v. Tops Markets, LLC, 2011 WL 2421224 (W.D.N.Y. June 13, 2011)

Sorrells v. Lake Martin, Inc., 2011 WL 627049 (M.D. Ala. Feb. 11, 2011)

2. Articulation of a Legitimate, Nondiscriminatory Reason

Baumeister v. AIG Global Inv. Corp., 420 Fed. Appx. 351 (5th Cir. March 28, 2011)

Plaintiff took pregnancy leave on two separate occasions prior to her position's elimination as part of a reduction-in-force ("RIF"). The only other portfolio analyst in the group was a male who was not laid off. Plaintiff alleged she was discharged because she took leave.

The Fifth Circuit affirmed summary judgment on plaintiff's FMLA claims, holding that defendant articulated a legitimate, non-discriminatory reason for discharging plaintiff: that she was discharged as part of a RIF because her primary job function supported a product the company was winding down, whereas her male counterpart's primary responsibilities were not going away.

The court then determined that a reasonable jury could not find plaintiff had proven pretext by a preponderance of the evidence. Although plaintiff disputed defendant's claim regarding her primary job function, the court found that plaintiff's own evidence bolstered, rather than contradicted, defendant's explanation. Moreover, because the record lacked evidence as to her male counterpart's qualifications, other than that plaintiff had more tenure, a reasonable jury would not be able to find that plaintiff was clearly better qualified than her male counterpart.

Bentley v. Orange County, Fla., 2011 WL 511952 (11th Cir. Oct. 28, 2011)

Plaintiff alleged she was discharged in retaliation for taking FMLA leave. The district court granted summary judgment in favor of the employer and plaintiff appealed. The Eleventh Circuit noted that the evidence was not clear whether plaintiff's discharge was motivated by her use of FMLA leave. Assuming plaintiff could make a *prima facie* case of retaliation, defendant had shown that plaintiff's employment was terminated for fraud and dishonesty and for failing to notify her supervisor that she missed a shift, in violation of the employer's leave policy. The court found plaintiff failed to demonstrate defendant's proffered reason for her discharge was untrue or not credible. Consequently, the court affirmed summary judgment.

Fields v. Verizon Servs. Corp., 2011 WL 4102087 (D. Md. Sept. 13, 2011)

Plaintiff alleged her employer retaliated against her in violation of the FMLA for taking FMLA leave for treatment of breast cancer. Plaintiff was employed as a Senior Consultant in Verizon's Requirements Group, which writes functional requirements for system enhancements. Around April 2009, she was diagnosed with breast cancer and took a leave of absence from Verizon from May to August 31, 2009. She used all of her FMLA leave, as well as additional leave under Verizon's short-term disability plan. She remained on short-term disability, taking full and half days off work as her chemotherapy treatments required, through November 23, 2009, when she was released to return to work full-time. The next day, she was notified that she had been terminated due to a reduction in force.

The district court granted the employer's motion for summary judgment on both claims. As to the FMLA claim, the court held that plaintiff had failed to establish a sufficient nexus between her taking FMLA leave and her discharge. There was no evidence the decisionmaker

was aware plaintiff had taken FMLA leave. While he was likely aware she was on short-term disability, it was not synonymous with FMLA leave. Further, her employer presented legitimate reasons for discharging her pursuant to the reduction in force, which plaintiff failed to show were pretextual. Her employer presented sufficient evidence that it terminated plaintiff's employment because she lacked technical skills and substantial familiarity with a particular software system on which much of the company's future projects would be based. Also, the two other employees retained over plaintiff had either greater familiarity and skills with the system, or had previously been ranked higher than plaintiff in terms of subject matter expertise. Thus, plaintiff's retaliation claim failed.

Gray v. Kroger Corp., 2011 WL 1398491 (S.D. Ohio Apr. 12, 2011)

Plaintiff was discharged by her employer for altering time cards to reduce overtime pay, allegedly at her supervisor's request. The employee filed suit claiming retaliation and the employer moved for summary judgment. The district court held that the employee could not establish that the employer's stated legitimate, non-discriminatory reason for her discharge was a pretext for discrimination. After conducting an investigation, the employer terminated plaintiff's employment based on its honest belief that she altered time cards and continued to do so after being told to stop. The district court further recognized that the focus is not whether the employer's reason for its decision is accurate, but whether the employer's reason is honest. Moreover, the court found that the employee did not offer evidence to rebut the employer's honest belief because her argument that it was unclear who made the termination decision failed to establish the employer's legitimate, non-discriminatory reason was pretextual. Thus, summary judgment was granted to the employer.

Jackson v. Planco, 431 Fed. Appx. 161 (3d Cir. 2011)

Plaintiff sued his former employer under a variety of theories, including retaliation for exercising rights under the FMLA. The district court granted defendant's motion for summary judgment on all claims, including the FMLA retaliation claim, and the Third Circuit affirmed. The employer presented evidence that plaintiff, who was under a performance management plan, was fired for visiting prohibited gun-related web sites on the internet, which created fear in fellow employees. Plaintiff presented no direct or circumstantial evidence of retaliation, and therefore the court found plaintiff did not create an issue of fact regarding whether defendant's proffered reason for termination was pretext.

Pacosa v. Kaiser Foundation Health Plan of the Northwest, 2011 WL208205 (D. Or., Jan. 21, 2011)

Plaintiff worked for defendant as a pediatric physician assistant. For several years, plaintiff had taken intermittent leave to care for his wife, who had clinical depression. Plaintiff began to take leave to care for his daughter during his last year of employment because she too suffered from depression. Defendant attempted to change plaintiff's schedule to better accommodate both his need for intermittent leave and defendant's staffing needs. Plaintiff asked that his schedule remain the same and contacted his union representative, who demanded that

defendant cease and desist from implementing unilateral schedule changes with regard to plaintiff. Defendant did not implement the suggested schedule change.

A month after defendant attempted to change plaintiff's schedule, it received a complaint from plaintiff's wife. His wife told defendant that plaintiff had accessed her medical records without her authorization and that he used the information in the records to obtain a restraining order against her. Plaintiff had been informed that he was required to comply with defendant's policies related to employee access to confidential medical records. These policies stated that employees were prohibited from accessing their own or family members' records unless they are the assigned healthcare provider, or the patient authorized access and the access had been approved by defendant. After receiving the complaint, defendant conducted an internal audit that revealed plaintiff had accessed records of both his wife and daughter repeatedly over the years. Defendant then discharged plaintiff.

Plaintiff filed a lawsuit, alleging that defendant retaliated against him by discharging him for exercising his FMLA rights and that defendant interfered with his FMLA rights by attempting to change his work schedule. The court granted defendant's motion for summary judgment on the retaliation claim, finding that plaintiff was aware of defendant's confidentiality policies because he had signed several confidentiality statements that indicated unauthorized medical record access was prohibited and grounds for discharge. The court found that the only reason defendant discharged plaintiff was because of his unauthorized medical record access and there was no evidence that his FMLA leave constituted a negative factor in the decision to discharge. The court also granted defendant's motion for summary judgment on the interference claim, finding that defendant never changed plaintiff's schedule and plaintiff could not establish that defendant ever denied him leave.

Sanchez v. Dallas/Fort Worth International Airport Board, 2011 WL 3667435 (5th Cir. Aug. 22, 2011)

Plaintiff requested FMLA leave to attend doctor appointments for her son, who had autism and attention deficit hyperactivity disorder. Plaintiff claimed that after making this request, her supervisor scheduled meetings during the doctor appointments and reduced plaintiff's responsibilities. Plaintiff complained to defendant's Chief Executive Officer about these occurrences and defendant then conducted an internal investigation into plaintiff's complaints. This investigation found no indication that the supervisor's actions were discriminatory.

The year following plaintiff's request for FMLA leave, she received a performance review that listed several shortcomings in plaintiff's job performance. The performance review also referred to an ongoing conflict between plaintiff and her supervisor, indicating that while the supervisor was willing to work to improve the conflict, plaintiff was not. In addition, that same year, one of plaintiff's direct reports resigned and participated in an exit interview that revealed plaintiff displayed favoritism and mismanaged resources. Defendant investigated the allegations and found that plaintiff approved inappropriate expenses, asked her assistant to do her personal errands, and was visibly intoxicated at a company event. Defendant discharged plaintiff based on these findings as well as her inability to get along with her supervisor.

Plaintiff filed suit, alleging FMLA retaliation. Defendant was granted summary judgment by the district court and the Court of Appeals affirmed. The court found that defendant's reasons for discharging plaintiff were legitimate and nondiscriminatory and that plaintiff could not demonstrate these reasons were pretextual. Plaintiff only presented her own affidavit to rebut defendant's proffered reasons and the court found that such a self-serving affidavit was not, on its own, sufficient to defeat summary judgment.

Summarized Elsewhere:

***Bell v. Dallas County*, 2011 WL 2672224 (5th Cir. July 8, 2011)**

***Blakley v. Schlumberger Technology Corp.*, 2011 WL 3503318 (8th Cir. Aug. 11, 2011)**

***Carroll v. Texas Dept. of Public Safety*, 2011 WL 1103474 (S.D. Tex. Mar. 23, 2011)**

***Dockens v. Dekalb County School System*, 2011 WL 4472298 (11th Cir. Sept. 28, 2011)**

***Harris v. HIP Administrators of Fla., Inc.*, 2011 WL 1103753 (S.D. Fla. Mar. 24, 2011)**

***Haynes v. The Community Hospital of Brazosport*, 2011 WL 43315 (S.D. Tex. Jan. 5, 2011)**

***Henry v. United Bank*, 784 F. Supp. 2d 68 (D. Mass. 2011)**

***Leach v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 2118723 (11th Cir. May 27, 2011)**

***Makeen v. Comcast Cable Communications, LLC*, 2011 WL 3300389 (D. Colo. Aug. 2, 2011) (adopting Mag. J. Report and Recommendation, 2011 WL 3300392 (D. Colo. May 6, 2011))**

***Markatos v. AT&T Consulting Solutions, Inc.*, 2011 WL 3648272 (E.D. Mich. Aug. 18, 2011)**

***Montgomery v. Ion Media Management Co.*, 2011 WL 1791294 (M.D. Fla. May 10, 2011)**

***Peletier v. Macomb County*, 2011 WL 4596051 (E.D. Mich. Sep. 30, 2011) (adopting Mag. J. Report & Recommendation, 2011 WL 3320328, March 25, 2011))**

***Platt v. Lamrite West, Inc.*, 2011 WL 3625564 (N.D. Ohio Aug. 17, 2011)**

***Robert v. Bd. of County Comm'rs of Brown County, Kansas*, 2011 WL 836729 (D. Kan. Mar. 3, 2011)**

***Ruble v. American River Transportation Co.*, 2011 WL 2600118 (E.D. Mo. June 29, 2011)**

***Tillman v. Ohio Bell Telephone Co.*, 2011 WL 2682405 (N.D. Ohio July 11, 2011)**

3. Pretext

Adams v. Fayette Home Care and Hospice, 2011 WL 5822702 (3d Cir. Nov. 18, 2011)

Plaintiff, a hospice nurse, was discharged two days after she returned from her fifth FMLA leave in six years. The employer reportedly terminated plaintiff's employment after receiving complaints from a patient and his wife alleging that plaintiff showed them lewd pictures of her husband on her cell phone. The complaints were made at approximately the same time plaintiff began two months of leave, and the employer waited to discuss the reports with plaintiff until she returned from leave. When meeting with her supervisors regarding the patient's complaints, plaintiff claims that she vigorously denied the allegations. However, her employer reported that she was largely silent. Following the meeting, the employer issued plaintiff a termination letter which recited the patient's allegations and stated that plaintiff had not denied them when confronted.

The employer moved for summary judgment, which the district court granted. On appeal, plaintiff argued that her employer's charge of misconduct was mere pretext for terminating her employment for taking protected leave. Plaintiff first argued that an issue of fact existed because the employer failed to disclose the name and contact information for the patient making the allegation in its Rule 26 disclosures. However, the court dismissed this argument stating that the employer disclosed the names of the patient and his wife during discovery, and plaintiff knew their contact information from her prior treatment of the patient at his home. Thus, the employer's omission did not prejudice plaintiff or create an issue of material fact. Next, plaintiff argued that a factual dispute existed because the employer did not present evidence that it had a formal policy of not communicating with employees who were on leave. However, plaintiff did not challenge testimony from other employees stating that they could not remember ever interacting with someone on leave. The court held that the employer did not need "to reduce that practice to a formal written policy" in order for the court to "credit it." It also pointed out that the employer knew the full duration of plaintiff's FMLA leave in advance, and if it sought to retaliate, the employer had no reason to wait until the leave ended.

Finally, plaintiff argued that an issue of material fact existed as to whether plaintiff denied the allegations during the meeting she had with supervisors. However, the court held that whether plaintiff objected to the allegations when she first heard them "is of no moment for us in determining their validity." The court also noted that plaintiff did not attempt to argue on appeal that the patient's allegations were false, and the employer offered evidence tending to show that the allegations were in fact true. In doing so, the court affirmed the district court's grant of summary judgment for the employer.

Coffman v. Ford Motor Co., 2011 WL 5865438 (6th Cir. Nov. 22, 2011)

Plaintiff was employed as a quality coordinator for Ford until her discharge in July 2005. Between 2004 and 2005, the employee frequently missed work and requested leave through the employer's medical department. Defendant's policies provided that failure to provide timely justification (15 calendar days) for leave would result in the designation of absence without leave ("AWOL"). Three AWOL designations within three months would result in progressive discipline ranging from unpaid suspension for the first set of occurrences to discharge upon the tenth occurrence. Though plaintiff properly supported many of her absences, at least ten occurrences of failure to submit timely documentation

resulted in progressive disciplinary action, culminating in termination shortly after the employee was diagnosed with obstructive sleep apnea. Plaintiff's discharge for repeated absenteeism resulted from 10 AWOL occurrences in an 8 month period. The district court held that the employee failed to rebut the employer's nondiscriminatory explanation for her dismissal, and granted summary judgment on that as well as statute of limitations grounds. The only question on appeal was whether plaintiff established that defendant's justification for termination was pretextual.

Plaintiff's first argument was that defendant failed to cite certain absences at her final disciplinary hearing as absences that contributed to her discharge. However, defendant consistently applied its policy requiring only three occurrences for disciplinary action to result. Further, plaintiff did not dispute that she failed to justify her absences within the allotted time period that would have entitled her to leave. Plaintiff's second argument concerned absences for which documentation was timely submitted. However, the documentation was rejected as invalid due to conflicting reasons provided for those absences and the physician's determination that the forms were medically insufficient to justify FMLA leave. The physician also noted an obvious discrepancy between signatures on those certifications and previous certifications as an additional reason for his determination. Plaintiff's claim that defendant was obligated to request additional information in writing for those absences fails because the certification was not incomplete, but rather invalid on its face. Plaintiff's final argument was that later absences should have been considered intermittent leave because they were based on the same illness as previous absences. However, plaintiff provided no evidence of a request for intermittent leave, much less an agreement by defendant to treat those absences as such. Additionally, plaintiff was not eligible for FMLA leave for the later absences due to insufficient hours. As a result, the Sixth Circuit affirmed summary judgment for defendant on the ground that plaintiff failed to demonstrate pretext.

Hillins v. Marketing Architects, Inc., 2011 WL 3901867 (D. Minn. Sep. 6, 2011)

Plaintiff was not restored to employment with an advertising agency after taking FMLA leave to care for a newborn. During her employment, the employee had been promoted several times in her account management role and had supervisory responsibilities. Despite concerns expressed by a major client (which were never relayed to her), she was to be nominated for a vice president position. Once she advised management about her pregnancy, however, she was transferred to a position heading a business unit requiring neither account management nor supervisory duties. Further, she alleged she was isolated by management and all talk of a vice president position ceased. Although she received a bonus and positive reviews before and during her leave, management also expressed the view that she should stay home to spend time with her son.

During her leave, the company eliminated plaintiff's business unit as well as another business unit. Plaintiff was the only employee of her unit and was discharged. The company decided to discharge plaintiff because it believed she could not transition back to account management duties due to the concerns expressed by the large client. The employee sued for interference and retaliation under FMLA. The district court denied the employer's motion for summary judgment.

The employer argued that the worker was fired as part of a bona fide reduction in force (RIF), others not on FMLA leave were terminated as part of the RIF, and no one performed her duties after the RIF. But the court was not persuaded by the company's position for several reasons. The employer produced no documents reflecting, nor any evidence of objective criteria to explain, its decision to eliminate the employee's position. In addition, the employer had many job openings and hired many persons after the alleged RIF. Further, the court found that there was ample evidence of pretext, including the timing of plaintiff's termination, the supervisor's comments about plaintiff spending time with her son, the failure to advise her of the client's concerns, and the inconsistency on the part of the company in praising her while simultaneously claiming she could not handle account management. In addition, her interference claim survived summary judgment because she was fired while on FMLA leave, and therefore a genuine issue of fact existed regarding whether the termination was related to plaintiff's leave.

Knodel v. Providence Health & Servs., 2011 WL 3563912 (W.D. Wash. 2011)

Plaintiff, a registered nurse, worked for defendant for nearly forty years, most recently in its hospice division. Shortly after moving to the hospice division, she suffered a brain aneurysm and later was diagnosed and treated for breast cancer. After starting chemotherapy treatment following surgery for breast cancer, she requested and was granted intermittent FMLA leave. She was discharged approximately four months later for, according to defendant, failure to meet expectations in a certain patient's care.

Plaintiff then sued defendant alleging multiple claims arising out of her termination, including a claim for FMLA retaliation on the basis that her FMLA leave constituted a negative factor in the decision to terminate her employment. Her evidence consisted of (i) her testimony that she was subjected to ridicule for making the FMLA requests, (ii) her personnel file which contained records of good performance prior to plaintiff's FMLA leave and multiple warnings that she received about her work performance after her FMLA leave, (iii) e-mail exchanges between managers in the hospice unit that could be construed as an attempt to "trump up" a record of poor performance to support plaintiff's termination, and (iv) some evidence of hostility from plaintiff's supervisor related to her FMLA requests. Without suggesting that plaintiff's case was a strong one, the court held that such evidence was sufficient to establish both a *prima facie* case and pretext.

Penberg v. HealthBridge Management, 2011 WL 4943526 (E.D.N.Y. Oct. 17, 2011)

Plaintiff took FMLA leave from his marketing position to recuperate from heart surgery. He claimed interference with his FMLA rights and retaliation based on the employer's failure to give him a raise after the leave and his termination nine months later. Defendant filed for summary judgment.

The court ruled first that the claim must be for retaliation, and not interference, since no adverse action occurred until after he took the FMLA leave. As to the retaliation claim, the court ruled that since plaintiff failed to separately include the allegation of failure to give a raise in his complaint, the court could only consider the actual discharge and not the failure to give a raise to plaintiff as an adverse consequence. The court ruled

there was genuine dispute as to whether the reason given by the employer for termination, the lack of qualification to perform clinical screenings, was pretextual because plaintiff was the highest producer in his group and had performed the job without the qualification to perform screenings for years. Further, plaintiff argued the decisionmaker in his termination was unaware of his lack of qualification for conducting screenings. The court therefore denied the employer's motion for summary judgment on plaintiff's retaliation claim.

Roehlen v. Ramsey County, 2011 WL 4640888 (D. Minn. Oct. 5, 2011)

Plaintiff, a veteran deputy sheriff for the Ramsey County Sheriff's Department, was assigned to the transport unit, where he transported restrained prisoners and unrestrained committed civilians between jails and various locations. According to the job description and plaintiff's deposition testimony, this assignment required physical strength sufficient to make a "forceful arrest."

After over a decade of service, plaintiff began suffering from a chronic back condition and had surgery in 2007. Plaintiff returned to the transport unit after surgery and worked under restrictions that he not lift more than 50 pounds, transport only restrained prisoners, and refrain from physically demanding training. In 2010, after his condition flared up, plaintiff took eight to nine weeks of approved FMLA leave for rehabilitation. He returned to work and provided his supervisor a doctor's note restricting him indefinitely by requiring that he (1) have discretion to refuse to work long transport trips and (2) transport only restrained prisoners. Plaintiff's supervisor became concerned that the restrictions disqualified him from working in the transport unit. On the date of his return, the supervisor told plaintiff that the department could not accommodate his restrictions and sent him home. That week, defendant reiterated that it could not accommodate plaintiff's restrictions and suggested that he look into other options such as long-term disability or a medical leave absence. After several weeks at home, plaintiff applied for pension benefits and, upon applying, submitted his resignation. He filed this lawsuit the following month, alleging FMLA retaliation for defendant's failure to reinstate him to his position upon return from FMLA leave.

Defendant moved for summary judgment, arguing (1) plaintiff was not entitled to reinstatement upon his return from leave because he was unable to make a forceful arrest, an essential function of his position; (2) plaintiff failed to make a *prima facie* case of discrimination; and (3) plaintiff failed to show that its proffered nondiscriminatory reason for reinstating plaintiff was pretext for discrimination. Plaintiff argued defendant's reason was pretext for discrimination because the position did not in fact require the ability to forcefully arrest someone. Plaintiff also noted that defendant's treatment varied from his 2007 return to work to his return to work in 2010, despite his 2007 restrictions being more severe. This change in tune, plaintiff argued, also evinced pretext.

The district court granted defendant's motion, holding plaintiff offered "no evidence" supporting pretext, and thus no question of material fact remained. The court found that plaintiff's restrictions were not more severe in 2007, noting the indefinite nature of plaintiff's 2010 restrictions. Additionally, the court found that the evidence was clear that being able to forcefully arrest someone was a requirement of plaintiff's former position, which plaintiff could

not meet. In a footnote, the court noted that the reasonableness of defendant's refusal to accommodate plaintiff's restrictions was not at issue because plaintiff had not brought a claim under the Americans with Disabilities Act.

Summarized Elsewhere:

Baumeister v. AIG Global Inv. Corp., 420 Fed. Appx. 351 (5th Cir. March 28, 2011)

Gray v. Kroger Corp., 2011 WL 1398491 (S.D. Ohio Apr. 12, 2011)

Karavish v. Ceridian Corp., 2011 WL 3924182 (D. Conn. Sept. 7, 2011)

Platt v. Lamrite West, Inc., 2011 WL 3625564 (N.D. Ohio Aug. 17, 2011)

Roberts v. Florida Gas Transmission Co., L.L.C., 2011 WL 5119520 (5th Cir. Oct. 28, 2011) (aff'ing 2011 WL 1135335 (M.D. La. Mar. 24, 2011))

Sanchez v. Dallas/Fort Worth International Airport Board, 2011 WL 3667435 (5th Cir. Aug. 22, 2011)

Schmidli v. City of Fraiser, 784 F. Supp. 2d 794 (E.D. Mich. 2011)

Terwilliger v. Howard Memorial Hospital, 770 F. Supp. 2d 980 (W.D. Ark. 2011)

a. Timing

Burress v. City of Franklin, 2011 WL 3651275 (M.D. Tenn. Aug. 17, 2011)

Plaintiff, a former police officer, filed FMLA claims arising out of both the City of Franklin's ("City") decision to terminate his employment and its alleged post-termination acts of retaliation. In 2007, as the result of various medical conditions, plaintiff took a series of leaves, ultimately returning to work in a light duty capacity. However, he last reported for work in February 2008, at which time he took additional leave to receive a liver transplant. In September 2008, the City realized that plaintiff had been on unpaid leave for six months -- two months longer than the four months allotted in the City's employment policies -- and terminated his employment. Plaintiff's attorney engaged in negotiations with the City until mid-2009, when the City offered to reinstate plaintiff -- conditioned upon his successfully passing psychological and physical examinations. After clarifying that he did not consider the reinstatement as a resolution of plaintiff's damages claims, plaintiff agreed. He passed his psychological examination on October 2, 2009. Plaintiff then filed his suit for damages on October 6, 2009. On October 16, 2009, the City sent a letter stating that it had reviewed the psychological evaluation and had noted some discrepancies between what plaintiff had stated and what the City knew to be true. The City then withdrew its offer of reinstatement on November 5, 2009.

Plaintiff filed additional retaliation claims, including claims under the FMLA. He argued that he was retaliated against within the meaning of the FMLA when the City withdrew its offer

of reinstatement after he filed his lawsuit asserting damages claims. The court denied the City's summary judgment motion, holding that "the very close proximity in time in this particular case is sufficient to give rise to an inference of causation that will defeat summary judgment."

Harris v. Dallas Independent School District, 2011 WL 3360642 (5th Cir. Aug. 4, 2011)

Plaintiff had been demoted from a director to a coordinator position due to budget cuts prior to her FMLA leave. After returning from her FMLA leave, plaintiff was told that her department had been eliminated also due to budget cuts. Defendant's motion for summary judgment was granted and plaintiff appealed.

The appellate court determined that defendant's reason for plaintiff's discharge was legitimate and nonretaliatory, and that plaintiff failed to show that defendant's reason was pretextual. The pretext inquiry focuses on the authenticity of the employer's proffered reason, and an appellate court reviews *de novo* whether the reason given by the employer was false, unworthy of credence, or otherwise unpersuasive. Although the timing of the decision can establish a *prima facie* case of retaliation and is a factor in considering pretext, alone it is insufficient to demonstrate pretext. The appellate court found that defendant had implemented broad reductions in the workforce, the director had discussed eliminating the department before plaintiff requested FMLA leave, the department had not been reinstated since its elimination, and no one had been hired to replace plaintiff. Accordingly, the appellate court affirmed the decision of the trial court in granting defendant's motion for summary judgment.

Jackson v. Gannett Co., 2011 WL 3362154 (D.N.J. Aug. 3, 2011)

Plaintiff sued his former employer for interference with his rights under the FMLA, alleging defendant denied him intermittent leave, and for retaliation, alleging defendant discharged him for exercising rights under the Act. With regard to the interference claim, plaintiff conceded in his deposition that he received FMLA leave every time he requested it. As a result, plaintiff could not establish a *prima facie* case of FMLA interference and the court granted defendant's motion for summary judgment on the interference claim.

With regard to the retaliation claim, the evidence showed defendant insisted that plaintiff have no restrictions on his release when plaintiff attempted to return to work after his leave expired. When plaintiff could not produce an unrestricted release, his employment was terminated. The court noted the "extreme proximity" of plaintiff's discharge and his FMLA leave and held that a reasonable trier of fact could find that plaintiff was discharged because defendant was tired of "repeatedly accommodating" his FMLA leaves of absence. The court therefore denied defendant's motion for summary judgment on plaintiff's retaliation claim.

Jain v. McGraw-Hill Cos., 2011 WL 5120261 (S.D.N.Y. Oct. 28, 2011)

Plaintiff filed a claim alleging defendant terminated her employment because she had exercised her right to take FMLA leave. Defendant moved for summary judgment, pointing to evidence that plaintiff had received repeated poor performance reviews and had been given several specific warnings concerning her poor work performance.

In granting defendant's motion, the court relied on the fact that the only evidence plaintiff offered in support of her claim was the timing of her termination – that she was dismissed the day she returned from leave. The court stated that while temporal proximity can support a *prima facie* showing of discrimination, “something more is required to show evidence of discriminatory intent once defendants have articulated a legitimate reason for the adverse action.” As a result, the court concluded plaintiff failed to meet her burden of proving pretext.

James v. Verizon, 792 F. Supp. 2d 861 (D. Md. 2011)

Plaintiff, who had responsibility for investigating complaints of discrimination, was placed on a Performance Improvement Plan (“PIP”) in July 2006 based on deficiencies in her performance. On September 11, 2006, as a result of recurring vision problems, plaintiff requested and was granted FMLA leave. On September 13, 2006, defendant concluded she had not fulfilled her expectations under the PIP and, on September 22, scheduled a meeting with plaintiff at which it terminated her employment. Plaintiff alleged that defendant violated the FMLA by ordering her to appear at work and terminating her employment while she was on FMLA leave. Defendant moved for summary judgment.

In granting the motion, the court found that it was “undisputed” that defendant’s “principal reasons” for firing plaintiff related to her performance issues relating to the PIP and an investigation she had conducted in May and June 2006. The court also relied on the fact that during oral argument on the summary judgment motion, plaintiff’s counsel all but conceded . . . that defendant’s perception of the investigation – not Plaintiff’s request for FMLA leave – was the primary reason for her termination. Although plaintiff then argued her request for FMLA leave resulted in defendant firing her more quickly than it otherwise would have, the court rejected the argument, finding that it was based entirely on speculation and contradicted by the facts in the record. Finally, the court noted that while there was a close temporal proximity – approximately 11 days – between when plaintiff announced she would be on leave and the date she was informed of her dismissal, an inference of improper motive did not arise because her PIP ended around that time and the actions that led to her discharge began before she requested FMLA leave.

Leal v. BFT, Limited Partnership, 423 Fed. Appx. 746 (5th Cir. 2011)

On appeal, plaintiff argued that the close temporal proximity between her FMLA leave and her job elimination showed that defendant’s decision to eliminate her position was based in part on plaintiff’s protected FMLA activity. The district court held that while the close temporal proximity here *was* sufficient to establish the necessary causal link for a *prima facie* case of retaliation, that proximity was not strong enough to create a genuine issue that defendant’s legitimate, non-discriminatory reason was pretext.

In affirming, the Fifth Circuit reasoned that defendant presented strong evidence that its decision was purely motivated by the economic downturn and decreasing sales, and presented evidence that defendant initiated ongoing discussions about eliminating the position seven months before plaintiff requested leave. In contrast, other than timing, plaintiff’s only other

evidence of pretext was a company email indicating that defendant's planned layoffs were complete before plaintiff's position was later eliminated and defendant's apparent satisfaction with plaintiff's job performance. The Fifth Circuit held that, at best, plaintiff's evidence created a weak inference of retaliatory intent, but it did not sufficiently cast doubt on the company's proffered reason to survive summary judgment.

Kosierowski v. Fitzgerald, 2011 WL 573449 (W.D. Tex. Feb. 14, 2011)

Plaintiff worked as a deputy chief for defendant Bexar County Community Supervision and Corrections Department (the "Department") for approximately four years. Following his discharge two weeks after returning to work following hernia surgery and while he claimed he was on intermittent FMLA leave to assist his wife with an injury she recently suffered, he sued the Department and both his supervisor and the former director of operations in both their individual and official capacities alleging he was discharged in retaliation for exercising his rights under the FMLA. Defendants moved for summary judgment.

The court concluded plaintiff failed to rebut defendant's evidence that the decision to terminate his employment was made before he gave notice of FMLA leave. The court also rejected plaintiff's testimony that his supervisor was upset about the timing of his leave (which coincided with a visit from a high-ranking state official), characterizing it as nothing more than plaintiff's subjective belief. Even if plaintiff could establish a *prima facie* case, the court found plaintiff failed to present evidence showing that defendants' reasons for terminating his employment were pretext. In particular, the court rejected plaintiff's reliance on "close temporal proximity," stating that "suspicious timing alone is insufficient to establish pretext." It also rejected plaintiff's argument that defendants made inconsistent or conflicting explanations for their conduct. The court explained that a letter advising plaintiff simply that his at-will employment was being terminated and defendants' elaboration on the specific reasons during the course of litigation was not an "inconsistency" from which to infer pretext.

The court therefore granted summary judgment to the Department and the individuals in their individual and official capacities because plaintiff failed to establish a *prima facie* case and/or to rebut the reasons for his discharge. The court also granted summary judgment to the former operations manager in her individual capacity for the additional reason that she lacked sufficient control over plaintiff's ability to take FMLA leave to qualify as an employer. In this case, the court simply assumed without deciding that there was individual liability under the FMLA for supervisors.

Makeen v. Comcast Cable Communications, LLC, 2011 WL 3300389 (D. Colo. Aug. 2, 2011) (adopting Mag. J. Report and Recommendation, 2011 WL 3300392 (D. Colo. May 6, 2011))

Plaintiff worked as a Senior Network Analyst or Senior Network Engineer for defendant for about four years. As a Senior Network Analyst, plaintiff had access to a dynamic Internet Protocol ("IP") address and could purchase a static IP address, which is permanently assigned to a specific computer, at a higher cost. Another employee reported to defendant that plaintiff was running a commercial pornography website. Defendant investigated this complaint and discovered that a static IP address had been assigned to a modem belonging to plaintiff. The investigation further revealed that plaintiff was not paying the higher rate for this static IP

address. Shortly after discovering this information, defendant terminated his employment. Plaintiff filed a complaint against his former employer, Comcast Colorado X, LLC, alleging that Comcast violated the FMLA when it terminated his employment.

The district court agreed with the Magistrate Judge's recommendation and granted summary judgment on plaintiff's FMLA claims. Plaintiff suffered from epilepsy and had been approved for continuous FMLA leave from November 2007 through December 2007. Plaintiff, therefore, argued that the timing of defendant's investigation into his actions created a genuine issue of material fact regarding whether defendant violated the FMLA. In particular, plaintiff asserted that the investigation began in November 2007 but that he was not discharged until February 2008, after he had taken FMLA leave and after he had complained that his superiors made inappropriate comments about his FMLA leave. The court found that the temporal proximity alone is not enough to show pretext on the part of defendant employer. Rather, the court stated that the proper question was whether defendant's stated reason for the termination was unworthy of credence. The court further noted that the employees responsible for the investigation did not work with plaintiff or know anything about his medical condition. As such, the court found that defendant employer established a good faith belief that plaintiff was using a static IP address to run a commercial pornography site without paying for that address and that plaintiff did not put forth sufficient evidence to question defendant's good faith belief.

Markatos v. AT&T Consulting Solutions, Inc., 2011 WL 3648272 (E.D. Mich. Aug. 18, 2011)

Plaintiff, who served as a manager of professional services for the company for five years, took FMLA leave in early 2008 to recover from back surgery. Before taking his leave, plaintiff transitioned his duties to a friend who also worked at the company. One week after returning from leave, plaintiff was informed that his position was eliminated as part of an economic reduction in force. The company split plaintiff's former duties between plaintiff's supervisor and plaintiff's friend, who had been performing those duties during the leave. The company gave plaintiff an option to receive a severance package or a sixty-day paid job search. Plaintiff chose the latter. During the search, plaintiff found another position with the company, which paid less and required more travel. One year after plaintiff's selection for discharge, his friend was promoted to plaintiff's former position.

The company moved for summary judgment, and the court granted the motion. The court found that plaintiff could establish a *prima facie* case of FMLA retaliation under the burden-shifting indirect method of proof because of the timing of plaintiff's selection for discharge after taking FMLA leave. The company also met its burden of presenting a legitimate, non-discriminatory reason for selecting plaintiff for a reduction in force. The court found that the company's reliance on the fact that plaintiff's job duties could be absorbed by others, as well as plaintiff's job performance as compared to other employees in his group, were legitimate reasons for its decision.

Plaintiff failed to establish that the company's reasons for selecting him as part of the reduction in force were pretext for retaliatory motives. Plaintiff argued that his position was never eliminated because his former job duties were performed by others. But the court held that spreading a discharged employee's duties, without the hiring of any new employees, does not constitute discriminatory replacement. The court also rejected plaintiff's argument that the

company later increased the number of employees in his group to its pre-reduction numbers. The court reasoned that the company hired new employees eight months after the reduction and that the new employees had different and specialized skill sets that plaintiff did not possess. Accordingly, the court awarded summary judgment to the company.

Peterson v. Exide Technologies, 2001 WL 67150 (D. Kan. Feb. 16, 2011)

On May, 27, 2007, plaintiff was injured after the forklift he was driving hit a support pole at defendant's distribution center. Plaintiff was taken to a hospital by his supervisor, received stitches and was placed on FMLA leave. Soon thereafter, the distribution center manager and human resources manager discussed what, if any, discipline plaintiff should receive as a result of the accident. Both the distribution center manager and human resources manager believed that plaintiff had been reckless and careless and severe discipline was warranted. According to the two managers, plaintiff had a history of unsafe and careless behavior. Moreover, the managers believed that plaintiff's violation of the company's safety policies led to the accident that occurred on May 27, 2007. Plaintiff was discharged four days after his forklift accident and the commencement of FMLA leave.

Plaintiff alleged defendant retaliated against him in violation of the FMLA. Defendant did not dispute the existence of a *prima facie* case. Instead, defendant argued that plaintiff's employment would have been terminated regardless of his FMLA leave because of his violation of company policies and his demonstrated carelessness.

In response, plaintiff cited five factors that he alleged were evidence of pretext: the timing of his discharge; the minor nature of the May 27, 2007 incident, defendant's alleged creation of dangerous conditions that led to the incident; his manager's alleged philosophy of blaming injured employees; and defendant's alleged violation of its progressive disciplinary rules.

The court first noted that temporal proximity alone is not sufficient to establish pretext. Next, the court determined that the record failed to show a genuine issue of material fact with respect to whether defendant's reasons for discharging plaintiff were pretextual. As a result, summary judgment was granted on plaintiff's FMLA claims.

Shaffer v. American Medical Association, 2011 WL 4921464 (7th Cir. Oct. 18, 2011)

Defendant determined that one position in plaintiff's department had to be eliminated due to budget cuts. Plaintiff was defendant's Director of Leadership Communications and his supervisor decided to recommend elimination of the Communications Campaign Manager position instead of plaintiff's position. Plaintiff's supervisor informed the Chief Marketing Officer of his recommendation in late October 2008. The Chief Marketing Officer specifically asked about plaintiff's position, to which the supervisor responded that no additional positions would need eliminated.

In late November 2008, plaintiff notified his supervisor that he was having knee replacement surgery and would need four to six weeks of FMLA leave. A few days later, his supervisor emailed the Chief Marketing Officer to inform him that plaintiff's position should be eliminated instead of the Communications Campaign Manager position. This email also

informed the Chief Marketing Officer that the department had already started preparing for plaintiff's leave so the immediate impact would be minimal. Plaintiff was then discharged a few weeks later. When the supervisor was notified of potential litigation in February 2009, he typed notes of conversations he had leading up to plaintiff's discharge and backdated them to late-November, claiming that he had shredded his original handwritten notes.

The district court granted defendant's motion for summary judgment on plaintiff's FMLA claim but the Court of Appeals reversed. The court found that a reasonable jury could conclude that defendant made the decision to discharge plaintiff because of his request for leave based on the content of the email his supervisor sent and the fact that the decision maker changed his mind shortly after plaintiff's made his FMLA request. The court also found that a jury could conclude that the supervisor backdated notes solely to support his contention that the leave request did not influence his decision.

Spring v. Sealed Air Corp., 2011 WL 4402600 (E.D. Pa. Sept. 22, 2011)

Defendant had a well-known policy requiring employees to immediately report all workplace injuries to their department supervisors, as well as a progressive discipline system that was communicated to all employees. Plaintiff injured his lower back at work on November 26, 2008. Although plaintiff took three days off of work related to the injury, he failed to inform anyone at the company that the injury was work related until the day before he intended to return to work, when he brought in paperwork to designate his absence as FMLA leave. Plaintiff admitted he had violated defendant's reporting policy, and defendant suspended him pending further investigation into the policy violation. Defendant ultimately terminated plaintiff's employment under the company's progressive discipline policy due to plaintiff's long history of documented safety issues and instances of counseling under the discipline policy, culminating with his failure to report his workplace injury. Plaintiff alleged his discharge constituted interference with, and retaliation for, his three day absence under the FMLA.

The court granted defendant's motion for summary judgment, rejecting plaintiff's argument that defendant interfered with his FMLA rights by suspending him and terminating his employment when he missed three days of work. Instead, the court found the undisputed evidence showed plaintiff violated defendant's policy requiring him to report all workplace injuries and found there was no evidence that defendant considered plaintiff's use of FMLA leave when deciding whether to terminate his employment. Thus, the court held that no reasonable jury could find that plaintiff's three day absence was in any way related to the termination of his employment.

Similarly, using the burden shifting framework established in *McDonnell Douglas v. Green*, the court held plaintiff was unable to sustain his claim of FMLA retaliation. Plaintiff relied on the temporal proximity between the date that he brought his FMLA paperwork into defendant's human resources department and his suspension, which both occurred on the same day. The court found this timing sufficient to establish a *prima facie* case. The court then held that the employer met its burden of articulating legitimate, non-discriminatory reasons for the adverse action – plaintiff's history of violations of defendant's performance and safety policies. The court then held that plaintiff was unable to prove that defendant's asserted rationale was a pretext for FMLA retaliation, rejecting plaintiff's argument that the injury reporting policy violated the Pennsylvania Workers' Compensation Act or was inconsistent with public policy.

Moreover, plaintiff could not point to any evidence that his suspension and termination was motivated by discrimination or retaliation. Instead, the rationale articulated by the decisionmakers was consistent and supported by the record. Further, the court found no evidence plaintiff or other company employees were subject to discriminatory treatment for exercising their rights under the FMLA in the past. In fact, plaintiff had taken FMLA leave on several previous occasions without incident. Thus, the court dismissed plaintiff's FMLA retaliation claim.

Sottile v. Church Healthcare, LLC, 2011 WL 4528034 (D. N.J. Sept. 28, 2011)

In May 2008, defendant elected to implement a reduction in force in an effort to reduce costs. On June 12, 2008, defendant informed plaintiff that her current assistant administrator position was going to be eliminated and asked that she accept a temporary position at another facility, where she would continue to have the assistant administrator title and receive the same salary, but would be performing social work duties, which she previously had performed for defendant. Defendant represented to plaintiff that after her temporary position had concluded, she would be transferred into the position of administrator at a third location. On June 13, 2008, plaintiff accepted the temporary position.

On June 16, 2008, plaintiff notified her supervisor that she would not be at work for one week due to recurrent colitis. At the time, plaintiff was three months pregnant, but had yet to inform defendant. On June 18, 2008, defendant's Chief Executive Officer ("CEO") sent an email to other high ranking executives and indicated that one assistant administrator must be added to the reduction in force. At the time, plaintiff was the only assistant administrator working for defendant. On June 24, 2008, plaintiff informed her supervisors that her doctor had ordered her to remain off of work until at least July 7, 2008. At no time did defendant provide plaintiff with paperwork outlining her FMLA rights. On June 27, 2008, when the layoffs were scheduled, plaintiff's supervisor called her and informed her that her employment was being terminated as part of a reduction in force.

With respect to her FMLA interference claim, the court found that despite learning that plaintiff would be off of work for a week due to medical reasons, defendant failed to inform plaintiff of her FMLA rights and did not provide her with FMLA leave. The court rejected defendant's argument that there would have been no position for plaintiff to return to had she taken leave, finding that plaintiff had accepted the temporary position offered to her and that defendant had filled the temporary position with another employee after her discharge. Further, the court found that there was evidence showing that defendant valued plaintiff's employment – it had provided financial assistance for her to receive a license necessary to advance within the company – and had no plans to include her in the reduction in force until plaintiff requested leave. The court also found that because there were so few employees laid off as part of the reduction in force and the cost savings resulting from plaintiff's discharge was relatively low, there was a genuine issue of material fact as to whether the reduction in force was the true reason for plaintiff's discharge. Thus, the court denied defendant's motion for summary judgment as to plaintiff's FMLA interference claim.

Regarding her retaliation claim, the court found that the timing of the decision to terminate plaintiff's employment – only a few days after defendant had learned of her request for

FMLA leave, when it previously had offered her a new position – was suspect and that there was a genuine issue of material fact as to whether plaintiff’s discharge was a pretext for retaliation. Thus, the court denied defendant’s motion for summary judgment as to plaintiff’s FMLA retaliation claim.

Summarized Elsewhere:

Greer v. Cleveland Clinic Health System East Region, 2011 WL 590223 (N.D. Ohio Feb. 10, 2011)

b. Statements and Stray Remarks

Henry v. United Bank, 784 F. Supp. 2d 68 (D. Mass. 2011)

In *Henry*, a credit analyst conceded that she could not work between July 1, 2008 and early April 2009. Her employer gave her FMLA leave commencing July 1. In mid- September, her primary physician certified to the employer that plaintiff was *not* incapacitated, could do her job, and did not require a reduced work schedule. As a result, her employer informed plaintiff it expected her to return to work in late September after her twelve weeks of leave had expired. She did not return and she was discharged. Instead, she provided a note from a different doctor stating that she needed to be out until a surgical procedure was performed, and she was not medically cleared to return to work by that doctor until April 2009. In her lawsuit, plaintiff alleged her former employer retaliated against her for taking FMLA leave. The district court granted the employer’s motion for summary judgment.

The court held the employer did not retaliate against plaintiff because defendant asserted several legitimate business reasons for plaintiff’s termination, including the following: : plaintiff’s colleagues were required to take on additional work and, in some cases, work additional hours because of her absence; there were no other credit analysts to transfer from another position to plaintiff’s position during her absence; and a temporary employee could not be hired given the confidential customer information to which someone in plaintiff’s position is exposed and that it would take approximately six months to train such an individual. Plaintiff did not dispute the employer’s reasons and instead argued defendant could not establish an “undue burden” by her absence. Dismissing this argument, the court explained defendant was not required to establish an undue burden; rather, plaintiff was required to show the employer’s reasons were false.

Plaintiff pointed to two comments in an attempt to show pretext, both from the same individual, a decisionmaker in the decision to discharge plaintiff. The first comment stated another employee on medical leave was a “wuss” and needed a backbone. The second occurred when plaintiff called to report she could not return to work and she heard the decisionmaker say in the background about her, “What did I do to you? Did I do something to you?” The court found the comments insufficient to meet plaintiff’s burden because neither was clearly discriminatory given the former could be interpreted to mean the employer believed the employer was scared to inform the employer of his situation and the latter could express concern about plaintiff. The court explained that when a statement can be interpreted two different ways,

it “does not directly reflect illegal animus.” Finally, the court held the employer exhibited no discriminatory intent by taking the primary care doctor’s certificate as true because there was no evidence that the employer believed that the certificate was countermanded or untrue. The court further held, even assuming plaintiff had asserted an interference claim, the employer was under no obligation to restore plaintiff to her position because she was unable to return to work when her leave expired.

Ley v. Wisconsin Bell, Inc., 2011 WL 1792918 (E.D. Wis. May 11, 2011)

Plaintiff filed a complaint against defendant alleging that defendant terminated her employment in retaliation for taking FMLA leave associated with plaintiff’s Multiple Sclerosis (“MS”) complications. The court denied defendant’s motion for summary judgment in light of the United States Supreme Court’s recently published decision in *Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011), which established a new rule for “cat’s paw” cases.

The court found a number of facts nearly identical to the facts in *Straub*, which showed that material facts were in dispute and summary judgment was improper. Plaintiff Ley’s supervisor allegedly commented just six weeks before plaintiff was discharged that plaintiff would have to “sell [her] butt off” since she missed so much time while on medical leave. The court held this comment alone presented a genuine dispute of material fact because a reasonable jury could find that the supervisor’s stray remark(s) showed that the supervisor harbored discriminatory animus towards plaintiff. Moreover, plaintiff’s supervisor was also the first person to accuse plaintiff of poor performance, an opinion which she communicated to the senior manager who was charged with making the ultimate termination decision. The court also found evidence supporting plaintiff’s allegation that defendant’s office culture disfavored the use of FMLA leave, as demonstrated by management’s regular practice of making personal home visits to employees on FMLA leave. As a result, the court concluded that a reasonable jury could find that the recommendation to terminate plaintiff’s employment was based on discriminatory animus in violation of federal law.

4. Comparative Treatment

Evans v. United Parcel Service, Inc., 2011 WL 3321309 (S.D. Ohio 2011)

Plaintiff was in an accident while on duty, which damaged his company vehicle. According to defendant, he attempted to conceal his accident, contrary to labor contract policy, and stole company time by not clocking out during the truck repair. As a result, he was discharged. Plaintiff, however, contended he did not try to hide the accident and instead took the vehicle directly to the company-owned repair shop because the accident occurred in a construction zone where it was unsafe to stop. He further claimed that he believed he had only a flat tire, which would take twenty minutes to repair. Six weeks prior to his discharge, he had taken four months of FMLA leave.

The employer’s motion for summary judgment was denied. The court first rejected defendant’s argument that the National Labor Relations Act preempted plaintiff’s FMLA claims because its actions were justified under the collective bargaining agreement (“CBA”), holding

that a jury could find defendant's purported reliance on the CBA had no basis in fact. The court then concluded that the employer's reliance on the policy violation could be viewed by a jury as pre-textual, considering: (1) the temporal proximity of plaintiff's discharge to his past leave, (2) at least one decisionmaker knew plaintiff's leave history, (3) other employees who entirely failed to report accidents received less discipline, and (4) plaintiff met performance expectations throughout his nearly twenty-five years of employment with defendant.

Peterson v. Garmin International, Inc., 2011 WL 2473726 (D. Kan. June 22, 2011)

In February 2008, plaintiff's supervisor began to allow plaintiff to modify her work schedule on short notice because of on-going medical conditions. Plaintiff's supervisor allowed these modifications, in part out of empathy for plaintiff's medical condition and in part because his department was understaffed. A few months later, plaintiff's supervisor learned that his practice of allowing plaintiff to modify her work schedule was in violation of company policy. Accordingly, he did not grant any future requests from plaintiff to modify her schedule on short notice. In addition, the supervisor assessed an attendance point for a schedule deviation that he approved before he learned that his practice was against company policy.

As a result of the supervisor's refusal to continue allowing plaintiff to modify her schedule on short notice, plaintiff began to accumulate even more attendance points. By October 7, 2008, plaintiff had received three Notice of Final Warnings in a twelve month period of time, all of which related to attendance. Plaintiff alleged that she requested two additional leaves of absences on September 23, 2008 and October 3, 2008, when she was given her Final Warnings. These requests were allegedly denied. After Human Resources reviewed plaintiff's attendance records, she was discharged on October 7, 2008. Plaintiff was scheduled to begin FMLA leave on October 8, 2008. Prior to her discharge, plaintiff was absent on approved FMLA leaves at various times in October, November, and December of 2007 and January 2008. By the end of January, 2008, plaintiff had exhausted all available FMLA leave and was not eligible to take FMLA protected leave again until October 8, 2008.

The court refused to grant summary judgment in favor of defendant on plaintiff's claims of FMLA interference and retaliation. With respect to plaintiff's claims of interference, the court noted that there were material issues of fact as to whether plaintiff would have been discharged irrespective of her request for, or taking of, FMLA leave. The court focused on the fact that prior to plaintiff's discharge in October 2008, no employee had been discharged for receiving three Final Warnings within a twelve month period of time. Moreover, the court determined that a reasonable finder of fact could determine that defendant's denial of plaintiff's requests for leaves of absence on September 23, 2008 and October 3, 2008 constituted more evidence of a causal connection between plaintiff's attempt to exercise her FMLA rights and her discharge.

Regarding plaintiff's retaliation claim, defendant argued that plaintiff was unable to establish a causal connection between the protected activity and the adverse action. Here, because the temporal proximity was strong (plaintiff was terminated the day before her FMLA was to commence), the court found that plaintiff was able to meet her *prima facie* burden.

Defendant argued that it discharged plaintiff for a legitimate non-discriminatory reason: it enforced the discretionary language in its policy and terminated plaintiff because she received

three written warnings within a 12 month period of time. Plaintiff was able to establish that two similarly situated non-FMLA protected individuals were treated more favorably. The Human Resources department did not discharge two other individuals until after they received four Final Warnings for attendance. Thus, plaintiff was able to raise an inference of discrimination as well as an issue of fact relating to whether defendant's stated reason for discharging plaintiff was pretext.

Platt v. Lamrite West, Inc., 2011 WL 3625564 (N.D. Ohio Aug. 17, 2011)

Plaintiff worked for the employer for approximately eight years and applied for and was granted FMLA leave on five occasions during his employment. Plaintiff alleged defendant interfered with his FMLA rights after it terminated his employment. The employer alleged it was justified in discharge plaintiff because he violated its "no-show, no-call" policy after he was warned to improve his attendance just one week earlier.

The court was faced with cross-motions for summary judgment. The court granted summary judgment in favor of the employer, ruling that plaintiff had not established a causal connection between his taking FMLA and the termination of his employment. It ruled that temporal proximity, without more, was insufficient to withstand summary judgment. Instead, plaintiff was required to show other indicia of retaliatory conduct. Here, the undisputed facts showed that the employer had provided FMLA forms when the leave was requested, initially granted FMLA leave and granted FMLA leave in the past.

Alternatively, the court ruled that plaintiff could not demonstrate the employer's legitimate non-discriminatory business reason for plaintiff's discharge, failure to comply with the "no-show, no-call" policy, was pretext for discrimination. Plaintiff was unable to show pretext because it was undisputed that between 2007 and 2010, 56 warehouse employees were discharged for attendance issues and between that same period, the employer granted 107 leave requests to its 84 employees, and each of these employees returned to work without incident.

Wierman v. Casey's General Stores, 638 F.3d 984 (8th Cir. Mar. 31, 2011)

Plaintiff, a convenience store manager, was approved for intermittent FMLA leave for pregnancy-related absences pending her return of the certification paperwork. Defendant told plaintiff that the paperwork must be returned by a certain date or her absences may not be covered. While her FMLA application was pending, plaintiff's supervisor visited her store and reviewed surveillance video, which was part of the supervisor's routine duties. This video revealed that plaintiff was late to work on three occasions and left early on one occasion without informing her supervisor. The video also revealed that plaintiff took food and drink items from the store without first paying for them pursuant to defendant's policy. Plaintiff was then discharged prior to returning her FMLA paperwork.

The district court granted summary judgment in favor of defendant on plaintiff's FMLA retaliation claim and the Eighth Circuit affirmed. The court found that plaintiff had exercised her rights under the FMLA even though she had not returned the paperwork because defendant was on notice of her need for leave and her application was pending at the time of her discharge. But

the court found that plaintiff could not demonstrate defendant's stated reason for plaintiff's discharge was pretext. Defendant stated that plaintiff was discharged because she stole merchandise and not because of her absences. The court found that plaintiff did not show that this reason was pretext because she did not demonstrate that other employees who had stolen merchandise were treated differently or that she was subject to more scrutiny than other store managers were.

Summarized Elsewhere:

Griffey, et al. v. Daviess/DeKalb Co. Regional Jail, 2011 WL 587264 (W.D. Mo. Feb. 10, 2011)

Pagel v. Tin, Inc., 2011 WL 2173667 (C.D. Ill., June 2, 2011)

C. Mixed Motive

Averette v. Diasorin, Inc., 2011 WL 3667218 (W.D.N.C. Aug. 22, 2011)

Plaintiff was an application specialist who worked with medical equipment in a laboratory owned by defendant's client. She alleged that her supervisor harassed her and discharged her the day after she submitted documentation from her doctor requesting a two-month FMLA leave for her tendonitis.

The court granted defendant's motion to dismiss all plaintiff's claims except for her claims of retaliation in violation of the FMLA and negligent supervision. In addressing her retaliation claim, the court noted that there is a serious question as to whether the mixed-motive theory of FMLA retaliation survives. However, the court found that plaintiff had sufficiently pled facts showing that her request for medical leave was the "but-for" cause of her discharge. Therefore, there was no need to address the mixed motive theory of FMLA retaliation.

The court then addressed plaintiff's negligent supervision claim, explaining that it requires that the incompetent employee committed a tortious act resulting in injury to plaintiff and that, prior to the act, the employer knew or had reason to know of the employee's incompetency. To establish a claim, plaintiff would have to adequately plead that an underlying tort occurred. However, plaintiff's only surviving claim was for retaliation in violation of the FMLA, which is not a common law tort in North Carolina. Because retaliation in violation of the FMLA cannot support a claim of negligent supervision, the court dismissed plaintiff's claim.

Kollstedt v. Princeton City Schs. Bd. of Educ., 2011 WL 249496 (S.D. Ohio Jan. 26, 2011)

Plaintiff worked as a payroll supervisor for defendant school district and was responsible for nearly all payroll functions. She alleged that following two months of FMLA leave, she returned to work and found that some of her job duties, namely her monthly reconciliations, had not been completed in her absence. She was subsequently given a negative performance evaluation and five months after she returned from leave, defendant gave her notice that her contract would not be renewed. Plaintiff then sued the school district and several individual

defendants under the FMLA on both retaliation and interference theories. The court granted defendants' motion for summary judgment on both claims.

The court first addressed the FMLA relation claim. Without deciding whether plaintiff could defend against summary judgment on (an un-pled) mixed-motive basis in order to avoid the burden of providing pretext, it concluded that even if she could, her evidence still failed to suggest an impermissible retaliatory motive for her discharge, which was plaintiff's initial burden. Plaintiff's sole evidence was testimony from her former supervisor that one of the reasons she was discharge was because the payroll as a whole had never been reconciled. Plaintiff argued that a reasonable factfinder could infer the mere mention of problems with the reconciliations must mean that she was discharged because of the two unfinished reconciliations during her FMLA leave. All of the other performance reasons given for the nonrenewal existed prior to her FMLA leave and therefore plaintiff argued could not have been the real reason. The court disagreed, citing the uncontroverted evidence that the problems with the reconciliations predated plaintiff's FMLA leave and were much broader than just the two months corresponding to her FMLA leave. According to the court, to tie the mere mention of the failure to reconcile the payroll as a whole, which was undisputed, to the two unfinished reconciliations while plaintiff was on leave and then to her use of FMLA leave "would require an inferential leap of unreasonable proportions."

The court then turned to plaintiff's FMLA interference claim. Plaintiff argued that defendants interfered with her use of FMLA leave by "failing to ensure that each of her duties [was] completed in her absence," thereby discouraging her from taking such leave. Plaintiff relied on an unpublished case from another district court. The court rejected this argument. First, it noted that plaintiff's leave request was approved and she was reinstated to the same job upon her return. Second, she was not hassled about having taken leave upon her return. Third, the court found no legal support in the case cited by plaintiff or otherwise that an employer must ensure that an employee's duties are performed by others in the employee's absence; and, in this case, the employer did in fact assign these duties to others but the prior reconciliations were in such bad shape they could not complete the task. In any event, the court noted that the FMLA does not entitle employees to return from leave with "a clean desk and an empty inbox."

Twigg v. Hawker Beechcraft Corp., 659 F.3d 987 (10th Cir. 2011)

The court first addressed plaintiff's retaliation claim. The court acknowledged that there was a question whether a mixed motive analysis would apply in a retaliation claim under the FMLA. Nonetheless, the court held that "[e]ven assuming, without deciding, that a mixed motive analysis would be used in an FMLA retaliation case, [plaintiff's] FMLA retaliation claim would fail." In mixed motive cases, plaintiff must "present direct or circumstantial evidence that directly shows that retaliation played a motivating part in the employment decision." Because plaintiff relied solely on pretext evidence, which does not demonstrate retaliatory animus directly, the court affirmed the district court's grant of summary judgment for the employer on the retaliation claim.

In addition, the court affirmed the district court's decision granting summary judgment to the employer on the interference claim. The court noted that "an employer generally does not

violate the FMLA if it terminates an employee for failing to comply with a policy requiring notice of absences, even if the absences that the employee failed to report were protected by the FMLA.” In this case, it was undisputed that plaintiff never received formal approval of her leave beyond April 1. She failed to notify the employer of her absences on April 2, 3, and 4. Plaintiff’s failure to comply with her employer’s policy was the cause of her discharge. The employer, therefore, was entitled to summary judgment.

Summarized Elsewhere:

Barton v. G.E.C., Inc., 2011 WL 938153 (M.D. La. Mar. 16, 2011)

Rosenfeld v. Canon Business Solutions, Inc., 2011 WL 4527959 (D.N.J. Sept. 26, 2011)

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
2. Possible Defendants
3. Jurisdiction

Cantrell v. Equity Trust Co., 2011 WL 4944317 (N.D. Ohio Oct. 17, 2011)

Plaintiff brought suit in Ohio state court alleging wrongful termination in violation of the laws of Ohio and of Ohio's public policy of "promoting the ability of employees to pursue necessary medical care and related absences from work." The company removed the case to federal court, asserting that plaintiff's claim was actually an FMLA retaliation claim. Plaintiff moved for remand, arguing that his claim did not invoke the FMLA, and rather was a contractually based claim relating to the discriminatory application of the company's paid employee absence policy. Plaintiff also argued that a clear public policy exists under Ohio law in favor of promoting employees' ability to take medical absences where authorized and approved under the terms of employment, and that the company violated that policy where it authorized paid leave but then terminated plaintiff for taking it.

In granting plaintiff's motion for remand, an Ohio district court considered whether defendants properly removed the case on the basis of federal question jurisdiction. The court noted that plaintiff's claim did not reference the FMLA as the source of the public policy allegedly violated. Because it could not say with certainty that plaintiff's claim was actually an FMLA claim, and not a wrongful discharge claim based upon a public policy of Ohio, the court held that the matter belonged in the state court and granted the motion for remand.

Englert v. Macy's Florida Stores, Inc., 2011 WL 1560967 (S.D. Fla. Apr. 14, 2011)

Plaintiff Linda Englert was a sales associate for Macy's. On December 27, 2010, after being employed by Macy's for 11 years, she was "falsely" accused of theft, and interrogated by the store's loss prevention manager for over two hours. Toward the end of the questioning, when plaintiff was left in a room to "think about" her conduct, she took a push pin from a store bulletin board and began mutilating herself to the point that medical personnel were required to be

summoned. Macy's department manager contacted Human Resources and requested FMLA leave on behalf of Ms. Englert. Nine days later, plaintiff's doctor called and confirmed the medical basis for Ms. Englert's leave. Six days later, while out on medical leave, Macy's terminated her employment.

Plaintiff filed a lawsuit in state court alleging that Macy's had violated both the Family Medical Leave Act ("FMLA") and had intentionally inflicted emotional distress on her through the interrogation process. Macy's removed Ms. Englert's lawsuit to federal court and plaintiff moved to remand her claims for intentional infliction of emotional distress ("IIED") back to state court, arguing that the facts related to proving her IIED claim involved different elements of proof from the FMLA, permitted different damages and required a heightened evidentiary burden.

The court, relying on the language in 28 U.S.C. § 1367, setting forth the standards for supplemental jurisdiction, ruled that the facts related to Ms. Englert's IIED claim were sufficiently related to those necessary to prove her FMLA cause of action and therefore denied plaintiff's Motion for Remand.

Fultz v. Columbia Gas of Ohio, 2011 WL 768090 (ND. Ohio Feb. 28, 2011)

Plaintiff initially filed suit in state court, alleging that defendant retaliated against him for engaging in protected activity. Plaintiff then filed an amended complaint, alleging a violation of 29 U.S.C. § 2617. Defendant claimed that it did not learn that plaintiff was alleging FMLA retaliation until several months later when it deposed plaintiff. At that point, defendant removed the case to federal court and plaintiff then moved to remand, arguing that defendant's removal was untimely.

The court granted the motion to remand and awarded attorneys' fees, pointing to the fact that the amended complaint cited 29 USC § 2617 and specifically alleged that plaintiff suffered from a serious medical condition and that he was discriminated against and retaliated against for taking leave. The court found that these allegations were sufficient to notify defendant that the case was removable. The court further stated that plaintiff's interrogatory responses gave sufficient notice that the case was removable because plaintiff stated that he was pursuing claims under the FMLA and the fact that he did not sign the interrogatories was irrelevant. Moreover, defendant knew that plaintiff had used FMLA on multiple occasions during his employment. Therefore, defendant's removal was untimely and unreasonable.

King v. Cardinal Health 411, Inc., 2011 WL 43030 (N.D.W. Va. Jan. 6, 2011)

Plaintiff filed a complaint in state court alleging defendants terminated her employment in violation of West Virginia public policy. Plaintiff later amended the complaint to allege her termination violated the FMLA. Defendants proceeded to remove the case to federal court. Plaintiff moved to remand, alleging that the removal was untimely and she in fact was not raising an FMLA claim. The court rejected both arguments.

As to timeliness, plaintiff alleged that defendants were on notice of the FMLA claims before she filed an amended complaint. The court found the removal timely. There was no

mention of the FMLA or any federal law in the original complaint, and thus defendants could not determine the existence of a federal question until the filing of plaintiff's amended complaint.

As to plaintiff's argument that she was not raising an FMLA claim, she argued that she was not seeking damages or remedies under the FMLA. Rather, the FMLA was referenced in support of her claim for violation of West Virginia public policy. The court disagreed and found that the amended complaint, in alleging that "[t]he Defendants' termination, failure to reinstate and/or rehire plaintiff violated the Family and Medical Leave Act in that plaintiff should not have been terminated for missing a day of work due to her serious medical condition," asserted a claim under the FMLA. Thus, the court had federal question jurisdiction over the action.

Summarized Elsewhere:

Lloyd v. Made-Rite Company, 2011 WL 846105 (E.D. Tex. Feb. 9, 2011)

B. Arbitration

1. Introduction
2. Individual or Employer-Promulgated Arbitration Agreements and Plans

Flores-Galan v. J.P. Morgan Chase & Co., N.A., 2011 WL 5901397 (N.J. Super. A.D. Nov. 23, 2011)

Defendant filed a motion to dismiss the complaint in favor of binding arbitration supported by an arbitration agreement plaintiff signed when she was hired. The lower court granted defendant's motion to compel arbitration, finding that the arbitration agreement was comprehensive enough to cover plaintiff's FMLA claims. The judge rejected plaintiff's argument that either the FMLA itself or FMLA regulations prohibited agreements to arbitrate FMLA claims. The appellate court affirmed the lower court's holding.

Plaintiff's first argument was that the arbitration clause was neither broad nor specific enough to require arbitration of claims under FMLA, as FMLA claims were not explicitly cited in the agreement. The court cited strong federal and state policy favoring arbitration, as well as precedent that an arbitration clause need not specify every conceivable statute that it covers, so long as the agreement to arbitrate statutory anti-discrimination claims is specific enough to put the employee on notice of the claims encompassed. Plaintiff also argued that FMLA prohibits arbitration agreements. The court cited a "plethora" of reported decisions holding that employment contracts requiring arbitration of FMLA claims are enforceable and that individual employees may agree to submit FMLA claims to binding arbitration. Plaintiff cited no case law to the contrary, but rather based her argument on the DOL's implementing regulations and a footnote in an amicus brief the DOL filed several years earlier. The court agreed that the statute and regulations prohibit employers from attempting to deprive employees of substantive rights and interfering with any ongoing proceedings that employees have filed to enforce those

rights. However, they do not prohibit agreements to submit FMLA claims to arbitration as Congress would have included a specific prohibition on arbitration if that was their intent. Plaintiff's reliance on a footnote from a DOL amicus brief was dismissed because nothing in the footnote suggested that DOL opposed arbitration of FMLA claims, an issue not even presented in that case.

3. Arbitration Under a Collective Bargaining Agreement

Thompson v. Air Transport International Limited Liability Company, 664 F.3d 723 (8th Cir. 2011)

The court addressed whether an arbitration clause in a collective bargaining agreement was an invalid waiver of the employee's FMLA rights under 29 C.F.R. § 825.220(d). The district court held that the arbitration clause was valid and granted the employer's motion to dismiss without prejudice. The court of appeals affirmed. The arbitration clause waived only the judicial forum, and not the FMLA claims, themselves. Citing the Supreme court's *14 Penn Plaza* decision, the court held the parties can waive the judicial forum as an avenue for bringing federal statutory claims and state anti-discrimination claims as part of a mandatory arbitration agreement. The Eighth Circuit further held that determining that plaintiff's FMLA claims were subject to binding arbitration did not require interpretation of the CBA, but merely referred to it. Therefore, plaintiff's FMLA claims were not preempted by the Railway Labor Act.

III. REMEDIES

A. Damages

1. Denied or Lost Compensation

Kirchner v. Sunbelt Rentals, Inc., 2011 WL 1303997 (N.D. Ill. Apr. 1, 2011)

On November 12, 2007, plaintiff injured his right ankle while delivering a piece of equipment to a customer. That night, plaintiff went to a medical care facility. The facility's discharge sheet characterized the injury as an "ankle sprain" and stated that the x-ray was negative. It prescribed the use of crutches, an Ace bandage with ice, and ibuprofen. It also requested that plaintiff stay off of his right leg and return for a reevaluation on November 15. Plaintiff reported to work on November 13, 2009, on crutches, and the parties disagree about what happened at that time. Plaintiff alleged defendant agreed to let him stay home through November 15, 2009, while defendant alleged plaintiff had to return to work the next day for light duty. When the parties spoke by telephone on November 16, 2009, defendant alleged plaintiff was insubordinate and discharged him. The termination notice, however, indicated that plaintiff was terminated for not returning to work, which constituted job abandonment.

In regard to the FMLA interference claim, defendant argued that plaintiff did not give sufficient notice of wanting FMLA leave. The court found there to be a dispute of fact because

plaintiff presented evidence that he expressly requested medical leave from his supervisor, that the supervisor witnessed him on crutches, and that the supervisor read the discharge sheet. In response to the argument that the injury was not a serious health condition, the court disagreed, explaining that the injury resulted in plaintiff being unable to work for three consecutive calendar days and he received treatment two or more times from a health care provider.

In regard to the FMLA retaliation claim, the court found there to be disputed facts. The court noted that plaintiff was discharged just three days after his injury. This fact, coupled with other evidence such as the conflicting reasons for termination, provided enough evidence to deny summary judgment.

The court did grant summary judgment on certain remedies that plaintiff sought. Specifically, the court found that the FMLA does not allow recovery for pain and suffering. The court also found that plaintiff could not seek lost wages or reinstatement because the evidence showed that he could not return to work at the completion of a twelve-week FMLA leave.

2. Actual Monetary Losses

Summarized Elsewhere:

***Benz v. West Linn Paper Co.*, 2011 WL 2935396 (D. Or. July 20, 2011)**

***Jones v. Omega Cabinets, Ltd.*, 2011 WL 1233192 (N.D. Iowa Mar. 31, 2011)**

***Poling v. Core Molding Technologies*, 2011 WL 2492772 (S.D. Ohio June 22, 2011)**

3. Interest

***Jadwin v. County of Kern*, 767 F. Supp. 2d 1069 (E.D. Cal. 2011)**

After a jury trial, defendant was found have violated state law, as well as the FMLA. After the verdict, plaintiff sought an award of prejudgment interest at a rate of 7%, which was the statutory rate for state law claims under California law. Defendant argued, however, that a prejudgment interest rate of 3.25%, which was the federal “prime rate” applicable to FMLA claims, should be used in calculating the award. The court noted that during the trial, the jury had completed a general verdict form and had never been asked to allocate the amount of damages attributable to defendant’s FMLA violation as compared to its state law violations. The court rejected plaintiff’s request for the higher state law prejudgment interest rate, finding that because the jury had not itemized the damages it awarded with respect to each adverse employment action under the FMLA and state law, there was no basis for it to conclude that the damage award was based on state law violations. The court decided to use the *average* the two rates applicable, applying a rate of 5.125%. The court concluded that the average rate would properly compensate plaintiff, while accounting for the possibility that the jury had returned a verdict supported only by the FMLA or state law.

Summarized Elsewhere:

Gutierrez v. Grant County, 2011 WL 5279017 (E.D. Wash. Nov. 2, 2011)

Marez v. Saint-Gobain Containers, Inc., 2011 WL 1930706 (E.D. Mo. May 18, 2011)

4. Liquidated Damages

a. Award

Jadali v. Mich. Neurology Assoc., 2011 WL 6848356 (Mich. App. Dec. 29, 2011)

Plaintiff, a psychiatrist, sued defendant because it took deductions from plaintiff's pay because of his FMLA leave. Defendant argued that plaintiff's employment agreement was unambiguous as to the calculation of his payments, thus the deductions were proper. After the jury found in favor of plaintiff and the trial court denied defendant's post-trial motions, defendant appealed the findings regarding the deduction in pay due to the FMLA leave, as well as the trial court's allowance of liquidated damages due to the alleged FMLA violation.

The court concluded that the contractual language at issue was ambiguous as to the deduction of pay due to sick leave. Further, the intent of the parties appeared to only include deductions for other reasons, not for lack of income generation because of missed work. Meanwhile, the deduction of pay for lost productivity was found to be a violation of the FMLA due to defendant essentially imposing a financial penalty for taking FMLA leave. Plaintiff was not seeking payment for the missed days, but defendant made additional deductions for loss of productivity, and thus violated the FMLA.

The court affirmed the trial court's ruling that the imposition of liquidated damages was proper. The court found the trial court's ruling reasonable as there was a lack of evidence of defendant acting in good faith. Due to defendant's knowledge of the reason for plaintiff's absence and because defendant never previously making such a deduction in pay, there was simply no evidence that defendant reasonably believed it was acting in good faith.

Marez v. Saint-Gobain Containers, Inc., 2011 WL 1930706 (E.D. Mo. May 18, 2011)

Defendant discharged plaintiff while she was out on FMLA leave in 2007. Shortly after the discharge, defendant realized the decision was made in error and reinstated plaintiff. In 2008, plaintiff informed a manager that she would need to take leave soon because her husband was going to have surgery. The manager then initiated a meeting with decisionmakers and provided them with documentation that supported discharging plaintiff. The decisionmakers reviewed this documentation and decided to discharge plaintiff without conducting their own investigation. As a result, they were unaware that other employees had committed the same infractions but had not been discharged and did not realize that plaintiff had just requested FMLA leave. Plaintiff was discharged two days after her request for FMLA leave and then filed suit, alleging that both the 2007 and 2008 discharge decisions violated the FMLA. The court disposed of the 2007 FMLA claim prior to trial, while the 2008 claim proceeded to trial under the "cat's paw" theory.

At trial, the jury found in favor of plaintiff and awarded plaintiff \$206,500 in damages and another \$206,500 in liquidated damages. Defendant moved for judgment as a matter of law, arguing plaintiff failed to present sufficient evidence to support her claim to the jury. The court upheld the jury verdict, concluding that the “cat’s paw” theory applied and that the jury’s conclusion that plaintiff’s request for FMLA leave was the “but for” cause of her discharge was not unreasonable.

Defendant also challenged the award of liquidated damages, the method used in calculating prejudgment interest, plaintiff’s request for reinstatement, plaintiff’s request for front pay, and plaintiff’s motions for attorney’s fees and costs. The court upheld the liquidated damages award, rejecting defendant’s argument that plaintiff’s 2007 reinstatement demonstrated good faith on its part. The court agreed with defendant’s method of calculating prejudgment interest, which used 28 U.S.C. § 1961, and rejected plaintiff’s method, which applied the rate the Internal Revenue Service uses to calculate interest on over-payment and under-payment of taxes. Although plaintiff had been unable to acquire another comparable job, the court found that reinstatement was not an appropriate remedy and instead awarded one year of front pay. Plaintiff requested attorney’s fees related to all the claims she originally brought, even though she only prevailed on one of the claims. Plaintiff argued all of the claims were “inextricably related” while defendant argued that only 30% of plaintiff’s counsel’s time was spent on the successful FMLA claim. The court found that a 70% reduction in fees was excessive but that a 50% reduction was appropriate. The court also disallowed the following costs plaintiff sought to recover: the mediator’s fee, special process server’s fee, the cost of postage for mailings sent to plaintiff, and attendance fees for witnesses who did not testify at trial.

Poling v. Core Molding Technologies, 2011 WL 2492772 (S.D. Ohio June 22, 2011)

In May 2008, plaintiff applied for and received FMLA leave for Reflex Sympathetic Dystrophy Syndrome (“RSDS”). In September 2008, plaintiff missed a day of mandatory overtime, allegedly because of RSDS. The employer reviewed his FMLA certification, determined that FMLA was not applicable to this absence and terminated plaintiff’s employment because the absence was unexcused.

Plaintiff was represented by a union, which filed a grievance over his discharge. At arbitration, the arbitrator ruled in plaintiff’s favor finding the employer did not have just cause to discharge plaintiff and ordered back pay and reinstatement without any loss of seniority. Plaintiff was reinstated 14 months after his discharge and then worked until April 2010 without incident, when he was laid off due to his low seniority.

Plaintiff filed suit seeking recovery of both compensatory and liquidated damages for the period of time between his September 2008 discharge and his reinstatement 14 months later. The employer filed a motion for summary judgment arguing that plaintiff received full backpay and could not recover either compensatory or liquidated damages since he did not suffer any loss of wages.

While the court agreed that plaintiff could not recover compensatory damages given the arbitrator’s award of full back pay, it disagreed that plaintiff was not entitled to liquidated

damages. The court ruled that compensation unlawfully denied but restored before trial could be considered a denial or a loss of wages warranting liquidated damages under the FMLA, if the delay was significant. The court noted cases awarding liquidated damages for delays shorter than the fourteen months at issue in plaintiff's case, as well as the Sixth Circuit's preference for awarding liquidated damages to employees aggrieved under the FMLA and FLSA. The court explained that the employer could avoid the payment of liquidated damages by demonstrating the no FMLA violation occurred or by showing that it had a subjective good faith and reasonable belief that it did not violate the FMLA.

Summarized Elsewhere:

Gutierrez v. Grant County, 2011 WL 5279017 (E.D. Wash. Nov. 2, 2011)

- b. Calculation
- 5. Other Damages
- B. Equitable Relief**
 - 1. Equitable Relief Available in Actions by the Secretary
 - 2. Equitable Relief Available in All Actions
 - a. Reinstatement
 - b. Front Pay

Gutierrez v. Grant County, 2011 WL 5279017 (E.D. Wash. Nov. 2, 2011)

Plaintiff moved for an award of front pay, interest and liquidated damages, and defendant moved to set aside the jury verdict and for a new trial. The court denied defendant's motion, holding that the jury's verdict was not contrary to the clear weight of the evidence presented at trial and stating that the jury found that plaintiff's FMLA leave was viewed as a negative factor by defendant in denying her request for reinstatement. In addressing plaintiff's motion on the issue of prejudgment interest, the court found that the prime rate was a fair measure considering the compensatory purpose of prejudgment interest, and applied the prevailing rate of 3.25% from the date of plaintiff's discharge to the date of final judgment.

On the issue of front pay, the court found that an award of front pay is an appropriate substitute for reinstatement, which was inappropriate. The court agreed with plaintiff that it would discourage plaintiffs from accepting employment and negate plaintiffs' duty to mitigate damages if eligibility for front pay terminated upon acceptance of new employment. The court held that plaintiff's economic expert's calculations for

front pay loss (\$18,255.00) were reasonable and did not constitute a windfall to plaintiff, citing precedent in according wide latitude to the district courts in its determination.

On the issue of liquidated damages, FMLA allows an additional presumptive award equal to the sum of compensatory damages awarded by the jury and the prejudgment interest, unless the employer demonstrates its violation was in good faith and that it had a reasonable basis for believing that its conduct was not in violation of FMLA. The Eleventh Circuit previously went a step further in finding that it is not an abuse of discretion to award liquidated damages where the employer acted in subjective good faith, but its conduct was objectively unreasonable. The court cited “strong circumstantial evidence” which led the court to question whether defendant acted in subjective good faith including the following examples: (1) a temporary employee was selected for a position over the more-experienced plaintiff; (2) plaintiff was required to apply and interview for the position within six months of being laid off where the handbook allows entitlement to consideration without the need to formally apply and interview in that time period; (3) the record showed examples of defendant’s failure to exercise extra concern and care before discharging an employee while on FMLA leave, including the human resources director’s testimony that she did not recall either familiarity with the relevant regulations or advising on the issue prior to the layoff. Ultimately, the court awarded an amount equivalent to the compensatory damages and prejudgment interest as liquidated damages.

c. Other Equitable Relief

Summarized Elsewhere:

Keeler v. Aramark, 2011 WL 3608698 (D. Kan. Aug. 12, 2011)

C. Attorneys’ Fees

Bell v. Prefix, Inc., 784 F.Supp.2d 778 (E.D. Mich. 2011)

Following a jury verdict in favor of plaintiff, plaintiff’s attorneys filed a motion for fees and costs. The jury awarded plaintiff approximately \$14,500 in back pay damages. The court awarded liquidated damages of approximately \$14,500 and \$180.00 in prejudgment interest, for a total recovery of approximately \$29,000. At trial, plaintiff had requested either \$350,000 or \$400,000 (the parties disputed what the exact request was). Plaintiff’s attorneys requested over \$512,000 in costs and fees, and defendant objected.

The court noted that an award of reasonable attorneys’ fees and costs to a prevailing plaintiff is mandatory under the FMLA. The court evaluated the twelve factors used in the Sixth Circuit to determine if a fee is reasonable and determined that the factors did not support either a reduction or enhancement of fees. Defendant argued that the large discrepancy between the requested amount of damages and the jury verdict was indicative of a lack of success for plaintiff, and fees should be reduced accordingly. The court rejected this argument, finding that the verdict showed at least some success for plaintiff, so a reduction due to lack of success was inappropriate. The court then analyzed the bills submitted by plaintiff’s attorneys and found sloppy billing practices, erroneous billing, and billing for more time than was reasonable or

necessary. The court criticized the use of block billing and duplicative efforts between the two attorneys representing plaintiff. The court also noted that one attorney's practice of billing on the quarter hour, as opposed to the tenth of an hour, increased the likelihood of overbilling. Finally, the court ruled that the hourly rate claimed by the attorneys was unreasonable. The court granted the motion for attorney's fees and costs in part and denied it in part, awarding plaintiff's attorneys approximately \$101,000 in fees.

Mawere v. Citco Fund Svcs., (USA) Inc., 2011 WL 744894 (S.D.N.Y. Mar. 1, 2011)

In *Mawere*, defendants moved for an award of a portion of their attorneys' fees and costs against plaintiff. Plaintiff's FMLA claim alleged that she was denied FMLA maternity leave. Defendants argued that this claim was groundless when made because plaintiff had not been employed by defendant for at least a year prior to the date of the requested leave. The court found, however, that although plaintiff may have been misguided in asserting this claim, the claim did not rise to the level of vexatious, wanton, or oppressive litigation conduct necessary to support an award of attorneys' fees and costs under the court's inherent authority. With respect to plaintiff's FMLA retaliation claim, the court found that it was less clear whether the claim could be viable because one could argue that retaliation against an employee for asserting an FMLA claim violated the statute, even if the employee was not eligible for FMLA leave. Thus, the court perceived no basis for concluding that plaintiff asserted this claim in bad faith.

Summarized Elsewhere:

Breneisen v. Motorola, Inc., 656 F.3d 791 (7th Cir. Sept. 2, 2011)

Marez v. Saint-Gobain Containers, Inc., 2011 WL 1930706 (E.D. Mo. May 18, 2011)

Millea v. Metro-North R.R. Co., 658 F.3d 154 (2d Cir. 2011)

D. Tax Consequences

IV. OTHER LITIGATION ISSUES

A. Pleadings

Bakeer v. Nippon Cargo Airlines Co., Ltd., et al., 2011 WL 3625103 (E.D.N.Y. July 25, 2011)

Plaintiff flight engineers sued cargo airline defendants alleging discrimination under various federal and state laws. One plaintiff also asserted a claim for violation of the FMLA. In the complaint, this plaintiff alleged that he was an "eligible employee" under the FMLA and that defendant was an "employer" within the meaning of the Act. The court granted defendants' motion to dismiss the FMLA claim. The court held that a plaintiff may not rely upon a conclusory allegation of eligibility under the FMLA. Rather, the court determined that, while plaintiff did not have to establish a *prima facie* case in order to survive a motion to dismiss, plaintiff did have to aver sufficient facts from which one could discern that plaintiff had a colorable FMLA claim.

Bass v. Roberts Dairy Co., LLC, 2011 WL 2532466 (D. Neb. June 23, 2011)

The *pro se* plaintiff alleged he had a chronic cough, hepatitis, and hip deterioration, of which his employer was aware. He further alleged that he was “required to take approved leave under the FMLA,” and was harassed and ultimately discharged for doing so. Plaintiff was given leave to proceed in forma pauperis. The court conducted a review of the complaint to decide whether summary dismissal was appropriate. The court concluded that the allegations were sufficient to state a retaliation claim under the FMLA.

Bell v. Dallas County, 2011 WL 3874904 (N.D. Tex. August 30, 2011)

On remand, the district court found plaintiff only alleged an FMLA retaliation claim, not an interference claim. Its decision was based on the facts that plaintiff: (1) titled his claim “Family and Medical Leave Act Discrimination,” (2) used the words “discharge” and “termination” to explain the circumstances giving rise to his claim; (3) did not assert that he was seeking relief for his employer’s failure to either grant him FMLA leave or to restore him to the same or equivalent position upon his return; and (4) titled the section of his complaint at issue “First Count,” which contradicted plaintiff’s assertion he was bringing two causes of action thereunder.

Additionally, the court went on to conclude *sua sponte* that even if plaintiff stated an interference claim, it failed as a matter of law. His employer could not have interfered with his FMLA’s rights given that he was not trying to exercise those rights during the applicable time frame. In fact, in a letter to defendant, he informed that he was not requesting to use his FMLA leave and that he had no “need to exhaust” his FMLA leave “at this time.”

Bennett v. Wal-Mart Stores, Inc., 2011 WL 1899362 (C.D. Ill. May 19, 2011)

Plaintiff alleged both interference and retaliation claims under the FMLA, but failed to plead he had worked at least 1,250 hours during the previous 12 months. Defendant filed a motion to dismiss, arguing that plaintiff’s complaint failed to state a claim for FMLA violations because he failed to plead that he was an “eligible” employee under the FMLA. The court agreed and granted the motion to dismiss, while also giving leave to plaintiff to file an amended complaint.

Bentley v. Dollar Tree Stores, Inc., 2011 WL 3678688 (N.D. Fla. 2011)

Plaintiff alleged that, although the employer knew she was eligible for FMLA leave, her request for leave to care for her daughter was denied. Defendant filed a motion to dismiss, arguing that plaintiff’s complaint failed to state a claim. Defendant argued that the FMLA claim should be dismissed because plaintiff failed to plead whether her daughter was under the age of 18 or over 18 but incapable of self-care. The court rejected this argument, noting that plaintiff’s complaint referred to the daughter as a “child,” and it was reasonable to infer that her daughter was under the age of 18.

In addition, defendant argued plaintiff failed to allege that she requested leave and that she provided sufficient evidence to defendant to determine if she was qualified for the leave. Again, the court rejected defendant's argument, noting that the complaint clearly stated that plaintiff requested time off to care for her daughter and that defendant knew that she was both eligible and in need of the time off. As such, the court denied defendant's motion to dismiss.

Bonzani v. Shinseki, 2011 WL 4479758 (E.D. Cal. Sept. 26, 2011)

Plaintiff, a former anesthesiologist at the Sacramento VA Medical Center, filed claims against the Secretary of Veterans Affairs, his former supervisor, and ten unnamed defendants under the FMLA. Plaintiff alleged that he took four weeks of leave following knee surgery and that upon returning from leave, his supervisor (1) yelled at him, (2) told him that his absence negatively impacted working conditions, (3) required him to work extra on-call shifts, (4) failed to return his emails and phone calls, and (5) refused to meet with him. Plaintiff also alleged that he was excluded from interviewing applicants for an open staff anesthesiologist position and that he requested to be reassigned to the open position because his supervisor's treatment made him unable to perform his duties as Chief of Anesthesiology. Lastly, plaintiff alleged that his supervisor informed him that his contract would not be renewed because he took too much time off following his knee surgery and because he took too much sick leave.

The court denied defendants' motion to dismiss on the ground that plaintiff failed to exhaust administrative remedies. The court found that the FMLA permits a plaintiff to file a complaint either with the Secretary of Labor or in court and that filing a complaint with the Secretary is not a prerequisite to pursuing a complaint in court. Instead, a plaintiff's private right of action ends only when the statute of limitations expires or when the Secretary files a complaint in court on behalf of plaintiff.

The court granted defendants' motion to dismiss on the basis of failure to state a plausible retaliation because plaintiff's complaint did not allege that plaintiff was discharged or discriminated against for opposing an unlawful practice under the FMLA or for participating in FMLA proceedings. On the other hand, the court denied defendants' motion to dismiss on the basis of failure to state a plausible FMLA interference claim. Although plaintiff's complaint did not allege that he was denied or was discouraged from taking FMLA leave, plaintiff did allege discrimination and retaliation as a result of taking leave. In addition, plaintiff's allegations that he was eligible for FMLA and that the leave he took was protected by the FMLA were sufficient to survive the motion to dismiss despite defendants' argument that the interference claim should fail because plaintiff took workers' compensation and not FMLA leave.

Cupps v. Pittsburgh Care Partnership, Inc., 2011 WL 284468 (W.D. Pa. Jan. 26, 2011)

Plaintiff took approved FMLA leave for gastric by-pass surgery from April 12, 2010, until her timely return in June 2010. During her leave, her husband, who also worked for defendant, was discharged, at which time she learned he had been having an extra-marital affair with a co-worker. This news caused her serious mental distress, which was heightened upon her return to work by the general awareness in the workplace of her husband's four extra-marital affairs. Plaintiff's psychological counselor advised her to remove herself from the work

environment, so she made plans to visit her uncle and requested four days of personal leave. Her request was denied, so with her physician's assistance, she made a request for FMLA leave, which was approved. Upon her return, she was discharged for lying about her request for FMLA leave, which plaintiff contended was pretext for having used FMLA in the past and a concern she would need it in the future. All of the preceding information was pled in plaintiff's complaint.

In considering the motion to dismiss, the court first noted that plaintiff withdrew her claim for interference under the FMLA as plaintiff had, in fact, received leave. The court went on to deny the motion as to the claim for retaliation, noting that the Supreme court did not require plaintiff to plead a *prima facie* case of retaliation in order to survive a motion to dismiss. Furthermore, because the case was on a motion to dismiss, the court did not consider the documents defendant had attached to its motion that arguably supported its reasons for discharge.

Danek v. County of Cook, 2011 WL 62130 (N.D. Ill. Jan. 7, 2011)

Plaintiff alleged in his complaint that in December 2007, he experienced back pain that added to the depression he experienced following his 2006 hospitalization for a stroke. It also pled that he was on disability leave from then until April 2008. In July 2008, his symptoms reoccurred and following his physician's recommendation, he submitted an FMLA request on August 5, 2008. He pled that he started his leave on August 12, 2008, but was discharged on September 8, 2008. He alleged violation of FMLA, and defendant moved to dismiss.

In denying the motion, the court addressed defendant's argument that plaintiff's allegations established he was not entitled to FMLA leave at the time of his discharge. In rejecting that argument, the district court noted that the complaint did not allege plaintiff had used FMLA leave for the period of December 2007 to April 2008. Although an employer can have a policy of counting certain types of leave against the FMLA entitlement, there was no allegation it had done so in that instance. Thus, the district court found that plaintiff had not pled himself out of an FMLA claim.

Fushi v. Bashas', Inc., 2011 WL 1771076 (D. Ariz. May 10, 2011)

Pro se plaintiff alleged that upon her return to work from FMLA leave, she was "told to leave..." by her supervisor. Because plaintiff's complaint did not make clear whether she was asserting that she was told to leave work because of her FMLA leave, the court held plaintiff's complaint fell short of the *Twombly/Iqbal* pleading standard needed to successfully plead a claim under the FMLA. Because the pleading standard had not been met, the court dismissed plaintiff's claim, with leave to amend.

Griffey, et al. v. Daviess/DeKalb Co. Regional Jail, 2011 WL 587264 (W.D. Mo. Feb. 10, 2011)

Plaintiff filed an internal complaint with her employer that resulted in a finding that defendant had violated the FMLA. Plaintiff claimed that after filing his internal complaint, defendant singled him out by forcing him to change shifts and denying him requested days off. Plaintiff also claimed that employees who had not filed an internal complaint did not receive the

same treatment. The court denied defendant's motion to dismiss, finding that these allegations were sufficient to state a claim upon which relief can be granted.

Hayes v. Elementary School District No. 159, 2011 WL 1059890 (N.D. Ill. Mar. 21, 2011)

In her complaint, plaintiff alleged she was discharged approximately 11 days after defendant received notice that plaintiff had filed a claim with the EEOC and after defendant had demanded plaintiff return to work since defendant determined plaintiff was no longer eligible for FMLA leave.

In response to plaintiff's FMLA retaliation and interference claims, defendant moved to dismiss, arguing plaintiff had failed to state a claim. The court determined that plaintiff was not required to provide "evidence of causality" linking the protected activity and the adverse job action at the pleading stage, and that defendant had relied on case law which addressed the standard for reviewing a motion for summary judgment rather than a motion to dismiss. The court explained that the elements for establishing a *prima facie* case under the *McDonnell Douglas* burden-shifting method are not applicable at the motion to dismiss stage. A complaint in an employment discrimination lawsuit need not contain specific facts establishing a *prima facie* case of discrimination under the *McDonnell Douglas* framework. The court found that it was plausible that plaintiff's protected activity led to her discharge based on plaintiff's allegations. Accordingly, the court denied defendant's motion to dismiss on this issue.

The court also determined that plaintiff pled sufficient allegations relating to her FMLA interference claim. For an FMLA interference claim, a plaintiff must establish: (1) she was eligible for the FMLA's protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her FMLA benefits to which she was entitled. The court found it could not be determined, based on evaluation of the pleadings alone, that plaintiff would not have qualified for FMLA leave the summer following her discharge and therefore the possibility of such leave could have been a basis for the discharge. The court also found that it could not be conclusively determined, based on the pleadings alone, whether plaintiff was able to return to work at any given time. Since it was possible she could have returned after her FMLA leave expired, her discharge could have interfered with her right to restoration. Accordingly, the court denied defendant's motion to dismiss plaintiff's interference claim.

Hofferica v. St. Mary Med. Ctr., 2011 WL 5837152 (E.D. Pa. Nov. 18, 2011)

Defendant, a medical center, moved to dismiss the remaining component of plaintiff's FMLA interference claim regarding her allegation of a lack of notice regarding her right to return to her position, or a substantially similar position, upon return from her FMLA leave. The district court had previously dismissed the remainder of plaintiff's FMLA interference claim for failure to state a claim, but denied the motion to dismiss her FMLA retaliation claim. This remaining claim was first brought up in defendant's reply briefing, thus the court allowed additional briefing for plaintiff.

The court held that plaintiff failed to state a valid claim regarding the lack of notice. The court first noted that plaintiff failed to concretely allege any deficiencies in the notice she was provided. While plaintiff argued that more discovery was needed for such allegations and that defendant's lack of communication was to blame for the lack of concrete allegations, the court found these arguments unpersuasive. By providing only one allegation regarding the parties' communications, without any allegations that the communications lacked the requisite notice, the legal conclusions in plaintiff's complaint were insufficient to state a valid claim. The court further held that even if concrete allegations were made, the allegations made in her briefs did not include any notice obligations under the statute or the then-applicable regulations (the regulations had since been amended, but the amendments were not applicable due to the timing of the actions complained of in plaintiff's complaint).

Also, plaintiff failed to allege that defendant had not provided her with notice of expectations and obligations within six months of her notice of need to take FMLA leave, which would be required for such a lack of notice claim. Finally, the court held that even if it were to accept that defendant failed to provide the necessary notice, plaintiff failed to allege any prejudice due to the lack of notice. As this is a necessary element to her interference claim, it was necessary for plaintiff to include such an allegation in her complaint. As such, the court granted the motion to dismiss, but allowed plaintiff to amend her complaint to include the necessary allegations in her complaint.

King v. Cardinal Health 411, Inc., 2011 WL 5967256 (N.D.W. Va. Nov. 29, 2011)

Plaintiff originally filed a complaint in state court, without an FMLA claim. Defendants filed a motion to dismiss the complaint. Then, plaintiff filed an amended complaint, which included an allegation that her termination violated the FMLA. Defendants then removed the lawsuit based on federal question. After plaintiff's initial motion to remand was denied, plaintiff attempted to voluntarily dismiss her FMLA claim and file a second amended complaint, without such a claim, and another motion for remand. The court granted plaintiff's motion to allow for the filing of the second amended complaint, but denied the motion for remand based on exercise of supplemental jurisdiction. Subsequently, plaintiff filed motion for leave to file yet another amended complaint, which included the FMLA claim. Defendants argued that plaintiff should not be allowed to include her FMLA claims because it was prejudicial and done in bad faith, as plaintiff had repeatedly stated her strategic decision to abandon it. The court allowed plaintiff to amend her complaint to include the FMLA claim as defendants had acknowledged the existence of such a cause of action in their notice of removal, so there was no prejudice or surprise regarding this claim. Further, the court found plaintiff was not judicially estopped from making such a claim since defendants had argued that such a claim was present, which balanced out plaintiff's attempts of dismissal.

Knight v. Continental Tire N. Am., Inc., 2011 WL 1155090 (D. Colo. Mar. 29, 2011)

Plaintiff, a salesperson, suffered a heart attack requiring a four-day hospital stay. The same year he was also defendant's top salesperson and was rated as a "solid" performer. Approximately nine months after the heart attack, he was passed over for a promotion and his

territory was reassigned approximately a month after that. Plaintiff was discharged four months later, about fifteen months after the heart attack. He sued his former employer for FMLA retaliation alleging simply that his “serious medical condition had a causal connection with Defendant’s adverse actions towards him.”

Defendant moved to dismiss the claim pursuant to Fed. R. Civ. P. 12(b)(6). Citing the standard *McDonnell Douglas* burden shifting analysis, the court held that although the allegations were sufficient to establish that plaintiff was an eligible employee within the meaning of the FMLA and that he engaged in an activity protected by the FMLA when he took leave following the heart attack. The court also held that the failure to promote plaintiff, the territory reassignment, and plaintiff’s discharge each constituted materially adverse employment actions. Nonetheless, the court found that plaintiff failed adequately to plead a causal connection between the two. The court held that the span of time between his medical leave and the adverse actions, which ranged from nine months to over one year, did not support a reasonable inference of retaliation. Thus, absent any additional facts, plaintiff’s “unadorned, defendant-unlawfully-harmed-me accusation” was simply not enough to allow the court to draw a reasonable inference of wrongdoing. Accordingly, the court dismissed plaintiff’s FMLA retaliation claim.

Mattern v. Panduit Corp. 2011 WL 4889091 (N.D. Ill. Oct. 11, 2011)

Plaintiff sued her former employer for FMLA interference and retaliation. After taking FMLA leave and submitting a “return-to-work” letter from her physician, plaintiff’s employer e-mailed her a termination memo. As a basis for termination, the employer listed several reasons, including that she had taken FMLA leave. The employer filed a motion to dismiss. The court granted the employer’s motion to dismiss the interference claim, without prejudice to filing an amended complaint, finding that plaintiff had not adequately pled that her employer denied her FMLA benefits to which she was entitled. The court denied the Motion on the retaliation claim, however, finding that by alleging that she took FMLA leave, that her employment was terminated, and that she was discharged because she took FMLA leave, plaintiff had sufficiently stated an FMLA retaliation claim.

O’Keefe v. Charter Communications, LLC, 2011 WL 2457658 (E.D. Mo. June 16, 2011)

Plaintiff’s former employer sent plaintiff a packet of forms to complete upon learning that plaintiff was ill and out on leave. Plaintiff returned a form requesting leave within 15 days but failed to return a physician certification form. A member of defendant’s human resources department spoke with plaintiff several times via telephone to request documentation from plaintiff’s physician. In addition, plaintiff had been made aware of defendant’s policy requiring physician certification as demonstrated by a handbook acknowledgement form she had signed. Over one month after plaintiff went out on leave, defendant discharged plaintiff because she had still not submitted documentation from her physician. Plaintiff had documentation from her physician for part of her leave, but she did not inform defendant of this documentation until after her discharge.

Defendant filed a motion for summary judgment and, in response, plaintiff sought to dismiss her complaint. Plaintiff then filed her claim again the same day the three-year statute of

limitations ran, but this new complaint did not allege a willful violation of the FMLA. In response, Defendant filed a motion to dismiss this complaint because the two year statute of limitations period for non-willful violations of the FMLA had run. Plaintiff then sought leave to amend her new complaint to allege a willful violation.

The court denied plaintiff's motion to amend, concluding that granting the motion would result in substantial prejudice to defendant and an undue delay in the proceedings. Alternatively, the court granted defendant's motion for summary judgment on plaintiff's initial complaint. The court found that defendant did not violate the FMLA because plaintiff failed to submit the required certification in the time period provided, despite that she was aware of the requirement, defendant had given her sufficient time to comply, and defendant had repeatedly requested it.

Rodriguez-Martinez v. Tiendas Grand Stores, 2011 WL 2292268 (D.P.R. June 7, 2011)

Plaintiff sued her former employer for discrimination under the FMLA. Plaintiff was named Best Sales Manager in 2008 and was diagnosed with cancer in February 2009. After plaintiff informed her employer of her diagnosis, defendant engaged in a pattern of discriminatory conduct by, among other things, forbidding plaintiff from taking time off to rest per her doctor's orders, making comments about her condition, treating her with hostility when she had to take time off to attend medical treatments, assigning her excessive work after absences, and forbidding her to leave the store. On June 18, 2009, defendant gave her a written warning for job abandonment after she began bleeding and alerted her supervisor she needed to seek medical attention. Thereafter, defendant made various comments to plaintiff doubting whether she was really sick. On June 26, 2009, plaintiff was issued another warning and fired. Plaintiff asserted all of these facts in a narrative complaint.

Defendant moved to dismiss claims under Federal Rule of Civil Procedure 12(b)(6), arguing that plaintiff failed to plead a *prima facie* case of discrimination. The parties consented to jurisdiction by a magistrate judge, who denied defendant's motion in its entirety. The opinion notes that, under the lenient pleading standard, plaintiff's narrative complaint pled a *prima facie* case of FMLA discrimination.

Ruder v. Pequea Valley School Dist., 2011 WL 1832794 (E.D.Pa. May 12, 2011)

Stephen Ruder was an art teacher and the chair of the art department at Pequea Valley. In March 2006, Ruder informed his employer that he had been diagnosed with Crohn's disease, a chronic autoimmune disorder that causes extreme abdominal pains, diarrhea and fevers, and abscesses in the pelvic cavity. On February 2 or 3, 2009, Ruder told Pequea Valley that his Crohn's condition had worsened and that he would need to be hospitalized. He requested information about medical leave from work, which Pequea Valley failed to provide. Two or three days later, on February 5, Ruder was commuting to work when he had a severe flare-up that caused severe pain and disorientation, and required Ruder to pull over to the nearest restroom for relief and care. Ruder left school almost immediately after arriving and was hospitalized.

Ruder returned to work the following week. He informed his employer he was still ill but had returned because he had not received information from it about medical leave and

authorization. Ruder was sent home and instructed not to return to the school until he had a medical release to return to work.

Several weeks later, Ruder obtained a medical release and returned to work the following day. On his second day back to work, Ruder was placed on a ten-day suspension, followed by an indefinite suspension. Pequa Valley ultimately fired Ruder for, among other things, violating the school's attendance policy on February 5, and failing to report to a disciplinary hearing on February 6.

Ruder sued defendant for FMLA interference based on its failure to provide medical leave information. This failure, Ruder asserted, caused him to attempt to go to work when he was too sick, which caused him to be sick, which in turn caused him to be late to work, which ultimately resulted in his suspension and termination. Defendant moved to dismiss the claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The district court denied defendant's motion. The court held that the FMLA regulations impose on employers a duty to advise eligible employees of their rights under the FMLA, including their right to leave. Defendant, according to the complaint, failed to meet this duty. Because defendant's inaction rendered Ruder unable to exercise his FMLA rights in a meaningful way, Ruder sufficiently pled a claim for FMLA interference.

***Schrack v. R+L Carriers, Inc.*, 2011 WL 1885672 (S.D. Ohio May 18, 2011 (adopting Mag. J. Report and Recommendation, 2011 WL 1758430 (S.D. Ohio Apr. 20, 2011))**

Plaintiff filed suit alleging FMLA claims and defendants filed a Rule 12(c) motion for judgment on the pleadings. The district analyzed the 12(c) motion as it would a 12(b)(6) motion, construing the complaint in the light most favorable to plaintiff and accepting all well-pled factual allegations as true. Nonetheless, the factual allegations must give notice to defendant as to what claims are alleged and plaintiff must have sufficient factual matter to render the claim plausible, more than merely possible.

Defendants argued plaintiff did not specifically allege that any defendant was an employer covered by the FMLA. However, the court disagreed and found the FMLA claim was sufficient to satisfy Rule 12(c) where plaintiff alleged that defendants were employers within the meaning of the FMLA and alleged that plaintiff was an eligible employee deprived of his rights under the FMLA by defendants. The complaint further alleged that plaintiff sought FMLA leave in order to undergo treatment for two serious health conditions, narcolepsy and COPD, and plaintiff's supervisor refused to allow him to take leave. Further, because defendants admitted that plaintiff was granted FMLA leave, the court found he was an eligible employee under the FMLA. Defendants' motion was therefore denied because plaintiff's failure to specifically allege that any defendant was an employer covered by the FMLA was not enough to dismiss the claim given the other allegations and facts to allow the claim to proceed.

***Sproul v. Washoe Barton Medical Clinic*, 2011 WL 5190529 (D. Nev. Oct. 27, 2011)**

Plaintiff suffered an injury at work, took a leave of absence and sought workers compensation benefits. On January 7, 2008, after plaintiff returned to work, defendant demoted her. On March 31, 2009, defendant terminated plaintiff's employment. Plaintiff filed a lawsuit, asserting a claim for FMLA interference. Defendant filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and plaintiff filed a motion to amend the complaint.

The district court found that plaintiff failed to plead any facts indicating she attempted to take FMLA leave, was denied leave or was discharged for taking leave "for a serious health condition that [made her] unable to perform the functions of [her] position." However, the court held plaintiff may be able to allege that she was discharged for opposing some unlawful practice on the part of defendant under the FMLA. Thus, the court dismissed plaintiff's FMLA claim with leave to amend.

Thurman v. BMO Capital Markets Corp., 2011 WL 1004652 (N.D. Ill. Mar. 16, 2011)

Plaintiff Thurman, an administrative assistant, was attacked by an assailant armed with a piece of rebar, and as a result suffered a traumatic and lasting brain injury. After a period of recovery and vacation, which included FMLA leave, Thurman returned to work, only to find that instead of serving one person, he was assigned to provide support to six persons, and his work was more closely scrutinized than his peers' work. In addition, he claimed, unnamed conditions were placed on him that were not placed on similarly situated employees, and because defendant held his FMLA leave against him, he had an adverse annual performance evaluation, which resulted in a smaller annual bonus and no raise. Thurman sued BMO for interference with his FMLA rights and retaliation. The court granted summary judgment against the former, and denied it against the latter.

The district court held that Thurman's interference claim was insufficient to survive a 12(b)(6) attack. The court found that Thurman's allegations, "where not sketchy [were] conclusory," yet Rule 12(b)(6) requires a showing that a claim "contains enough detail, factual or argumentative, to indicate that plaintiff has a substantial case." Because Thurman's allegations failed to crest the "speculative level," he did not meet this standard.

Thurman fared better on his retaliation claim, consideration of which required the district court to examine defendant's argument that a plaintiff can bring a retaliation claim "only by expressly stating an FMLA cause of action." The court sided with Thurman because 29 USC § 2615(b)(1) can reasonably be read to allow claims "related to" the FMLA, "but which do not state an express FMLA cause of action."

Torrente-Leyva v. Capitol Sec. Police, Inc., 2011 WL 148051 (D.P.R. Jan. 18, 2011)

A security guard filed a suit pro-se against his former employer alleging his former employer unlawfully denied him leave to treat his cancer. The employer filed a 12(b)(6) motion to dismiss plaintiff's complaint, arguing that plaintiff's suit was time-barred and that plaintiff failed to provide the employer with notice of the need for leave. Plaintiff's response contained facts not included in his complaint. The court, interpreting plaintiff's complaint, determined that his complaint alleged (1) he was a cancer patient, (2) he was denied leave without pay, (3) he took a vacation from work, and (4) upon his return he was not returned to his job. The court held

that plaintiff's complaint fell short of the pleading requirements necessary to survive the motion to dismiss. Accordingly, the court granted the employer's motion to dismiss with prejudice. Citing its concern after reading plaintiff's response, the court advised plaintiff to seek counsel in order to determine whether plaintiff should seek leave to file an amended complaint.

Wamack v. Windsor Park Manor, 2011 WL 6780654 (N.D. Ill. Dec. 27, 2011)

Plaintiff was not returned to his same or equivalent position at the end of his medical leave. He filed suit, and his amended complaint against Windsor Park Manor ("Windsor") and Covenant Retirement Communities, Inc. ("Covenant") alleged violations of the ADA, the Rehabilitation Act, and the FMLA. Defendant Covenant filed a motion to dismiss the FMLA claim against it under Rule 12(b)(6) because plaintiff omitted it from the EEOC charge, intake questionnaire, and the original complaint filed *pro se*. The court found this argument "patently without merit." It denied the motion holding that, accepting plaintiff's allegations as true and making all reasonable inferences in plaintiff's favor from those allegations, the amended complaint sufficiently stated a claim against Covenant under the FMLA.

Underwood v. Geo Group, Inc., 2011 WL 2607117 (D. Colo. July 1, 2011)

Plaintiff, a detention officer, sued her former employer, a private secure detention center, alleging interference under the FMLA. Plaintiff filed a motion to clarify and amend the complaint after the deadline for amending pleading set in the scheduling order. Finding that plaintiff failed to show good cause to justify allowing the untimely motion and that the requested amendment would be futile, the court denied plaintiff's motion to clarify and amend.

The court noted that when deciding a motion to amend a complaint filed past the scheduled deadline, the court must examine Rules 16(b)(4) and 15(a)(2). Under 16(b)(4), the court must first determine whether the movant has shown good cause to justify allowing the untimely motion. In this case, the court determined that plaintiff provided no justification for missing the deadline. Next, under Rule 15(a)(2), a request for leave to amend may be denied where the amendment would be futile and, therefore, subject to dismissal. The court characterized plaintiff's request as a request to amend the complaint to add a claim of retaliation. A retaliation claim may be brought when the employee successfully took FMLA leave, was restored to her prior employment status, and was adversely affect by an employment action based on incidents post-dating her return to work. The complaint contained no allegations that plaintiff was restored to her prior employment status and, therefore, an allegation of retaliation would fail. Accordingly, the court denied plaintiff's motion to clarify and amend the complaint.

Young v. City of Milwaukee, 2011 WL 2265523 (E.D. Wis. June 7, 2011)

The *pro se* plaintiff brought a complaint purporting to allege that his employer violated his FMLA rights. Because the complaint failed to state that plaintiff was an eligible employee under the FMLA, the court granted the motion to dismiss.

Summarized Elsewhere:

Chapman v. U.S. Postal Serv., 442 Fed. Appx. 480 (11th Cir. Oct. 4, 2011)

Cooper v. Smithfield Packing, Inc., 2011 WL 3207912 (E.D.N.C. July 27, 2011)

Cuturilo v. Jefferson Reg'l Med'l Ctr., 2011 WL 2941031 (W.D. Pa. July 20, 2011)

Wetter v. Aultman Health Foundation et al., 2011 WL 4458678 (N.D. Ohio Sept. 23, 2011)

B. Right to Jury Trial

Summarized Elsewhere:

Thompson v. Air Transport International Limited Liability Company, 664 F.3d 723 (8th Cir. 2011)

C. Protections Afforded

D. Defenses

1. Statute of Limitations

a. General

Dahlman v. American Assoc'n of Retired Persons, 791 F. Supp.2d 68 (D.D.C. 2011)

Plaintiff, who worked as an in-house attorney for defendant, alleged that when she indicated an intent to leave in order to move to Canada, her supervisor convinced her to take a transitional leave of absence instead. Shortly thereafter, her supervisor allegedly began a campaign of harassment and intimidation. On November 9, 2005, plaintiff was diagnosed with acute post-traumatic stress disorder ("PTSD"), and she took FMLA as a result, which expired in March 2006. She claimed that the condition lasted until April 2008, after which she could begin to take care of herself, leave her home, and begin to address her business affairs. She further claimed that in May 2008, she discovered that her former supervisor had forged her name onto 2 emails, which caused a relapse and resulted in her dropping efforts to pursue her rights. She filed suit in November 2009.

It was undisputed that plaintiff's FMLA leave rights ran out in March 2006. After determining that she had not established she was *non compos mentis*, the district court refused to toll the statute of limitations. Thus, her claim was untimely and, therefore, dismissed

Madry v. Gibraltar Nat'l Corp., 2011 WL 1565807 (E.D. Mich. Apr. 25, 2011)

Plaintiff signed an employment application containing a provision requiring all claims relating to her employment to be brought within 180 days. Nonetheless, plaintiff filed a

complaint against the firm after more than 180 days but well within the two-year statute of limitations for FMLA claims. The firm argued that plaintiff's employment application contained a waiver of the two-year limitations period, substituting a six-month period. According to the firm, the parties may contractually shorten any statute of limitations and the statute of limitations for FMLA claims is a procedural rather than a substantive right, thus rendering inoperative any federal regulations that prohibit waiver of rights under the FMLA. Plaintiff moved to strike the firm's statute of limitations defense. The court agreed, striking the contractually-shortened statute of limitations defense because of the "strong public interest in providing employees their full panoply of rights under the FMLA."

Swartz v. Oracle Corp., 787 F. Supp. 2d 686 (N.D. Ohio 2011)

Plaintiff's complaint alleged he was "functionally demoted" upon return from his leave of absence in June 2007, in violation of the FMLA. However, he did not file his complaint until December 2010. Defendant filed a motion to dismiss, which the court granted, holding that plaintiff's FMLA claim was time-barred by the FMLA's two-year statute of limitations.

Summarized Elsewhere:

Drye v. University of Arkansas for Medical Sciences, 2011 WL 4434232 (E.D. Ark. Sept. 23, 2011)

Ervin v. Alliant Techsystems, Inc., 2011 WL 4566112 (D. Md. Sept. 29, 2011)

Redman v. New York State Dept. of Correctional Services, 2011 WL 5119574 (S.D.N.Y. Oct. 12, 2011)

b. Willful Violation

Drye v. University of Arkansas for Medical Sciences, 2011 WL 4434232 (E.D. Ark. Sept. 23, 2011)

Plaintiff was discharged in February 2009, after roughly five years of employment, from her position as a patient representative with defendant. During plaintiff's employment, other employees lodged numerous complaints with management about the harsh manner in which she communicated with patients and fellow employees. The complaints were documented as part of plaintiff's annual evaluations and her superiors counseled her about them. During early-to-mid-2008, plaintiff requested and was granted intermittent FMLA leave to care for her ailing mother. In fall 2008, plaintiff requested and was granted FMLA leave for her own serious health condition. Altogether, plaintiff was provided the maximum amount of FMLA leave. Upon plaintiff's return from leave for her own condition, defendant informed her that changes to her position had been made while she was out on leave. Although plaintiff's compensation, benefits, title, and office space remained unchanged, defendant removed certain supervisory duties plaintiff had performed.

In February 2009, defendant learned from other employees that plaintiff had been clocking in for work and then driving off in her car. Plaintiff's supervisor witnessed one such

instance. Defendant thereafter notified plaintiff what she was being discharged for falsifying time records. After filing a complaint with the EEOC and receiving a right to sue letter, plaintiff filed a complaint on December 9, 2009, challenging her discharge. She did not allege a violation of the FMLA. Plaintiff filed an amended complaint on November 15, 2010, alleging defendant demoted her in retaliation for taking FMLA leave and discharged her in retaliation for complaining about being demoted for taking FMLA leave. Defendant filed a motion for summary judgment, which the court granted.

Specifically, the court concluded that the FMLA's two-year statute of limitations barred her claim that she had been demoted in retaliation for taking FMLA leave because she returned from leave on September 8, 2008, which was the date she learned that her job duties had changed. Plaintiff had not mentioned her altered job duties in her initial complaint; but first mentioned them in her amended complaint dated November 15, 2010, more than two years after her duties had been changed. The court rejected plaintiff's argument that the allegations in her amended complaint related back to her original complaint because her November 2010 allegations did not relate to the same conduct, transaction, or occurrence that was the basis of her December 2009 complaint. Further, the court rejected plaintiff's argument that the three-year statute of limitations, for willful violations, should apply. That one of plaintiff's supervisor's had commented that plaintiff was out on FMLA in connection with a discussion about changing her job duties does not show a willful violation, but only that the FMLA was "in the picture," which the Eight Circuit court of Appeals has determined is insufficient to show a willful violation warranting application of the three-year statute of limitations.

The court also dismissed plaintiff's retaliation claim related to her discharge. According to the court, plaintiff presented no evidence that her discharge had anything to do with her leave, which occurred five months before her discharge. Thus, she did not establish a *prima facie* case of retaliation. Moreover, defendant had presented undisputed evidence that it discharged plaintiff for falsifying time records, and plaintiff could not show defendant's reason was pretext.

Ervin v. Alliant Techsystems, Inc., 2011 WL 4566112 (D. Md. Sept. 29, 2011)

Ms. Ervin was employed by defendant from February 7, 2005 to December 6, 2007. She was suspended in August 2007 and November 2007, and then discharged in December 2007. Plaintiff alleged she was suspended and discharged in retaliation for taking an FMLA leave.

On defendant's motion for summary judgment, the district court dismissed plaintiff's cause of action under the FMLA as time barred. There was no dispute that plaintiff's FMLA claim was untimely under the general two year statute of limitations, as plaintiff did not file suit until more than two years after her discharge. Relying on the Supreme court's definition of "willful" in *McLaughlin v. Richland Shoe Co.*, 486b U.S. 128, 133 (1988), holding that employers act willfully when they know or show reckless disregard about whether its conduct is prohibited, the court found that plaintiff's allegations fell short of making the requisite showing. Her contention that her supervisor was "upset" over her taking an FMLA leave did not, as a matter of law, constitute willful conduct so as to extend the statute of limitation from two to three years. Alternatively, the court relied on defendant's representation that the supervisor was not aware that plaintiff had taken a leave justified summary judgment in favor of defendant.

Jetter v. Rohnm and Haas Chemicals, LLC, 2011 WL 2473917 (E.D. Pa. June 22, 2011)

The court granted defendant summary judgment on plaintiff's FMLA interference claim because defendant's alleged FMLA interference occurred three years before plaintiff's claim. The court declined to extend the two year statute of limitations absent some showing that defendant either knew or showed a reckless disregard for whether its alleged conduct was prohibited by the FMLA.

Mahran v. Benderson Development Co., 2011 WL 1467368 (W.D.N.Y. Apr. 18, 2011)

Plaintiff alleged that when he returned from short-term disability leave, his co-workers harassed him about the medical basis for his disability leave. Since he had not discussed his health condition with any of his co-workers, plaintiff assumed that defendant's short-term disability representative had done so.

Defendant filed a motion to dismiss plaintiff's complaints under Rule 12(b)(1), 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, defendant moved to dismiss plaintiff's FMLA claims because they were filed outside the two-year statute of limitations and plaintiff did not provide sufficient facts to support the three-year statute of limitations applicable to willful violations.

The court commented that analyzing the relevant statute of limitations period would be difficult because plaintiff's FMLA claim did not pertain to the actual medical leave. Rather, plaintiff's FMLA claim related to the alleged violation of the privacy of the medical information that he submitted to his employer to secure his short-term disability leave. However, the court held that plaintiff had sufficiently pled a willful violation of the FMLA. According to the court, the confidentiality of any medical information provided to an employer is one of the rights protected by the FMLA. The court further held that plaintiff had pled that defendant employer knew or should have known about the confidentiality of any medical information that it reviewed but chose to disclose it anyway. The court noted that the issue of whether plaintiff could establish this claim was not before the court and plaintiff's claim was sufficient to trigger the three-year statute of limitations and survive dismissal at the pleading stage.

Riddle v. Citigroup, 2011 WL 6015761 (2d Cir. Dec. 5, 2011)

Plaintiff filed a complaint asserting fourteen causes of action including one for retaliation in violation of the FMLA. The district court granted defendants' Rule 12(c) motion to dismiss, but did not specifically address the FMLA claim. The Second Circuit vacated the district court's dismissal of the FMLA claim and remanded for further proceedings.

Defendants first claimed that the suit was barred by the statute of limitations. The Complaint was filed between two and three years from the date of plaintiff's discharge. The court of appeals held that plaintiff had plausibly alleged a claim of willful violation of the FMLA to avail herself of the three year statute of limitations, including allegations that Citigroup human resources personnel prevented her from obtaining medical leave and did not allow her to fill out medical-leave applications, and that she was given notice of her discharge in April 2007,

immediately after she attempted to obtain leave. The court of appeals also held that plaintiff sufficiently pled a claim for FMLA retaliation by alleging that: she attempted to take medical leave under the FMLA, she was qualified for her job, she was fired, and her April 2007 notice of termination immediately followed her failed attempt to obtain medical leave. Likewise, the release contained in plaintiff's separation agreement was not cause for dismissal, in light of her allegations that the agreement was invalid, that she was fraudulently induced into signing the agreement, and that she did not receive adequate consideration in exchange for the agreement.

Ridner v. Salisbury Behavioral Health, 2011 WL 5089806 (M.D. Pa. Sept. 28, 2011)

An employee at a residential facility alleged that after returning from FMLA leave, her employer placed her in a different position and then fired her 14 months later because she was not qualified for her position. The employee also alleged that prior to her discharge, she was offered part-time positions which were not substantially equivalent to her pre-leave position. The employer moved to dismiss the complaint, arguing that (a) the act of placing the employee in the different position upon her return from leave occurred more than two years prior to filing the complaint; (b) the employee's retaliation complaint was untimely because it was made more than one year after she returned from FMLA leave; and (c) the employee's request for damages for pain and suffering should be struck because such relief is not available under the FMLA.

The magistrate judge recommended that the employer's motion to dismiss be denied in its entirety, except as it related to the employee's claim for pain and suffering, damages which the employee conceded were not recoverable. First, the court found that because the employee's complaint alleged that the employer's actions were undertaken "knowingly, intentionally and discriminatorily," the employee successfully pled a willful violation of the FMLA and therefore the three year statutory period applied. Alternatively, the court noted that even if the two-year statute of limitations applied, the employee's claim was timely filed based on the chain of events alleged in the complaint: returning from FMLA leave to find her job had not been saved for her, the employer unilaterally declaring the position she returned to was the "substantial equivalent" of her prior position and the employer discharging her because she was not qualified for that position. Consequently, the court rejected the employer's second argument, that a time lapse of 14 months prevented plaintiff from establishing a causal connection. The court held that there was a plausible, unbroken chain of events and that, in any event, "the lack of temporal proximity did not necessarily defeat the ability to demonstrate a causal connection."

Rodgers v. Data Transmission Network, et al., 2011 WL 1134670 (D. Neb. Mar. 25, 2011)

Plaintiff alleged she was discharged for filing for FMLA leave. The court granted defendants' motion to dismiss the claim on the grounds it was barred by the two-year statute of limitations. The court refused to apply the three-year statute of limitations applicable when an employer engages in a willful violation of the FMLA because plaintiff failed to allege that defendants' conduct in terminating her employment was "willful, knowing, or in reckless disregard of the FMLA." The court noted that while the FMLA does not define "willful," the Eighth Circuit, in *Hanger v. Lake County*, 390 F.3d 579 (8th Cir. 2004), had defined it as occurring where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. . . . Willfulness' requires more than an

employer knowing that the FMLA ‘was in the picture,’ or ‘general knowledge regarding a statute’s potential applicability.’”

Even though plaintiff alleged willfulness with respect to her ADEA claim in the same complaint, and plaintiff generally incorporated all previous allegations into each of her claims, the court found that the allegation of willfulness relating to the ADEA violation was a separate allegation applicable only to plaintiff’s ADEA claim. The court refused to infer that plaintiff alleges willfulness into all of her claims because of the incorporated ADEA-specific allegations. As a result, the court applied the two-year statute of limitations to plaintiff’s FMLA claim, found she exceeded that time limit, and dismissed the claim with prejudice.

Waites v. Kirkbride Center, 2011 WL 2036689 (E.D. Pa. May 23, 2011)

Plaintiff claimed that she was discharged in violation of the FMLA and defendant moved for summary judgment, arguing the claim was time-barred by the FMLA’s two-year statute of limitations because there was no evidence of willfulness. The court, however, rejected this argument and found that there was sufficient evidence of willfulness for plaintiff to avoid summary judgment based on evidence suggesting that the employer (i) failed to inform employees about their FMLA leave rights and post required notices, (ii) ignored plaintiff’s attempts to contact it about her absences, (iii) failed to process plaintiff’s absences as FMLA leave notices despite knowledge that they were protected by the FMLA, and (iv) terminated plaintiff’s employment after she requested to return to work.

Summarized Elsewhere:

Cham v. Station Operators, Inc., 2011 WL 2181194 (D.R.I. June 3, 2011)

Laing v. Federal Express Corporation, 2011 WL 4102155, (W.D.N.C. Sept. 14, 2011)

Male v. Tops Markets, LLC, 2011 WL 2421224 (W.D.N.Y. June 13, 2011)

2. Sovereign Immunity

Dolan v. City of Ann Arbor, 407 Fed.Appx.45 (6th Cir. Jan. 12, 2011)

Plaintiff filed suit against her former employer, the Fifteenth District Court in Ann Arbor, Michigan, alleging FMLA violations. The district court dismissed her claim, determining that the court was protected by Eleventh Amendment sovereign immunity. While plaintiff’s appeal was pending, the Sixth Circuit decided another case where it determined a trial-level court in Michigan was protected sovereign immunity under the Eleventh Amendment against claims brought under 42 U.S.C. § 1983. The court in *Dolan* affirmed the district court’s dismissal, finding that its precedent of granting state courts sovereign immunity constituted controlling authority where plaintiff did not point to a contrary United States Supreme Court or *en banc* decision of the Sixth Circuit.

Dye v. Indiana Dept of Corrections, 2011 WL 2728109 (S.D. Ind. July 12, 2011)

Plaintiff worked as a Captain for defendant, Department of Corrections. As such, she was responsible for supervising the entire facility and reported to the Major of the facility. Plaintiff retired in February 2011 and later sued defendant for, among other things, retaliating against her for taking FMLA leave to care for her ailing mother. Specifically, she claimed that she was disciplined in February 2005 by then-Captain Dusty Russell for failure to properly report the assault of a cook at the facility in retaliation for having taken FMLA leave in 2005.

Defendant moved for summary judgment, arguing only that plaintiff's FMLA claim was barred by the doctrine of sovereign immunity. Noting that the Seventh Circuit had previously concluded that Congress did not validly abrogate its sovereign immunity in enacting the self-care provision of the FMLA, the court explained that plaintiff's claim was not brought under the self-care provision, but instead under the family-care provision of the statute. Thus, plaintiff's claim was not barred by the doctrine of sovereign immunity. Consequently, the court denied defendant's motion plaintiff's FMLA claim.

Helbring v. Bringer, 2011 WL 4406330, (E.D. MO. Sept 21, 2011)

Plaintiff employee was a secretary for a state judge, whom plaintiff sued only in her personal capacity. Plaintiff alleged that defendant terminated her employment in retaliation for exercising her rights under the FMLA. Plaintiff claimed that defendant's reprimands, harsh criticism and alleged false accusations of misconduct deteriorated plaintiff's physical and mental health, which necessitated her need for FMLA leave on February 15, 2011. Plaintiff's employment was terminated on May 27, 2011.

The magistrate court dismissed plaintiff's FMLA claim on the ground that it was barred by the doctrine of state sovereign immunity under the Eleventh Amendment of the United States Constitution. In its analysis, the court distinguished the United States Supreme Court's holding in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which held that Congress abrogated state sovereign immunity with regard to the *family-care* provisions in 29 U.S.C. § 2612(a)(1)(A) – (C), but the Supreme Court did not extend that holding to the *self-care provisions* of the FMLA § 2612(a)(1)(D) at issue here. The magistrate court cited decisions in accord with its interpretation of *Hibbs* from the First, Second, Fourth, Sixth, Eighth, and Tenth Circuits.

The court therefore held that the Eleventh Amendment is applicable to state officials who are sued in their official capacity under the FMLA's self-care provisions. In extending immunity here, the court reasoned that plaintiff's attempt to frame her cause of action against defendant in her individual capacity was not controlling, since plaintiff's entire claim relied on state disciplinary procedures, plaintiff's acknowledgement that defendant terminated plaintiff's employment pursuant to her judicial authority, and because any judgment against defendant in her personal capacity would still have an effect on public administration.

Keene v. Prine, 2011 WL 2493120 (M.D. Ga. June 22, 2011)

Two former employees of the Lowndes County Sheriff's Office alleged that defendant Sheriff Prine wrongfully terminated their employment because they supported his opponent

during the 2008 campaign for sheriff and because they requested FMLA leave. Plaintiff Crews had requested time off for surgery prior to his termination, but did not request FMLA leave, and instead planned to use accrued comp time for his absence. Plaintiff Bennett had submitted an FMLA request for maternity leave prior to her discharge.

Prior to reaching the merits of plaintiffs' FMLA claims, the court analyzed whether Sheriff Prine was exempt from liability because of sovereign immunity afforded by the Eleventh Amendment. To determine whether Sheriff Prine had Eleventh Amendment immunity, the court analyzed: 1) whether he acts as an arm of the state; and 2) if so, whether Congress eliminated Eleventh Amendment immunity for any of the claims asserted against him or whether the State of Georgia has consented to the suit.

To determine whether an entity is an arm of the state, the court examined: 1) how state law defines the entity; 2) what degree of control the state maintains over the entity; 3) where the entity derives its funds; and 4) who is responsible for covering judgments against the entity. The court found that the Georgia Constitution grants the state legislature exclusive authority to establish and control a sheriff's powers and duties. The court also found that, even though the sheriff's office receives the majority of its funding from the county, the county has no control over the office. Finally, even though the sheriff's office may have to pay any judgment against it, the court found that the totality of the circumstances weighed in favor of finding that Sheriff Prine is an arm of the state and therefore, immune from liability in his official capacity under the FMLA. The court also found that the Eleventh Amendment bars FMLA claims for damages arising from the Act's self-care provision. The court found no evidence that Georgia had waived this immunity so, at most, plaintiffs would be entitled to equitable relief under the Act.

For the claims against defendants not entitled to sovereign immunity, the court granted defendants' motion for summary judgment. The court found that Plaintiff Crews had not engaged in protected activity that could give rise to an FMLA retaliation claim because he never requested FMLA leave. The court also found that Plaintiff Bennett's claim failed because, although she had engaged in protected activity by requesting FMLA leave, the decisionmaker was unaware of this request at the time he decided to terminate her employment. Consequently, she was unable to show that her discharge was related to the protected activity.

Miller v. California Attorney General's Office, 2011 WL 997231 (E.D. Cal. Mar. 17, 2011)

Plaintiff, a civil service peace officer, filed a thirteen count complaint against her employer, the California Department of Corrections and Rehabilitation, including an FMLA interference claim. The district court dismissed the FMLA claim as barred by the Eleventh Amendment. Noting the *Hibbs* case ruled that Congress abrogated state immunity relating to the FMLA's family care provision, the district court followed numerous other federal courts that have refused to extend *Hibbs* to self-care claims arising under § 2612(a)(1)(A).

O'Donnell v. Penn. Dept. of Corrections et al., 2011 WL 1871287 (M.D. Pa. May 16, 2011)

When plaintiff was not selected for a promotion or reimbursed for expenditures, she sued the Department of Corrections and several of its administrators in their official capacity under

the FMLA. The district court dismissed plaintiff's FMLA claims against the Department of Corrections because it has Eleventh Amendment immunity. Although the U.S. Supreme court has held that Congress abrogated state sovereign immunity with respect to family-care provisions, it did not do so for self-care provisions. Because the Department of Corrections had immunity, its immunity extended to its administrators for actions taken in their official capacity.

Plaintiff also sued her immediate supervisor in his individual capacity for interfering with her rights under the FMLA because he allegedly gave her erroneous information about her FMLA rights. The district court dismissed this claim because there was no evidence that plaintiff sought or was denied FMLA leave.

Quinnett v. Iowa, 644 F.3d 630 (8th Cir. July 7, 2011)

Plaintiff filed a lawsuit against the State of Iowa, the Iowa Department of Administrative Services ("DAS") and two DAS officials alleging FMLA interference and retaliation. Plaintiff claimed that he took FMLA leave to receive treatment for various medical conditions, that defendants asked him to apply for long-term disability benefits instead of taking additional FMLA leave, and that defendants discharged him while claiming that he had resigned.

The district court dismissed plaintiff's FMLA claims, concluding that the Eleventh Amendment barred the claims against all of defendants. On appeal, plaintiff contended that the State of Iowa waived Eleventh Amendment immunity by providing FMLA leave to its employees. The court concluded that providing a substantive right under the FMLA without also indicating that the right can be enforced in federal court does not amount to a waiver of Eleventh Amendment immunity. While the DAS benefits website did state that employees can bring a civil action against an employer for FMLA violations, the website did not specify that actions could be brought in federal court. Because the State of Iowa did not clearly declare its intent to submit itself to federal jurisdiction, the court concluded it had not waived Eleventh Amendment immunity and the FMLA claims against the State had been properly dismissed.

Redman v. New York State Dept. of Correctional Services, 2011 WL 5119574 (S.D.N.Y. Oct. 12, 2011)

A correctional officer sued the New York State Department of Correctional Services alleging wrongful termination under the FMLA. Defendant filed a motion to dismiss for lack of subject matter jurisdiction based on Eleventh Amendment sovereign immunity. The court noted that while *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) recognized Congress's abrogation of state sovereign immunity with respect to FMLA claims addressing family-care leave, the Supreme court did not explicitly hold that sovereign immunity is abrogated with respect to FMLA claims based on one's own health condition. Thus, the court found that *Hale v. Mann*, 219 F.3d 61 (2d. Cir. 2001) controlled, which held that sovereign immunity barred self-care claims. As a result, plaintiff's FMLA claims relating to caring for herself were dismissed.

The court further noted that any FMLA claim were also barred by either the two- or three-year statute of limitations because plaintiff was discharged in 2006 and did not commence

her action until 2010. The statute of limitations was not tolled because plaintiff filed a complaint with the EEOC and the EEOC has no enforcement authority over the FMLA.

Swanson v. Railroad Comm'n of Texas, 2011 WL 2039601 (S.D. Tex. May 24, 2011)

Plaintiff sued her employer, the Railroad Commission of Texas, a state agency, after the Commission discharged her for absenteeism for which she sought FMLA leave. Defendant moved to dismiss on sovereign-immunity grounds. The court granted defendant's motion, noting that the Fifth Circuit held in *Kazmier v. Widmann*, 225 F.3d 519, 526-29 (5th Cir. 2000) held that the Eleventh Amendment immunizes states from suits for money damages brought under the FMLA's self-care and family-care provisions. While the Supreme court later reversed this decision as to family-care in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 735 (2003), Eleventh Amendment immunity still applies to claims for money damages for claims asserting the right to FMLA to care for oneself.

Westermeyer v. Kentucky Dep't of Public Advocacy et al., 2011 WL 830342 (E.D. Ky. Mar. 3, 2011)

Plaintiff was employed by the Kentucky Department of Public Advocacy as an attorney. Plaintiff was discharged on June 19, 2009, for violating an employer policy that prohibited attorneys from interviewing with a prosecutor's office that handles opposing cases without first informing his/her supervisor. Plaintiff appealed her discharge through Kentucky's personnel board system, which overturned the termination as excessive discipline and ordered plaintiff's reinstatement.

Plaintiff also filed a lawsuit, alleging FMLA violations against her employer and supervisors. The employer moved to dismiss the lawsuit in its entirety. First, the court dismissed plaintiff's FMLA claims against both her employer and her supervisors in their official capacities as barred by the Eleventh Amendment. The court held that plaintiff could have maintained claims for injunctive or declaratory relief, but her claims for monetary damages under the FMLA were barred. Second, the court dismissed plaintiff's FMLA claims against her supervisors in their individual capacities. The court held that the FMLA does not impose individual liability on public agency employees.

Weth v. O'Leary, 2011 WL 2693178 (E.D. Va. July 11, 2011)

Plaintiff was terminated from her job as Deputy Treasurer in Arlington County, Virginia. Plaintiff sued the County Treasurer in both his official and individual capacities under the FMLA, as well as for intentional infliction of emotional distress. Specifically, plaintiff alleged that she was discharged in February 2010 in retaliation for taking FMLA leave for uterine cancer. Plaintiff returned from FMLA leave on February 16, 2010. That same day, the County Treasurer stripped plaintiff of her job duties and instructed her to find a new job. One month later, plaintiff was suspended with pay and again instructed to focus on finding a job. Plaintiff was officially discharged on July 2, 2010. The County Treasurer contended that plaintiff was discharged for various performance-related reasons.

The County Treasurer moved for summary judgment and the employee cross-moved for partial summary judgment. The court granted summary judgment in favor of the Treasurer in his official capacity as barred by the Eleventh Amendment. The court refused to apply the *Ex Parte Young* exception to sovereign immunity on this claim because plaintiff functioned not only as Deputy Treasurer but also as an attorney for the County Treasurer. Therefore, the court could not allow plaintiff's equitable claim for reinstatement to proceed because it would effectively impose an attorney (plaintiff) on an unwilling client (the County Treasurer).

The court denied summary judgment as to the County Treasurer in his individual capacity and allowed plaintiff's claims to proceed. The court recognized "a substantial and growing division of authority within the federal judiciary" as to whether individual public officials are subject to suit under the FMLA. The court sided with the Fifth and Eighth Circuits that permit FMLA claims against public officials in their individual capacities. Finally, the court denied both parties' summary judgment motion as to the substance of plaintiff's FMLA interference and retaliation claims based on material issues of fact as to the reasons for plaintiff's suspension and discharge. The court found the timeline of events particularly disturbing.

Summarized Elsewhere:

Mason v. Massachusetts Department of Environmental Protection, 774 F. Supp. 2d 349 (D. Mass. 2011)

3. Waiver

Gerrard v. Garda Security, 2011 WL 3511481 (C.D. Ill. Aug. 11, 2011)

Plaintiff alleged defendant violated his FMLA rights following his FMLA leave by: 1) refusing to restore him to his original or equivalent job upon his ability to return to work; 2) demanding he provide it with a return to work note; 3) terminating his wife's health insurance coverage while he was on leave; 4) terminating his employment; and 5) refusing to consider him for rehire or reinstatement. Defendant moved for summary judgment on all of plaintiff's claims.

Plaintiff failed to respond to defendant's arguments against plaintiff's claims, save his claim that he was discharged in violation of the FMLA. As a result, the court found plaintiff had waived those claims. In a footnote, the court, out of an abundance of caution, considered the merits of plaintiff's waived claims, noting each still failed, as follows: 1) plaintiff's "restoration to original job" claim failed as the undisputed facts showed plaintiff was returned to substantially the same position when he returned from his FMLA leave; 2) plaintiff's "return-to-work note" claim failed because he had not identified any employees who took FMLA leave but were not required to produce such note; 3) plaintiff's claim premised upon the mistaken termination of his wife's health insurance benefits failed because the undisputed facts show that the mistake was corrected as soon as it was brought to defendant's attention; and 4) there was no evidence that anyone who made the decision not to re-hire him after his discharge knew of his FMLA leave or refused to hire him because of it.

On plaintiff's remaining claim of wrongful termination, the court held that plaintiff failed to establish a *prima facie* case of retaliation under the *McDonnell Douglas* burden-shifting

framework, as the evidence indicated that defendant's decisionmakers did not know plaintiff had taken FMLA leave at the time they decided to terminate plaintiff's employment pursuant to a reduction in force.

Whiting v. The Johns Hopkins Hospital, 17 WH Cases2d 853 (4th Cir. 2011)

In *Whiting*, a former employee filed an EEOC charge claiming she was discharged by the hospital in violation of the Americans with Disabilities Act. As a result of an EEOC-monitored mediation, her charge was settled. The parties entered into two settlement agreements. One agreement was a mediation settlement agreement approved by the EEOC in which the former employee agreed she would not file a lawsuit against the hospital under various federal anti-discrimination laws. The second agreement contained a broad release, which was not approved by the EEOC, in which she released the hospital from any and all causes of action arising out of her employment. After the agreements were signed, she filed a lawsuit in federal court alleging that the hospital violated the FMLA during her employment. The hospital moved to dismiss the lawsuit, contending that the settlement agreements barred the lawsuit. The district court dismissed the lawsuit, and plaintiff appealed.

Plaintiff argued on appeal that a revised Department of Labor ("DOL") FMLA regulation on the settlement of FMLA claims did not apply to her claims because the regulation was issued after the settlement agreements were signed. This new regulation provides that FMLA claims can be settled without DOL or court approval. If the regulation applied to her settlement agreements, she argued, it should be found to be contrary to the FMLA. The court of appeals rejected both arguments and affirmed the district court.

As to her first argument, the court of appeals found that the DOL's revised regulation was intended to clarify the original regulation and promote the DOL's long-held view that employers and employees are free to enter into settlement agreements without having to obtain DOL or court approval. The court rejected her second argument as well and deferred to the DOL regulation because it promotes the efficient resolution of FMLA claims.

Summarized Elsewhere:

Madry v. Gibraltar Nat'l Corp., 2011 WL 1565807 (E.D. Mich. Apr. 25, 2011)

Riddle v. Citigroup, 2011 WL 6015761 (2d Cir. Dec. 5, 2011)

4. Res Judicata and Collateral Estoppel

Flores v. City of Trenton, et al., 2011 WL 812469 (N.J. Super A.D. Mar. 10, 2011)

Plaintiff worked as a firefighter for the city of Trenton. Plaintiff took FMLA leave on two separate occasions for drug and alcohol addiction treatment. Plaintiff failed drug tests upon returning from both leaves and was discharged after failing the second drug test. Plaintiff initially filed an FMLA claim in federal court, but voluntarily withdrew the claim after court determined there was no basis for an FMLA claim because plaintiff was discharged for unlawful

drug use. Plaintiff then filed suit in state court, alleging state law violations. After these state law claims were dismissed, plaintiff sought to reinstate the FMLA claim in state court. The court denied plaintiff's motion, concluding that *res judicata* prohibited reinstating the FMLA claim because the federal court had disposed of that claim on the merits. The court also found that plaintiff had a full and fair opportunity to present the issues at an administrative hearing, where it was determined that he was discharged because of the second failed drug test. Therefore, he was collaterally estopped from claiming that his discharge violated the FMLA in a subsequent state action.

Jiles v. United Parcel Serv., Inc., 413 Fed. Appx. 173 (11th Cir. 2011)

Finding plaintiff's FMLA claims were barred under the doctrine of *res judicata*, the Eleventh Circuit affirmed the district court's decision granting defendant's motion for judgment on the pleadings and dismissing plaintiff's allegations of interference and retaliation under the FMLA. In an earlier action against defendant, plaintiff alleged that he had been dismissed in April 2005 because of his race. In that same lawsuit, he claimed that he was later reinstated after he contested the dismissal, but that defendant suspended him in December 2006 and subsequently terminated his employment in January 2007 in retaliation for his earlier complaint. Thereafter, plaintiff commenced a second action against defendant, claiming that his January 2007 discharge was the result of defendant's incorrectly calculating his FMLA leave.

In applying the doctrine of *res judicata*, the Eleventh Circuit relied on the fact that plaintiff's FMLA claim arose from the same nucleus of operative facts – challenging the conduct leading to this 2007 termination – that was at issue in his earlier litigation. The court rejected plaintiff's contention that he only discovered that his FMLA leave had been miscalculated while conducting discovery in the first action and found that plaintiff could have asserted his FMLA claims in his first action against defendant. In reaching this conclusion, the court relied on the fact that plaintiff had acknowledged speaking to his manager about the exhaustion of his FMLA leave, but then failed to investigate his FMLA claims in a timely manner.

Karavish v. Ceridian Corp., 2011 WL 3924182 (D. Conn. Sept. 7, 2011)

Plaintiff worked as a sales representative for defendant, earning commissions on closed sales. Defendant recommended that a sales representative have three or four times his sales quota in his "sales pipeline." In 2008, plaintiff's "sales pipeline" was only about one and one half times his sales quota. In December 2010, plaintiff's supervisor expressed concern about plaintiff's substandard performance and indicated that he wanted to develop ways to increase plaintiff's "sales pipeline" and closed sales. After that meeting, plaintiff informed his supervisor that he might need to take leave in the near future because of his wife's pregnancy.

In January 2009, defendant approved plaintiff's FMLA leave. While he was on leave, defendant reassigned a number of plaintiff's accounts to other representatives to keep the sales process moving. Two sales were closed on plaintiff's accounts while he was on leave. Although plaintiff and his colleague had verbally agreed to split the commission from these sales, that agreement was not binding on defendant, which eventually assigned all of the commissions to plaintiff's colleague. Upon returning from leave, plaintiff was placed on a performance improvement plan ("PIP") to address the concerns with his job performance that were addressed

prior to his leave. This PIP was modified to accommodate the time that plaintiff had been away due to his approved FMLA leave. In May 2009, after plaintiff had failed to meet the requirements of his PIP, he was issued a final PIP. In July 2009, even though plaintiff had failed to meet some of the requirements of the “final” PIP, he was issued another “final” PIP because the supervisor who issued the previous final PIP had resigned. In September 2009, plaintiff was discharged for failing to meet the requirements of the third PIP.

Defendant first argued that plaintiff was not eligible for leave under the FMLA because it employed fewer than 50 employees within 75 miles of plaintiff’s workplace. Plaintiff argued that defendant should be estopped from contesting his eligibility under the FMLA. A party may be estopped from pursuing a claim or defense where: (1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely on it; (2) and the other party reasonably relies on it; (3) to his detriment. The court found that defendant’s certification of plaintiff’s FMLA leave was a misrepresentation of fact that defendant had reason to believe plaintiff would rely on. The court then proceeded to analyze whether or not defendant retaliated against plaintiff in order to determine whether plaintiff had relied on the misrepresentation to his detriment. The court’s analysis focused on defendant’s proffered legitimate, non-retaliatory reason for plaintiff’s discharge and whether it was pretext.

Plaintiff identified three actions that he believed were retaliatory: (1) his termination; (2) defendant’s decision to assign plaintiff’s accounts to other salespeople during his leave; and (3) defendant’s decision to assign all commissions on closed sales during his leave to his colleague. With regard to his discharge, the court found that plaintiff’s work performance was, by his own admissions, not meeting defendant’s expectations. Plaintiff was issued three PIPs and failed to meet the requirements each time. Consequently, plaintiff failed to show that defendant’s reasons for terminating him were pretextual.

The court similarly rejected plaintiff’s remaining arguments regarding defendant’s decisions to assign his accounts to others during his leave and paying all commissions to plaintiff’s colleague for the closed sales. Pursuant to its policies, defendant had the discretion to make these decisions and plaintiff admitted as much. Because the court found that defendant had followed its policies, it found no pretext and granted defendant’s motion for summary judgment.

Warwas v. City of Plainfield, 2011 WL 734938, (D.N.J. Feb. 23, 2011)

The court concluded that plaintiff’s claim under the FMLA was barred by issue preclusion. Plaintiff was a former city employee whose employment was terminated for working at another job while receiving paid sick leave from the city. Plaintiff appealed her discharge and the Merit System Board (“MSB”) agreed the punishment was too harsh, but nonetheless determined that plaintiff was guilty of conduct unbecoming a public employee for abusing her sick leave.

The court concluded that plaintiff was foreclosed from pursuing an FMLA interference claim based on the MSB’s previous determination that plaintiff abused her sick leave. In other words, the court found that it would need to make factual findings contrary to those already

made by the MSB in order for plaintiff to prevail on her FMLA claim. For this reason, the court found that the doctrine of issue preclusion barred plaintiff's FMLA claim as a matter of law.

5. Equitable Estoppel as a Bar to Certain Defenses

Chen v. Grant County, D et al., 2011 WL 830108 (E.D. Wash. Mar. 3, 2011)

Plaintiff, a former deputy county prosecutor, alleged that she was terminated in retaliation for exercising her rights under the FMLA. She brought suit against the county, the county's human resources director, and her supervisor, the county prosecutor. After the county prosecutor fired two other deputy county prosecutors while on sick leave, Plaintiff met with the human resources director to explore her options for taking time off because of health concerns. The human resources director advised plaintiff that she could seek leave under the FMLA. A few months later, while plaintiff was on a leave of absence, she was fired by the county prosecutor.

At summary judgment defendants conceded that there were triable issues of fact as to whether they retaliated against Plaintiff and/or interfered with her FMLA rights. However, defendants still argued that summary judgment was appropriate because plaintiff was not an "employee" and therefore not entitled to FMLA protection. Plaintiff agreed that she was not an "employee" as defined by the FMLA, however, she argued that the county was equitably estopped from asserting that defense.

Although plaintiff met the initial threshold requirements of an "employee" under the FMLA, she fell within the "personal staff exception" which excludes individuals "selected by the holder of a public office of a political subdivision to be a member of his or her personal staff." See 29 U.S. § 203(e)(2)(c). Plaintiff's estoppel argument was based on the fact that the human resources director for the county presented plaintiff with FMLA paperwork and informed plaintiff that she would be required to provide a doctor's certification before the county could determine whether or not she was qualified for FMLA leave.

Since the county was a government entity, in addition to meeting the elements of estoppel, plaintiff also had to prove that defendants engaged in affirmative misconduct going beyond mere negligence. In addition, plaintiff was also required to prove that defendants' actions would cause serious injustice and the imposition of estoppel will not unduly harm the public interest. Plaintiff failed to make a sufficient showing that her employer or the human resources director engaged in the requisite affirmative misconduct. The statement made by the human resources director, and her affirmative act of providing plaintiff with an informational packet regarding the FMLA, was nothing more than a mistake. Such conduct can not be considered an affirmative misrepresentation.

In addition, plaintiff failed to provide any evidence that the human resources director played a role in the decision to discharge plaintiff. All of the relevant evidence established that the human resources director lacked the authority to hire and fire county prosecutors. Moreover, the human resources director did not supervise or control the county prosecutor's working conditions and did not determine their method or rate of pay. Accordingly, the court did not consider the human resources director to be an employer as defined by the FMLA.

Wilson v. Rawle & Henderson LLP, 2011 WL 5237345 (E.D. Pa. Nov. 2, 2011)

The employee worked for a law firm with less than 50 employees. She requested and was granted FMLA leave for her serious health condition. Before the end of her leave, however, the employer discharged her without giving a reason. The employee filed suit for violation of the FMLA, acknowledging that the employer did not have the necessary 50 employees within 75 miles, but claiming that she had detrimentally relied on the employer's grant of FMLA leave. The court undertook an extensive analysis of equitable estoppel cases in the Third Circuit and concluded that they applied the doctrine in FMLA cases. It also determined that there was a jury question concerning plaintiff's detrimental reliance on defendant's FMLA eligibility representations, and denied defendant's motion to dismiss, or in the alternative motion for summary judgment.

Summarized Elsewhere:

Harrell v. Jacobs Field Services North America, 2011 WL 3044863 (C.D. Ill. July 25, 2011)

Matthys v. Wabash Nat'l, 799 F. Supp. 2d 891 (N.D. Ind. 2011)

Pantoja v. Monterey Mushrooms, Inc., 2011 WL4737407 (C.D. Ill. Oct. 6, 2011)

Poindexter v. City of Sallisaw, 2011 WL 5330746 (E.D. Okla. Nov. 7, 2011)

Towns v. Northeast Mississippi Electric Power Ass'n, 2011 WL 839759 (N.D. Miss. Mar. 8, 2011)