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

2013 MIDWINTER MEETING REPORT OF 2012 CASES

**Submitted by:
SUBCOMMITTEE ON THE FAMILY AND MEDICAL LEAVE ACT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES		xiii
CHAPTER 1.	HISTORY, STRUCTURE, AND ADMINISTRATION OF THE FMLA	1
I.	OVERVIEW	1
II.	HISTORY OF THE ACT	1
A.	Early Initiatives	1
	1. The Parental and Disability Leave Act of 1985	1
	2. The Parental and Medical Leave Act of 1986	1
	3. The Family and Medical Leave Act of 1987	1
	4. The Parental and Medical Leave Act of 1988	1
	5. The Family and Medical Leave Act of 1989	1
	6. The Family and Medical Leave Act of 1991	1
B.	Enactment of the Family and Medical Leave Act of 1993	1
	1. The 103rd Congress	1
	2. Congressional Findings	1
C.	The 2008 Military Family Leave Amendments (National Defense Authorization Act for Fiscal Year 2008) [New Topic]	1
D.	The 2009 Military Family Leave Amendments (National Defense Authorization Act for Fiscal year 2010) [New Topic]	1
E.	The 2009 Airline Flight Crew Technical Corrections Act [New Topic]	1
III.	PROVISIONS OF THE FMLA	1
A.	General Structure	1
B.	Provisions of Title I	1
C.	Effective Date	1
D.	Transition Issues	1
	1. Effect on Employer Coverage and Employee Eligibility	1
	2. Effect on Leave in Progress on, or Taken Before, the Effective Date	1
IV.	REGULATORY STRUCTURE OF THE FMLA	2
A.	The DOL’s Regulatory Authority	2
B.	Development of the Interim and Final Regulations	2
	1. Chronology of Regulatory Development	2
	a. Notice of Proposed Rulemaking	2
	b. Interim Final Regulations	2
	c. Final Regulations	2
	d. 2009 Regulations [New Topic]	2
	i. Revisions to the 1995 Regulations [New Topic]	2
	ii. “Qualifying Exigency” Leave [New Topic]	2
	iii. Military Caregiver Leave [New Topic]	2
	2. Judicial Deference to the DOL’s Regulations	2
	a. Interim Final Regulations	2
	b. Final Regulations	2

V.	THE ROLE OF THE DOL IN ADMINISTERING AND ENFORCING THE FMLA	2
A.	Administrative Action	2
1.	Initiation of Administrative Complaints	2
2.	DOL Investigation	2
a.	Investigation Authority	2
b.	Subpoena Power	2
3.	Resolution of Complaints	2
4.	Posting Violations	2
a.	Appealing a Penalty Assessment for a Posting Violation	2
b.	Consequences of Not Paying the Penalty Assessed	2
B.	Enforcement Action	2
1.	Actions by Secretary of Labor	3
2.	Actions for Injunctive Relief	3
C.	Wage and Hour Division Opinion Letters	3
VI.	THE COMMISSION ON LEAVE	3
CHAPTER 2.	COVERAGE OF EMPLOYERS	4
I.	OVERVIEW	4
II.	PRIVATE SECTOR EMPLOYERS	4
A.	Basic Coverage Standard	4
B.	Who Is Counted as an Employee	5
1.	Location of Employment	5
2.	Payroll Status	5
3.	Independent Contractors	5
III.	PUBLIC EMPLOYERS	5
A.	Federal Government Subdivisions and Agencies	6
1.	Coverage Under Title I	7
2.	Civil Service Employees	8
3.	Congressional and Judicial Employees	8
B.	State and Local Governments and Agencies	8
IV.	INTEGRATED EMPLOYERS	12
V.	JOINT EMPLOYERS	12
A.	Test	12
B.	Consequences	12
C.	Allocation of Responsibilities	12
VI.	SUCCESSORS IN INTEREST	12
A.	Test	12
B.	Consequences	13
VII.	INDIVIDUALS	13
CHAPTER 3.	ELIGIBILITY OF EMPLOYEES FOR LEAVE	20
I.	OVERVIEW	20
II.	BASIC ELIGIBILITY CRITERIA	20
III.	MEASURING 12 MONTHS OF EMPLOYMENT	23
IV.	MEASURING 1,250 HOURS OF SERVICE DURING THE PREVIOUS 12 MONTHS	23

V.	DETERMINING WHETHER THE EMPLOYER EMPLOYS FIFTY EMPLOYEES WITHIN 75 MILES OF THE EMPLOYEE’S WORKSITE	25
A.	Determining the Number of Employees	26
B.	Measuring the Number of Miles	26
C.	Determining the Employee’s Worksite	26
VI.	INDIVIDUALS WHO ARE DEEMED TO BE ELIGIBLE EMPLOYEES UNDER THE FMLA	26
VII.	EXCEPTION FOR CERTAIN AIRLINE EMPLOYEES [New Topic]	29
CHAPTER 4.	ENTITLEMENT OF EMPLOYEES TO LEAVE	30
I.	OVERVIEW	30
II.	TYPES OF LEAVE	30
A.	Birth and Care of a Newborn Child	30
B.	Adoption or Foster Care Placement of a Child	30
C.	Care for a Covered Family Member With a Serious Health Condition	30
1.	Eligible Family Relationships	30
a.	Spouse	30
b.	Son or Daughter	32
c.	Parent	32
d.	Certification of Family Relationship	33
2.	“To Care For”	33
D.	Inability to Work Because of an Employee’s Own Serious Health Condition	35
E.	Qualifying Exigency Due to a Call to Military Service [New Topic]	37
1.	Covered Military Members [New Topic]	37
2.	Qualifying Exigency [New Topic]	37
a.	Short Notice Deployment [New Topic]	37
b.	Military Events and Related Activities [New Topic]	37
c.	Childcare and School Activities [New Topic]	37
i.	Leave to Arrange for Alternative Childcare [New Topic]	38
ii.	Leave to Provide Childcare on an Urgent Basis [New Topic]	38
iii.	Leave to Enroll in or Transfer to a New School or Daycare Facility [New Topic]	38
iv.	Leave to Attend Meetings with School or Daycare Staff [New Topic]	38
d.	Financial and Legal Arrangements [New Topic]	38
e.	Counseling [New Topic]	38
f.	Rest and Recuperation [New Topic]	38
g.	Post-Deployment Activities [New Topic]	38
h.	Additional Activities [New Topic]	38
3.	Eligible Family Relationships [New Topic]	38
F.	Care for a Covered Servicemember with a Serious Injury or Illness [New Topic]	38
1.	Covered Servicemembers [New Topic]	38
2.	Serious Illness or Injury [New Topic]	38

	3.	Eligible Family Relationships [New Topic]	38
	4.	Relationship to Leave to Care for a Family Member With a Serious Health Condition [New Topic]	38
III.		SERIOUS HEALTH CONDITION	38
	A.	Overview	39
	B.	Inpatient Care	40
	C.	Continuing Treatment.....	40
	1.	Incapacity for More Than Three Consecutive Calendar Days and Continuing Treatment by Health Care Provider	41
	a.	Incapacity for More Than Three Calendar Days	42
	b.	Continuing Treatment	44
	c.	Treatment by Health Care Provider	44
	2.	Pregnancy or Prenatal Care	44
	3.	Chronic Serious Health Condition	45
	4.	Permanent or Long-Term Incapacity	46
	5.	Multiple Treatments	46
	D.	Particular Types of Treatment and Conditions.....	46
	1.	Cosmetic Treatments	46
	2.	Treatment for Substance Abuse.....	46
	3.	“Minor” Illnesses	46
	4.	Mental Illness	47
CHAPTER 5.		LENGTH AND SCHEDULING OF LEAVE	48
	I.	OVERVIEW	48
	II.	LENGTH OF LEAVE	48
	A.	General	48
	B.	Measuring the 12-Month Period	48
	C.	Special Circumstances Limiting the Leave Period.....	50
	1.	Birth, Adoption, and Foster Care.....	50
	2.	Spouses Employed by the Same Employer	50
	D.	Effect of Offer of Alternative Position	50
	E.	Required Use of Leave	50
	F.	Measuring Military Caregiver Leave [New Topic]	51
III.		INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES	51
	A.	Entitlement to Take Intermittent Leaves or Leaves on a Reduced Schedule.....	52
	B.	Eligibility for and Scheduling of Intermittent Leaves and Leaves on a Reduced Schedule	52
	C.	Measuring Use of Intermittent Leaves and Leaves on a Reduced Schedule.....	53
	D.	Transferring an Employee to an Alternative Position to Accommodate Intermittent Leave or Leave on a Reduced Schedule	53
	1.	Standards for Transfer	53
	2.	Equivalent Pay and Benefits.....	53
	3.	Limitations on Transfer	53
	E.	Making Pay Adjustments.....	53
	1.	FLSA-Exempt Employees Paid on a Salary Basis	53

	2.	FLSA-Nonexempt Employees Paid on a Fluctuating Workweek Basis ...	53
	3.	Exception Limited to FMLA Leave	53
IV.		SPECIAL PROVISIONS FOR INSTRUCTIONAL EMPLOYEES OF SCHOOLS	53
	A.	Coverage	53
	B.	Duration of Leaves in Covered Schools.....	53
	C.	Leaves Near the End of an Academic Term	53
CHAPTER 6.		NOTICE AND INFORMATION REQUIREMENTS	54
	I.	OVERVIEW	54
	II.	EMPLOYER’S POSTING AND OTHER GENERAL INFORMATION REQUIREMENTS	54
	A.	Posting Requirements	54
	B.	Other General Written Notice.....	54
	C.	Consequences of Employer Failure to Comply With General Information Requirements	54
III.		NOTICE BY EMPLOYEE OF NEED FOR LEAVE	55
	A.	Timing of the Notice and Leave	55
	1.	Foreseeable Leave	55
	a.	Need for Leave Foreseeable for 30 or More Days	55
	b.	Need for Leave Foreseeable for Less Than 30 Days.....	55
	2.	Unforeseeable Leave	56
	3.	Military Family Leave [New Topic]	59
	B.	Manner of Providing Notice	59
	C.	Content of Notice	64
	D.	Change of Circumstances	69
	E.	Consequences of Employee Failure to Comply With Notice of Need for Leave Requirements.....	70
IV.		EMPLOYER RESPONSE TO EMPLOYEE NOTICE	73
	A.	Notice of Eligibility for FMLA Leave [Renumbered and Amended Heading Title (Formerly IV.C, “Notice of Ineligibility for Leave”)]	73
	B.	Notice of Rights and Responsibilities [Amended Heading Title (Formerly “Individual Notice to Employee Concerning FMLA Leave”)]	74
	C.	Designation of Leave as FMLA Leave [Renumbered Heading (Formerly IV.A.)].....	75
	D.	Consequences of Employer Failure to Comply With Individualized Notice Requirements	76
	1.	Eligibility Notice [Renumbered and Amended Heading Title (Formerly IV.D.3, “Notice of Ineligibility”)]	77
	2.	Rights and Responsibilities Notice [Amended Heading Title (Formerly “Individual Notice”)].....	77
	3.	Designation Notice [Renumbered and Amended Heading Title (Formerly IV.D.1, “Designation”)].....	78
V.		MEDICAL CERTIFICATION AND OTHER VERIFICATION	80
	A.	Initial Certification [Renumbered Heading (Formerly V.B.)]	80

	B.	Content of Medical Certification [Renumbered Heading (Formerly V.A.)]	83
	C.	Second and Third Opinions	87
	D.	Recertification	87
	E.	Fitness-for-Duty Certification	89
	F.	Certification of Continuation of Serious Health Condition	90
	G.	Certification Related to Military Family Leave [New Topic]	90
	1.	Certification of Qualifying Exigency [New Topic].....	90
	2.	Certification for Military Caregiver Leave [New Topic].....	90
	H.	Other Verifications and Notices [Renumbered Heading (Formerly V.G.)]	90
	1.	Documentation of Family Relationships [Renumbered Heading (Formerly V.G.1)].....	90
	2.	Notice of Employee’s Intent to Return to Work [Renumber Heading (Formerly V.G.2)].....	90
	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”)]	90
	1.	Employee [Renumbered Heading (Formerly V.H.1)].....	91
	2.	Employer [Renumbered Heading (Formerly V.H.2)].....	93
VI.		RECORDKEEPING REQUIREMENTS	93
	A.	Basic Recordkeeping Requirements	93
	B.	What Records Must Be Kept	93
	C.	Department of Labor Review of FMLA Records	93
CHAPTER 7.		PAY AND BENEFITS DURING LEAVE	94
	I.	OVERVIEW	94
	II.	PAY DURING LEAVE	94
	A.	Generally	94
	B.	When Substitution of Paid Leave Is Permitted	94
	1.	Generally.....	94
	2.	Types of Leave.....	94
	a.	Paid Vacation and Personal Leave.....	94
	b.	Paid Sick or Medical Leave.....	94
	c.	Paid Family Leave.....	94
	d.	Workers’ Compensation or Temporary Disability Benefits.....	94
	e.	Compensatory Time.....	95
	C.	Limits on the Employer’s Right to Require Substitution of Paid Leave [New Topic]	95
	III.	MAINTENANCE OF BENEFITS DURING LEAVE	95
	A.	Maintenance of Group Health Benefits	95
	1.	Generally.....	95
	2.	What Is a Group Health Plan.....	95
	3.	What Benefits Must Be Provided.....	95
	4.	Payment of Premiums.....	95
	a.	Methods of Payment.....	96

	i.	During Paid Leave	96
	ii.	During Unpaid Leave	96
	b.	Consequences of Failure to Pay	96
5.		When the Obligation to Maintain Benefits Ceases.....	96
	a.	Layoff or Termination of Employment	96
	b.	Employee Notice of Intent Not to Return to Work	96
	c.	Employee’s Failure to Pay Premiums	96
	d.	“Key Employees”	96
	e.	Other Circumstances.....	96
6.		Rules Applicable to Multi-employer Health Plans.....	96
B.		Employer’s Right to Recover Costs of Maintaining Group Health	
		Benefits	96
	1.	When an Employer May Do So.....	96
	2.	How an Employer May Do So	96
C.		Continuation of Non-Health Benefits During Leave.....	96
	1.	Generally	96
	2.	Non-Health Benefits Continued at Employer’s Expense	96
	3.	Non-Health Benefits Continued at Employee’s Expense.....	96
	4.	Specific Non-Health Benefits.....	96
	a.	Pension and Other Retirement Plans	96
	b.	Lodging.....	97
	c.	Holiday Pay	97
	d.	Paid Leave [New Topic].....	97
CHAPTER 8.		RESTORATION RIGHTS	99
I.		OVERVIEW	99
II.		RESTORATION TO THE SAME OR AN EQUIVALENT POSITION ...	100
A.		General	101
B.		Components of an Equivalent Position.....	102
	1.	Equivalent Pay.....	102
	2.	Equivalent Benefits	102
	3.	Equivalent Terms and Conditions of Employment	102
III.		CIRCUMSTANCES AFFECTING RESTORATION RIGHTS	104
A.		Events Unrelated to the Leave.....	104
	1.	Burden of Proof	104
	2.	Layoff	104
	3.	Discharge Due to Performance Issues	105
	4.	Other	110
B.		No-Fault Attendance Policies	113
C.		Employee Actions Related to the Leave	113
	1.	Other Employment	113
	2.	Other Activities During the Leave	114
	3.	Reports by Employee	115
	4.	Compliance With Employer Requests for Fitness-for-Duty Certifications	116
	5.	Fraud.....	116
D.		Timing of Restoration	120

IV.	INABILITY TO RETURN TO WORK WITHIN 12 WEEKS.....	120
V.	SPECIAL CATEGORIES OF EMPLOYEES	122
A.	Employees of Schools	122
B.	Key Employees.....	122
1.	Qualifications to Be Classified as a Key Employee	122
2.	Standard for Denying Restoration	122
3.	Required Notices to Key Employees.....	122
a.	Notice of Qualification	122
b.	Notice of Intent to Deny Restoration.....	122
c.	Employee Opportunity to Request Restoration	122
CHAPTER 9.	INTERRELATIONSHIP WITH OTHER LAWS, EMPLOYER PRACTICES, AND COLLECTIVE BARGAINING AGREEMENTS.....	123
I.	OVERVIEW	123
II.	INTERRELATIONSHIP WITH LAWS	123
A.	General Principles	123
B.	Federal Laws	123
1.	Americans With Disabilities Act.....	123
a.	General Principles.....	123
b.	Covered Employers and Eligible Employees	123
c.	Qualifying Events	123
i.	Serious Health Conditions and Disabilities	123
ii.	Triggering Events for Leave of Absence Rights	123
d.	Nature of Leave and Restoration Rights.....	123
i.	Health Benefits	124
ii.	Restoration.....	124
iii.	Light Duty	124
e.	Medical Inquiries and Records	124
f.	Attendance Policies	124
2.	COBRA	124
3.	Fair Labor Standards Act.....	124
4.	42 U.S.C. § 1983	124
5.	Title VII of the Civil Rights Act.....	124
6.	Uniformed Services Employment and Reemployment Rights Act	125
7.	IRS Rules on Cafeteria Plans.....	125
8.	ERISA [New Topic]	125
9.	Government Contract Prevailing Wage Statutes [New Topic]	125
10.	Railway Labor Act [New Topic].....	125
11.	NLRA and LMRA [New Topic]	125
12.	Genetic Information Nondiscrimination Act of 2008 [New Topic]	125
13.	Social Security Disability Insurance [New Topic]	125
C.	State Laws	125
1.	State Leave Laws.....	125
a.	General Principles.....	125
b.	Effect of Different Scope of Coverage	126
i.	Employer Coverage	126

	ii.	Employee Eligibility.....	126
	c.	Measuring the Leave Period.....	126
	d.	Medical Certifications.....	126
	e.	Notice Requirements.....	126
	f.	Fitness-for-Duty Certification.....	126
	g.	Enforcement.....	126
	h.	Paid Family Leave Laws [New Topic].....	126
	2.	Workers' Compensation Laws.....	126
	a.	General Principles.....	126
	b.	Job Restructuring and Light Duty.....	126
	c.	Requesting Medical Information.....	127
	d.	Recovery of Group Health Benefit Costs.....	127
	3.	Fair Employment Practices Laws.....	127
	4.	Disability Benefit Laws.....	127
	5.	Other State Law Claims [New Topic].....	127
	D.	City Ordinances [New Topic].....	127
III.		INTERRELATIONSHIP WITH EMPLOYER PRACTICES.....	128
	A.	Providing Greater Benefits Than Required by the FMLA.....	128
	B.	Employer Policy Choices.....	129
	1.	Method for Determining the "12-Month Period".....	129
	2.	Employee Notice of Need for Leave.....	130
	3.	Substitution of Paid Leave.....	131
	4.	Reporting Requirements.....	131
	5.	Fitness-for-Duty Certification.....	132
	6.	Substance Abuse.....	132
	7.	Collecting Employee Share of Group Health Premiums.....	133
	8.	Other Benefits.....	133
	9.	Other Employment During FMLA Leave.....	133
	10.	Restoration to an Equivalent Position for Employees of Schools.....	133
IV.		INTERRELATIONSHIP WITH COLLECTIVE BARGAINING	
		AGREEMENTS.....	133
	A.	General Principles.....	133
	B.	Fitness-for-Duty Certification.....	133
 CHAPTER 10. INTERFERENCE, DISCRIMINATION, AND RETALIATION			
		CLAIMS.....	134
I.		OVERVIEW.....	134
II.		TYPES OF CLAIMS.....	134
	A.	Interference With Exercise of Rights.....	136
	1.	<i>Prima Facie</i> Case [New Topic].....	144
	2.	Interference Claims [New Topic].....	153
	B.	Other Claims.....	172
	1.	Discrimination Based on Opposition.....	172
	2.	Discrimination Based on Participation.....	172
III.		ANALYTICAL FRAMEWORKS.....	174
	A.	Substantive Rights Cases.....	174
	1.	General.....	174

	2.	No Greater Rights Cases	175
B.		Proscriptive Rights Cases	179
IV.		APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK	
		179
A.		Direct Evidence.....	179
B.		Application of <i>McDonnell Douglas</i> to FMLA Claims	181
	1.	<i>Prima Facie</i> Case	189
	a.	Exercise of Protected Right	194
	b.	Adverse Employment Action	197
	c.	Causal Connection.....	203
	i.	Temporal Proximity.....	214
	ii.	Statements.....	220
	2.	Articulation of a Legitimate, Nondiscriminatory Reason	220
	3.	Pretext.....	238
	a.	Timing	249
	b.	Statements and Stray Remarks	254
	4.	Comparative Treatment	257
C.		Mixed Motive	258
D.		Pattern or Practice.....	260
CHAPTER 11.		ENFORCEMENT, REMEDIES, AND OTHER LITIGATION	
		ISSUES	261
I.		OVERVIEW	261
II.		ENFORCEMENT ALTERNATIVES.....	261
A.		Civil Actions	261
	1.	Who Can Bring a Civil Action	261
	a.	Secretary	261
	b.	Employees	261
	c.	Class Actions	261
	2.	Possible Defendants.....	262
	3.	Jurisdiction	263
B.		Arbitration	264
	1.	Introduction	264
	2.	Individual or Employer-Promulgated Arbitration Agreements and Plans	
		264
	3.	Arbitration Under a Collective Bargaining Agreement.....	265
III.		REMEDIES	265
A.		Damages.....	265
	1.	Denied or Lost Compensation	267
	2.	Actual Monetary Losses	267
	3.	Interest	267
	4.	Liquidated Damages	267
	a.	Award	268
	b.	Calculation.....	268
	5.	Other Damages	269
B.		Equitable Relief	269
	1.	Equitable Relief Available in Actions by the Secretary	269

	2.	Equitable Relief Available in All Actions.....	269
	a.	Reinstatement	269
	b.	Front Pay	269
	c.	Other Equitable Relief.....	269
C.		Attorneys' Fees	269
D.		Tax Consequences	269
IV.		OTHER LITIGATION ISSUES.....	269
A.		Pleadings.....	269
B.		Right to Jury Trial.....	276
C.		Protections Afforded	276
D.		Defenses	277
	1.	Statute of Limitations	278
	a.	General.....	279
	b.	Willful Violation	279
	2.	Sovereign Immunity	283
	3.	Waiver	288
	4.	Res Judicata and Collateral Estoppel.....	289
	5.	Equitable Estoppel as a Bar to Certain Defenses	289

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u><i>Abdulkaki v. Regent Care Center of San Antonio II Limited Partnership,</i></u> <u>2012 WL 1076206 (W.D. Tex. March 29, 2012)</u>	64, 237
<u><i>Adams v. Auto Rail Logistics, Inc.,</i></u> <u>2012 WL 5439962 (6th Cir. Nov. 8, 2012)</u>	118, 179
<u><i>Adams v. Valega’s Professional Home Cleaning, Inc. et al.,</i></u> <u>2012 WL 5386028 (Nov. 2, 2012 N.D. Ohio)</u>	4, 12
<u><i>Adcock, et al. v. Domtar Industries, Inc.,</i></u> <u>2012 WL 4955209 (W.D.Ark. Oct. 16, 2012)</u>	216
<u><i>Ahmed v. Salvation Army,</i></u> <u>2012 WL 6761596 (D. Md. Dec. 12, 2012)</u>	85
<u><i>Ainsworth v. Loudon Cnty. Sch. Bd.,</i></u> <u>851 F. Supp. 2d 963 (E.D. Va. 2012)</u>	18, 171
<u><i>Alexander v. Trilogy Health Services, Inc., 19 Wage & Hour Cas.2d 1711,</i></u> <u>2012 WL 5268701 (S.D. Ohio Oct. 23, 2012)</u>	55, 62
<u><i>Algie v. NKU,</i></u> <u>456 Fed.Appx. 514 (6th Cir. 2012)</u>	124, 276
<u><i>Allen v. U.S. Postal Service,</i></u> <u>2012 WL 3763618 (W.D. Wash. Aug. 29, 2012)</u>	80, 171
<u><i>Ambs v. Sir Home Improvement,</i></u> <u>2012 WL 1909355 (W.D. Mich. May 25, 2012)</u>	17, 171
<u><i>Amsel v. Texas Water Dev. Board,</i></u> <u>464 F. Appx. 395 (5th Cir. 2012)</u>	212
<u><i>Anderson v. Lockheed Martin Corp.,</i></u> <u>2012 WL 933215 (D. Md. March 16, 2012)</u>	30, 270
<u><i>Anderson v. Roche Carolina, Inc.,</i></u> <u>2012 WL 368710 (D.S.C. Feb. 3, 2012)</u>	155
<u><i>Anderson v. Shade Tree Services, Co.,</i></u> <u>2012 WL 3288120 (E.D. Mo. Aug. 10, 2012)</u>	127

<u><i>Antone v. Nobel Learning Communities, Inc., et al.</i></u> <u>2012 WL 174960 (D.N.J. Jan. 19, 2012)</u>	79
<u><i>Arora v. Dental Health Group, P.A.</i></u> <u>2012 WL 4856944 (S.D. Fla. Aug. 8, 2012)</u>	203, 219
<u><i>Augustus v. AHRC Nassau</i></u> <u>2012 WL 6138484 (E.D. N.Y. Dec. 11, 2012)</u>	196, 257, 258
<u><i>Avent v. Kraft Foods Global, Inc.</i></u> <u>2012 WL 3555378 (E.D. Va. Aug. 16, 2012)</u>	110, 113, 120, 279
<u><i>Ayanna v. Dechert LLP, 19 WH Cases2d 1329 (D. Mass. 2012)</i></u>	171, 255
<u><i>Baggish v. Clear Wireless, LLC</i></u> <u>2012 WL 3538712 (N.D. Fla. Aug. 16, 2012)</u>	42
<u><i>Baker v. Enterprise Leasing Co. of Indianapolis, Inc.</i></u> <u>2012 WL 4358740 (S.D. Ind. Sept. 21, 2012)</u>	106, 254, 269
<u><i>Baldwin v. Board of Trustees of University of Illinois</i></u> <u>2012 WL 3292831 (N.D. Ill. Aug. 8, 2012)</u>	203, 270
<u><i>Ballato v. Comcast Corp.</i></u> <u>676 F.3d 768 WH Cases2d 1843 (8th Cir. 2012)</u>	165
<u><i>Barker v. Professional Educators of Tennessee</i></u> <u>2012 WL 4793544 (M.D. Tenn. Oct. 9, 2012)</u>	168, 276
<u><i>Barlow v. Dan’s Payroll Services, Inc.</i></u> <u>2012 WL 5522652 (D.R.I. Aug. 20, 2012), adopted by 2012 WL 5525494 (Nov. 12, 2012)</u>	102, 107
<u><i>Barnes v. Greensboro Living Ctr.</i></u> <u>2012 WL 2344623 (M.D. N.C. June 20, 2012)</u>	4, 23
<u><i>Bellanger v. H&E Healthcare, L.L.C.</i></u> <u>2012 WL 4325633 (M.D. La. Sept. 20, 2012)</u>	35, 46
<u><i>Bellow v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, et al.</i></u> <u>2012 WL 6697180 (E.D. La. Dec. 21, 2012)</u>	14
<u><i>Benton v. Belk, Inc.</i></u> <u>2012 U.S. Dist. Lexis 156933 (D.S.C. Sept. 20, 2012), adopted, 2012 U.S. Dist. Lexis 155997 (D.S.C. Oct. 31, 2012)</u>	18

<u>Bertrand v. City of Lake Charles,</u> <u>2012 WL 1596706 WH Cases2d 497 (W.D. La May 3, 2012)</u>	165, 219
<u>Blair v. Wilson Trailer Company,</u> <u>2012 WL 2989661 (N.D.Iowa. July 20, 2012)</u>	86, 91
<u>Blosser v. AK Steel Corp.,</u> <u>2012 WL 3112307 (S.D. Ohio Jul 31, 2012)</u>	208, 257
<u>Boggs v. Automotive Operations, L.P.,</u> <u>2012 WL 12926 (E.D. Tex., Jan. 4, 2012)</u>	101, 104
<u>Bommarito v. Vilsack,</u> <u>2012 WL 786232 (E.D. Mo. March 9, 2012)</u>	8
<u>Bone v. G4S Youth Services, LLC,</u> <u>686 F.3d 948 (8th Cir. 2012)</u>	186
<u>Bonzani v. Shinseki,</u> <u>2012 WL 3993426 (E.D. Cal. Sept. 11, 2012)</u>	7, 288
<u>Bowman v. St. Luke’s Ouakertown Hospital,</u> <u>2012 WL 6527402 (E.D. Pa. Dec. 13, 2012)</u>	145
<u>Boyd-Richards v. DeJongh, et al.,</u> <u>2012 WL 13682 (D. Virgin Islands, Jan. 4, 2012)</u>	269
<u>Bradley v. Little Rock Wastewater Util.,</u> <u>2012 WL 174382 (E.D.Ark. Jan. 20, 2012)</u>	153, 194
<u>Branham v. Gannett Satellite Infor. Network, Inc.,</u> <u>2012 WL 1155928 (M.D. Tenn. Apr. 6, 2012)</u>	43, 152, 197
<u>Braziel v. Medtronic, Inc.,</u> <u>2012 WL 4092600 (E.D. Tex. Aug. 22, 2012)</u>	277
<u>Brea v. Heartland Express, Inc.,</u> <u>2012 WL 2898993 (D. Ariz. Aug. 8, 2012)</u>	65
<u>Breidenbach v. Shillington Box Co. et al.,</u> <u>2012 WL 85276 (E.D.Mo. 2012)</u>	37, 262
<u>Bright v. Evonik Cyro, LLC,</u> <u>2012 WL 811221 (E.D. Ark. March 12, 2012)</u>	32, 271
<u>Brooks v. Delaware, Department of Health & Social Services,</u> <u>2012 WL 1134481 (D. Del. March 30, 2012)</u>	283

<u>Brookshire v. Buncombe County, North Carolina, et al.,</u> <u>2012 WL 136899 (W.D.N.C. Jan. 18, 2012)</u>	40, 70
<u>Brown, et. al. v. ATX Group, Inc., et al.,</u> <u>2012 WL 3962620 (N.D. TX. July 16, 2012)</u>	269, 272
<u>Brown v. City of Jacksonville,</u> <u>2012 WL 604218 (E.D. Ark., Feb. 24, 2012)</u>	214, 237
<u>Brown v. Scriptpro, LLC,</u> <u>700 F.3d 1222 WH Cases2d 1675 (10th Cir. 2012)</u>	160
<u>Brushwood v. Wachovia Bank, N.A.,</u> <u>2012 WL 642216 (W.D. Va. Feb. 28, 2012)</u>	68
<u>Burden v. City of Opa Locka,</u> <u>2012 WL 4764592 (S.D. Fla. Oct. 7, 2012)</u>	187
<u>Burnsed v. Pasco Medical Center, LLC,</u> <u>2012 WL 3264901 (M.D. Fla. Aug. 10, 2012)</u>	136, 189
<u>Burton v. Lawhorn, et al.,</u> <u>2012 WL 5308069 (M.D. Ala. Oct. 9, 2012)</u>	129
<u>Bushfield v. Donahoe,</u> <u>2012 WL 6086848 (D. Idaho Dec. 6, 2012)</u>	199
<u>Butler v. Champion,</u> <u>2012 WL 78200 (S.D. Ohio 2012)</u>	109, 144
<u>Byrd v. New Prime, Inc.,</u> <u>2012 WL 651436 (W.D. Mo., Feb. 27, 2012)</u>	170, 238
<u>Byron v. St. Mary’s Medical Center,</u> <u>2012 WL 3966090 WH Cases 2d 1283 (E.D. Mich. 2012)</u>	40, 59
<u>Calero v. Cardone Industries, Inc.,</u> <u>2012 WL 2547356 (E.D. Pa. June 29, 2012)</u>	136, 218
<u>Callaway v. Academy of Flint Charter School,</u> <u>2012 WL 5265728 (E.D. Mich. Oct. 23, 2012)</u>	103, 181
<u>Caloia v. Putnam Investments, LLC,</u> <u>2012 WL 3600345 (Aug. 21, 2012)</u>	144, 189
<u>Carita v. Mon Cheri Bridals, LLC,</u> <u>2012 WL 2401985 (D. N.J., June 25, 2012)</u>	208

<u><i>Carrero-Ojeda v. Autoridad de Energía Eléctrica,</i></u> <u>2012 WL 2434594 (D. P.R., June 27, 2012)</u>	178
<u><i>Carroll v. Ceridian Benefits Services,</i></u> <u>2012 WL 5431007 (M.D. Fla. Nov. 7, 2012)</u>	231, 249
<u><i>Carroll v. Sanderson Farms, Inc.,</i></u> <u>2012 WL 3866886 WH Cases2d 1408 (S.D. Tex. Sep 5, 2012)</u>	200, 243
<u><i>Cashman v. CNA Financial Corp., et al.,</i></u> <u>2012 WL 113667 (E.D. Pa. Jan. 13, 2012)</u>	75, 203
<u><i>Cavaliere v. Advertising Specialty Institute, Inc.,</i></u> <u>853 F. Supp. 2d 472 (E.D. Penn. 2012)</u>	59, 69
<u><i>Cham v. Station Operators, Inc.,</i></u> <u>685 F.3d 87 WH Cases2d 520 (1st Cir. 2012)</u>	125, 187
<u><i>Chappell v. The Bilco Company,</i></u> <u>675 F.3d 1110 WH Cases2d 1641 (8th Cir. 2012)</u>	128, 131, 203
<u><i>Christmas v. Arc of the Piedmont, Inc.,</i></u> <u>2012 WL 2905584 WH Cases2d 970 (W.D. Va. July 16, 2012)</u>	276
<u><i>Cleveland v. Mueller Copper Tube Co., Inc.,</i></u> <u>2012 WL 1192125 (N.D. Miss. Apr. 10, 2012)</u>	227
<u><i>Clinkscale v. St. Therese of New Hope,</i></u> <u>701 F.3d 825 (8th Cir. 2012)</u>	56, 110
<u><i>Coleman v. Maryland Court of Appeals,</i></u> <u>132 S. Ct. 1327 (2012)</u>	11, 285, 284
<u><i>Cook v. Avon Protection Systems, Inc.</i></u> <u>2012 WL 6650638 (W.D. Mich. Dec. 20, 2012)</u>	44, 47, 49, 80
<u><i>Cooper v. New York State Nurses Association,</i></u> <u>847 F.Supp.2d 437 (E.D.N.Y. 2012)</u>	190, 219
<u><i>Copeland v. Mid-Michigan Regional Medical Center,</i></u> <u>2012 WL 511534 Wage & Hour Cases 2d 1611 (E.D. Mich. Feb. 16, 2012)</u>	30, 279
<u><i>Cordero v. AFI Food Service, LLC,</i></u> <u>2012 WL 5989424 (D. N.J. Nov. 29, 2012)</u>	110, 147
<u><i>Corral v. Hersha Hosp. Mgm't, Inc.,</i></u> <u>2012 WL 4442666 (D.N.J. Sept. 24, 2012)</u>	27, 55, 276

<u><i>Cotora v. Lee County,</i></u> <u>2012 WL 2996550 (M.D.Fla. July 23, 2012)</u>	12, 257, 288
<u><i>Cotto v. Municipality of Aibonito,</i></u> <u>2012 WL 1110177 (D.P.R. April 2, 2012)</u>	20
<u><i>Cousins v. Hastings Manufacturing Co., LLC,</i></u> <u>2012 WL 6690398 (W.D. Mich. Dec. 21, 2012)</u>	21, 22
<u><i>Cox-Frietch v. Ohio Bureau of Worker’s Compensation,</i></u> <u>2012 WL 508977 (S.D. Ohio Feb. 15, 2012)</u>	11, 175, 214
<u><i>Cox-Frietch v. Ohio Bureau of Workers’ Compensation,</i></u> <u>2012 WL 6051972 (6th Cir. Dec. 6, 2012)</u>	94, 203
<u><i>Crawford v. JP Morgan Chase & Co.,</i></u> <u>2012 WL 1185983 (S.D. Ohio Apr. 9, 2012)</u>	103, 203
<u><i>Crisses v. Gucci America, Inc.,</i></u> <u>2012 WL 3834634 (S.D. N.Y., Aug. 21, 2012)</u>	172, 188
<u><i>Cullison v. Dauphin County,</i></u> <u>2012 WL 3026784 (M.D. Pa. July 24, 2012)</u>	74, 210
<u><i>Cullison v. Dauphin County, PA,</i></u> <u>2012 WL 3027776 (M.D. Pa. May 18, 2012)</u>	16, 171, 219
<u><i>Cummings v. BNSF Rwy. Co.,</i></u> <u>2012 WL 3059417 (D. Kan. Jul. 26, 2012)</u>	232, 249
<u><i>Davis v. Metro. Pier & Exposition Auth.,</i></u> <u>2012 WL 2576356 (N.D. Ill. July 3, 2012)</u>	275
<u><i>Davis v. Navy Fed.Cred.Union,</i></u> <u>2012 WL 73233 (E.D.Va. 2012)</u>	30, 282
<u><i>Dawson v. Jetty Partners, LLC,</i></u> <u>2012 WL 439672 (D. Md. Feb. 8, 2012)</u>	37
<u><i>De La Cruz v. Children’s Trust of Miami-Dade County,</i></u> <u>843 F.Supp.2d 1273 (S.D. Fla. 2012)</u>	222, 248
<u><i>Dean v. Wackenhut Corp.,</i></u> <u>2012 WL 1577453 (N.D. Ill. May 4, 2012)</u>	55, 80
<u><i>DeGraw v. Exide Technologies,</i></u> <u>462 Fed. Appx. 800 (10th Cir. 2012)</u>	204

<u><i>Delaney v. Simplexgrinnell L.P.</i></u> <u>2012 WL 465177 (N.D.Cal. Feb. 13, 2012)</u>	110
<u><i>Delp v. Rolling Fields, Inc.</i></u> <u>2012 WL 3144050 (W.D. Pa. Aug. 1, 2012)</u>	64, 164, 219
<u><i>Demyanovich v. Cadon Plating & Coatings, LLC</i></u> <u>2012 WL 6025762 (E.D. Mich. Dec. 4, 2012)</u>	26, 122
<u><i>Dennis v. County of Atlantic County</i></u> <u>2012 WL 1059420 (D. N.J. March 28, 2012)</u>	20, 178
<u><i>Denton v. Fairfield Medical Center</i></u> <u>2012 WL 2409224 (S.D. Ohio, June 26, 2012)</u>	273
<u><i>Diehl v Bank of America, N.A.</i></u> <u>470 Fed.Appx. 771 (11th Cir. 2012)</u>	36, 123
<u><i>Dimitrov v. Quest Diagnostic, Inc.</i></u> <u>2012 WL 555767 (Mich. App., Feb. 21, 2012)</u>	55, 194, 248
<u><i>Dominick v. Baton Rouge Clinic, AMC</i></u> <u>2012 WL 414243 (M.D. La. Feb. 7, 2012)</u>	42, 197
<u><i>Donald v. Sybra, Inc.</i></u> <u>667 F.3d 757 WH Cases2d 993 (6th Cir. 2012)</u>	175, 182, 254
<u><i>Donnelly v. Greenburgh Central School District No. 7</i></u> <u>691 F.3d 134 WH Cases2d 865 (2nd Cir. 2012)</u>	23, 181
<u><i>Doolin v. Hinkle Contracting Corp.</i></u> <u>2012 WL 3028510 FEP 1627 (E.D. Ky. July 25, 2012)</u>	28, 122
<u><i>Dorsey v. Jacobson Holman, PLLC</i></u> <u>476 Fed. Appx. 861 (D.C. Cir. Apr. 9, 2012)</u>	156, 237
<u><i>Dove v. Community Education Centers Inc.</i></u> <u>2012 WL 5403508 (E.D. Pa. Nov. 5, 2012)</u>	141, 203
<u><i>Drake v. Walmart Stores, East L.P., Inc.</i></u> <u>2012 WL 2996488 (M.D. Fla. July 23, 2012)</u>	82
<u><i>Dressler v. New York City Department of Education</i></u> <u>2012 WL 1038600 (S.D. N.Y. March 29, 2012)</u>	225, 248
<u><i>Drew v. Quest Diagnostics, Inc.</i></u> <u>2012 WL 2341690 (S.D. Ohio June 20, 2012)</u>	171, 255

<u><i>Dye v Indiana Dept. of Correction,</i></u> <u>2012 WL 1390206 (April 20, 2012)</u>	32
<u><i>Edwards v. Southcrest, L.L.C.,</i></u> <u>2012 WL 826963 (N.D. Ok. March 9, 2012)</u>	219, 250
<u><i>Ellison v. Oaks 422 LLC,</i></u> <u>2012 WL 876723 (E.D. Pa. March 15, 2012)</u>	144, 219
<u><i>Elsayed v. The University of Houston,</i></u> <u>2012 WL 2870699 (S.D. TX, July 11, 2012)</u>	149, 175
<u><i>Emch v. Superior Air-Ground Ambulance Serv. Of Mich., Inc.,</i></u> <u>2012 WL 4090794 (E.D. Mich. Sept. 17, 2012)</u>	244
<u><i>Erdman v. Wachovia,</i></u> <u>2012 WL 728917 (D.S.C. Feb. 16, 2012), adopting report and recommendation,</u> <u>2012 WL 716595 (D.S.C. Mar. 6, 2012)</u>	39, 69, 73
<u><i>Farver v. Coventry Health Ctr.,</i></u> <u>2012 WL 1191849 (M.D. Pa. March 2, 2012)</u>	214, 219, 250
<u><i>Fazio v. NJ Turnpike Authority,</i></u> <u>2012 WL 71749 (D.N.J.)</u>	24, 37
<u><i>Ferguson v. N. Broward Hosp. Dist.,</i></u> <u>478 F. App'x 565 WH Cases2d 1847 (11th Cir. 2012)</u>	21, 171
<u><i>Fields v. Dep't of Public Safety,</i></u> <u>2012 WL 6005775 (M.D. La. Nov. 27, 2012)</u>	12, 263, 264
<u><i>Fields v. Fairfield County Board of Developmental Disabilities,</i></u> <u>2012 WL 6051965 (6th Cir. Dec. 6, 2012)</u>	211
<u><i>Fleck v. Wilmac Corp.,</i></u> <u>2012 WL 1033472 (E.D. Pa. Mar. 27, 2012)</u>	19, 201, 257
<u><i>Folts v. South Lyon Senior Care and Rehab Center, LLC,</i></u> <u>2012 WL 995209 (E.D. Mich. Mar. 23, 2012)</u>	168, 174
<u><i>Franklin v. Pepco Holdings, Inc.,</i></u> <u>2012 WL 2870266 (D.D.C. July 13, 2012)</u>	213
<u><i>Franks v. Indian Rivers Mental Health Center,</i></u> <u>2012 WL 4736444 (N.D. Ala. Sept. 30, 2012)</u>	97
<u><i>Freeman v. Philadelphia Housing Authority,</i></u> <u>2012 WL 3235323 (E.D. Pa. Aug. 8, 2012)</u>	15, 279

<u>Fries v. TRI Marketing Corp., 139 WH Cases2d 186 (D. Minn. 2012)</u>	41, 257
<u>Furry v. Lehigh Valley Health System, 2012 WL 4510760 (E.D. Pa. Sept. 28, 2012)</u>	62, 69, 153
<u>Gambill, et al. v. Duke Energy Corp., 456 Fed. Appx. 578 (6th Cir. 2012)</u>	172, 204, 220
<u>Garcia v. Renaissance Global Logistics, Inc., 2012 WL 680378 (E.D. Mich. March 1, 2012)</u>	267, 268, 269
<u>Gates v. United States Postal Service, 2012 WL 4902851 (6th Cir. Oct. 16, 2012)</u>	70, 189
<u>Gebhart v. Exide Technologies, 2012 WL 1059865 (D. Kan. March 28, 2012)</u>	224
<u>Gerdin v. CEVA Freight, LLC, --- F. Supp.2d ---, 2012 WL 5464966 (S.D. Tex. Nov. 8, 2012)</u>	252, 257
<u>Gerdin v. CEVA Freight, LLC, --- F. Supp.2d --- FEP Cases 883, 2012 WL 5464966 (S.D. Tex. Nov. 8, 2012)</u>	102
<u>Gervais v. Franklin Public Schools, 2012 WL 988026 (D. Mass. Mar. 23, 2012)</u>	257
<u>Ghawanmeh v Islamic Saudi Academy, 857 F.Supp.2d 22 (D. D.C. 2012)</u>	33, 102
<u>Giddens v. UPS Supply Chain Solutions, 2012 WL 2524396 (D. Del. June 28, 2012)</u>	39, 47
<u>Gilbert, et al., v. St. Rita’s Professional Services, LLC, 2012 WL 2344583 (N.D. Ohio June 20, 2012)</u>	172
<u>Gilliard v. Georgia Department of Corrections, 2012 WL 6115913 WH Cases 1798 (11th Cir. Dec. 7, 2012)</u>	48, 76
<u>Goldsmith v. Greater Dayton Reg’l Transit Auth., 2012 WL 2576645 (S.D. Ohio July, 3, 2012)</u>	71
<u>Golez v. Potter, 2012 WL 3134256 (S.D. Cal. July 31, 2012)</u>	64, 71
<u>Gonzalez v. Carestream Health, Inc., 2012 WL 4210293 (W.D.N.Y. Sept. 19, 2012)</u>	253
<u>Goode v. Heritage Hospice, Inc., 2012 WL 1038669 (E.D. Ky. Mar. 26, 2012)</u>	290

<u><i>Grace v. Adtran, Inc.</i></u> <u>470 Fed.Appx. 812 (11th Cir. 2012)</u>	44
<u><i>Graham v. Bluecross Blueshield of Tennessee, Inc.</i></u> <u>2012 WL 529551 (E.D. Tenn. Feb. 17, 2012)</u>	83, 89, 93
<u><i>Grant v. JPMorgan Chase Bank, N.A.</i></u> <u>2012 WL 5966644 (S.D. Tex. Nov. 28, 2012)</u>	53, 159, 258
<u><i>Green v. City of North Little Rock</i></u> <u>2012 Ark.App. 21 (Ark. App. Jan. 4, 2012)</u>	126, 170
<u><i>Green v. U.S. Steel Corp.</i></u> <u>2012 WL 4478967 (N.D. Ala. Sept. 26, 2012)</u>	38
<u><i>Greer v. Cleveland Clinic Health System-East Region</i></u> <u>2012 WL 5359255 (6th Cir. Oct. 31, 2012)</u>	86, 249
<u><i>Griffey, et al., v. Daviess/Dekalb County Regional Jail</i></u> <u>2012 WL 10881 (W.D. Mo., Jan. 3, 2012)</u>	181, 279
<u><i>Grisby v. Wilberforce University</i></u> <u>2012 WL 4957544 (S.D. Ohio Oct. 16, 2012)</u>	52, 87
<u><i>Grosso v. UPMC</i></u> <u>857 F. Supp. 2d 517 (W.D. Pa. 2012)</u>	63, 73
<u><i>Guethlein v. Donahoe</i></u> <u>2012 WL 3028509 (S.D. Ohio July 25, 2012)</u>	90
<u><i>Gunn v. Transamerica Life Ins. Co.</i></u> <u>2012 WL 3596587 (E.D. Ark. Aug. 21, 2012)</u>	256
<u><i>Hair v. Federal Express Corp.</i></u> <u>2012 WL 4846999 (E.D. Wash. Oct. 11, 2012)</u>	109, 283
<u><i>Halilovic v. Southwestern Bell Telephone Co.</i></u> <u>2012 WL 5471223 (E.D. Mo. Nov. 9, 2012)</u>	281
<u><i>Hall v. Ohio Bell Telephone Co.</i></u> <u>2012 WL 3113157 (N.D. Ohio Jul 31, 2012)</u>	47, 185
<u><i>Ham-Jones v. United Airlines, Inc.</i></u> <u>2012 WL 4358004 (E.D. Mo. Sept. 24, 2012)</u>	198
<u><i>Hamedl v. Weiland</i></u> <u>2012 WL 3903499 (E.D. N.Y. Sep 06, 2012)</u>	201

<u><i>Hanczyc v. Valley Distributing and Storage Company,</i></u> <u>2012 WL 3890213 (M.D. Pa. 2012)</u>	170
<u><i>Hanlon v. Missouri Department of Health and Human Services,</i></u> <u>2012 WL 528316 (W.D. Mo. Feb. 17, 2012)</u>	9
<u><i>Harrelson v. Unlimited Development, Inc.,</i></u> <u>2012 WL 3715493 (S.D. Ill. Aug. 27, 2012)</u>	30, 263
<u><i>Harter v. County of Washington,</i></u> <u>2012 WL 1032478 (W.D. Pa. March 27, 2012)</u>	8
<u><i>Hartman v. University of Maryland at Baltimore, 19 WH Cases2d 898 (D. Md. Aug. 14, 2012)</i></u>	247
<u><i>Haybarger v. Lawrence Cnty. Adult Probation & Parole,</i></u> <u>776 F.3d 408 WH Cases2d 1467 (3d Cir. 2012)</u>	11, 13
<u><i>Hayes v. Elementary School District No. 159,</i></u> <u>2012 WL 580713 (N.D. Ill., Feb. 22, 2012)</u>	156, 175
<u><i>Hayes v. Vermeer Manufacturing Co.,</i></u> <u>817 N.W.2d 495 (Iowa App. 2012)</u>	47
<u><i>Hill v Walker,</i></u> <u>2012 WL 1439628 (E.D.Ark. April 26, 2012)</u>	22, 94
<u><i>Hill v. Walker,</i></u> <u>2012 WL 4792738 (E.D. Ark. Oct. 9, 2012)</u>	276
<u><i>Hobbs v. Ketera Technologies, Inc.,</i></u> <u>2012 WL 1081476 (N.D. Tex. March 30, 2012)</u>	237, 240, 254
<u><i>Holder v. Ill. Dep't of Corr.,</i></u> <u>2012 WL 223357 (S.D.Ill. Jan. 25, 2012)</u>	171, 267
<u><i>Holfelder v. Inservco, Inc.,</i></u> <u>2012 WL 3960449 WH Cases 2d 1159 (N.D.Ohio 2012)</u>	73, 244
<u><i>Holland v. Shinseki,</i></u> <u>2012 WL 162333 (N.D. Tex. Jan. 18, 2012)</u>	78, 173
<u><i>Hollstein v. Caleel & Hayden, LLC,</i></u> <u>2012 WL 4050302 FEP Cases 1037 (D. Colo. 2012)</u>	233, 276
<u><i>Hoopingarner v. Corinthian College, Inc.,</i></u> <u>2012 WL 1551274 WH Cases2d 731 (M.D. Fla. Apr. 30, 2012)</u>	57

<u><i>Horen v. Cook,</i></u> <u>2012 WL 5877422 (N.D. Ohio Nov. 20, 2012)</u>	8, 12, 263
<u><i>Horton v. Channel,</i></u> <u>2012 WL 3025154 (E.D. Ark. July 24, 2012)</u>	166
<u><i>Huberty v. Time Warner Enter. Co.,</i></u> <u>2012 WL 406983 (N.D. Ohio Feb. 8, 2012)</u>	43, 132
<u><i>Hughes v. New Jersey,</i></u> <u>2012 WL 761997 (D. N.J. March 7, 2012)</u>	10, 19
<u><i>Hurnevich v. ArvinMeritor, Inc.,</i></u> <u>2012 WL 4475603 (E.D. Mich. Sept. 27, 2012)</u>	101, 104, 193
<u><i>Hyldahl v. Michigan Bell Telephone Co.,</i></u> <u>2012 WL 5359257 (Oct. 31, 2012)</u>	83
<u><i>Ignatenkov v. U.S. Food Service, Inc.,</i></u> <u>2012 WL 2930864 (SD Ohio July 18, 2012)</u>	216, 254
<u><i>Imbornone v. Tchefuncta Urgent Care, Inc.,</i></u> <u>2012 WL 3440136 (E.D. La. Aug. 15, 2012)</u>	26
<u><i>Ion v. Chevron USA, Inc., 19 WH Cases2d 207 (S.D. Miss. Apr. 11, 2012)</i></u>	258
<u><i>Jackson v. Alabama Dep’t of Corrections,</i></u> <u>2012 WL 3104047 (M.D. Ala. June 29, 2012)</u>	264, 286
<u><i>Jacober v. U.S. Dep’t of Agriculture Agency, 19 WH Cases2d 1128 (S.D. Ill. 2012)</i></u>	6, 288
<u><i>Jaszczyszyn v. Advantage Health Physician Network, 19 WH Cases2d 1549 (6th Cir. Nov. 7, 2012)</i></u>	117, 237
<u><i>Jeffers v. Redlands Community College Board of Regents, et al.,</i></u> <u>2012 WL 137412 (W.D. Okla. Jan. 18, 2012)</u>	9
<u><i>Jezek v. Medco Health Solutions,</i></u> <u>2012 WL 209372 (D.N.J. Jan. 24, 2012)</u>	179, 189
<u><i>Johnson v. Dollar General et al.,</i></u> <u>2012 WL 3072997 (N.D. Iowa Jul 30, 2012)</u>	41, 149
<u><i>Johnson v. Roehl Properties of Indiana LLC,</i></u> <u>2012 WL 1144027 (N.D. In. April 4, 2012)</u>	207, 248
<u><i>Jones v. C&D Techs, Inc.,</i></u> <u>684 F.3d 673 (7th Cir. 2012)</u>	35, 46

<u><i>Jordan v. Southeastern Pennsylvania Transit Authority,</i></u> <u>2012 WL 912723 (E.D. Pa. Mar. 19, 2012)</u>	74
<u><i>Juarez v. Verizon Services Corp.,</i></u> <u>--- F.Supp.2d ---, 2012 WL 3764878 (M.D. Fla. 2012)</u>	99, 101, 174, 219
<u><i>Karr v. Dow Agrosciences LLC,</i></u> <u>2012 WL 1365438 (Apr. 19, 2012)</u>	152, 197
<u><i>Katoula v. Detroit Entertainment LLC,</i></u> <u>2012 WL 6088325 (E.D. Mich. Dec. 6, 2012)</u>	271, 279, 283
<u><i>Keeler v. Aramark,</i></u> <u>483 Fed. Appx. 421 (10th Cir. 2012)</u>	90, 97
<u><i>Kelsh v. WCI Steel, Inc.,</i></u> <u>2012 WL 366947 (Ohio Ct. App. Feb. 6, 2012)</u>	78, 116
<u><i>Khami v. Ortho-McNeil-Janssen Pharmaceutical, Inc., et al,</i></u> <u>2012 WL 414812 (E.D. Mich. Feb. 8, 2012)</u>	202
<u><i>Kim v. Goldberg, Weprin, Finkel Goldstein, LLP,</i></u> <u>862 F. Supp. 2d 311 (S.D. N.Y. 2012)</u>	211, 238
<u><i>Kinds v. Ohio Bell Tel. Co.,</i></u> <u>2012 WL 3075304 (N.D. Ohio, Jul. 30, 2012)</u>	92, 152
<u><i>King v. Blanchard Machinery Co.,</i></u> <u>2012 WL 4586177 (D. S.C. Sept. 28, 2012)</u>	60
<u><i>Kirmer v Goodyear Tire & Rubber Co.,</i></u> <u>2012 WL 1424415 (E.D.La. April 24, 2012)</u>	30, 42
<u><i>Koller v. Riley Riper Hollin & Colagreco,</i></u> <u>850 F. Supp. 2d 502 (E.D. Pa. 2012)</u>	171, 216
<u><i>Krumheuer v. GAB Robins North America, Inc.,</i></u> <u>484 Fed. Appx. 1 WH Cases2d 285 (6th Cir. 2012)</u>	231
<u><i>Kurtzman v. University of Cincinnati, et al,</i></u> <u>2012 WL 1805486 (S.D. Ohio May 17, 2012)</u>	19, 166, 249
<u><i>Lamb v. Roll Coater, Inc.,</i></u> <u>2012 WL 266971 (N.D. Ind. Jan. 27, 2012)</u>	194, 222
<u><i>Larmanger v. Kaiser Foundation Health Plan of the Northwest,</i></u> <u>2012 WL 3921777 (D. Or. 2012)</u>	170

<u><i>Latowski v. Northwoods Nursing Center,</i></u> <u>2012 WL 4475542 (E.D. Mich. 2012)</u>	167
<u><i>Law v. Hunt County, Texas, et al.,</i></u> 19 WH Cases2d 482 (N.D. Tex. 2012)	16, 171, 254
<u><i>Laws v. HealthSouth Northern Kentucky Rehabilitation Hospital Limited Partnership,</i></u> <u>2012 WL 6176797 (6th Cir. Dec. 11, 2012)</u>	181, 243
<u><i>Lawson v. Bethesda Lutheran Communities, Inc.,</i></u> <u>2012 WL 5947488 (N.D.Ind. Nov. 27, 2012)</u>	161
<u><i>Lee v. State of Iowa,</i></u> <u>815 N.W. 2d 731 (Iowa 2012)</u>	288
<u><i>Lee v. U.S. Steel Corp.,</i></u> <u>450 Fed.Appx. 834 (11th Cir. 2012)</u>	56, 197
<u><i>Lehman v. Maricopa County Community College,</i></u> <u>2012 WL 3638715 (D. Ariz. Aug. 24, 2012)</u>	122, 128
<u><i>Levings v. Mountain Country Foods, Inc.</i></u> <u>2012 WL 1023342 (W.D. Okla. March 27, 2012)</u>	102
<u><i>Lewandowski v. Columbia College Chicago,</i></u> <u>2012 WL 669060 (N.D. Ill., Feb. 28, 2012)</u>	223, 254
<i>Lewis v. New York City Police Department,</i> 2012 WL 5467551 (E.D.N.Y. Nov. 9, 2012)	281
<u><i>Lichtenstein v. Univ. of Pittsburgh,</i></u> <u>691 F.3d 294 WH Cases2d 776 (3d Cir. 2012)</u>	73, 248
<u><i>Linebarger v. Honda of America Mfg., Inc.,</i></u> <u>2012 WL 1606026 (S.D. Ohio May 8, 2012)</u>	47
<u><i>Linzy v. Sara Lee Corp.,</i></u> 19 WH Cases2d 117 (N.D. Miss. Apr. 10, 2012)	239, 260
<u><i>Lopez v. Four Dee, Inc.,</i></u> 19 WH Cases2d 837 (E.D.N.Y. 2012)	172, 263
<u><i>Lorenz v. Magee Women’s Hosp. of U.P.M.C.,</i></u> <u>2012 WL 1229369 (Apr. 12, 2012)</u>	152, 153
<u><i>Lovland v. Employers Mutual Casualty Company,</i></u> <u>674 F.3d 806 WH Cases.2d 1552 (8th Cir. 2012)</u>	134, 173
<u><i>Lujan v. Exide Technologies,</i></u> <u>2012 WL 380270 (D.Kan. Feb 6, 2012)</u>	223, 248

<u><i>Lushute v. Louisiana, Dept. of Soc. Services,</i></u> <u>479 F. Appx 553 (5th Cir. 2012)</u>	192
<u><i>Macfarlan v. Ivy Hill SNF, LLC,</i></u> <u>675 F.3d 266 (3d Cir. 2012)</u>	120, 278
<u><i>Madry v. Gibraltar Nat'l Corp.</i></u> <u>2012 WL 404968 (E.D. Mich. Feb. 8, 2012)</u>	238, 258
<u><i>Maledy v. City of Enterprise,</i></u> <u>2012 WL 1028176 (M.D. Ala. Mar. 26, 2012)</u>	278
<u><i>Malena v. Victoria's Secret Direct, LLC,</i></u> <u>-- F. Supp. 2d --, 2012 WL 3542192 (S.D.N.Y. Aug. 16, 2012)</u>	19, 259
<u><i>Mann v. Navicor Group, LLC,</i></u> <u>2012 WL 2926275 (6th Cir. 2012)</u>	210
<u><i>Marbrey v. Jewish Hospital,</i></u> <u>2012 WL 3273621 (W.D. Ky. Aug. 10, 2012)</u>	274
<u><i>Marez v. Saint-Gobain Containers, Inc.,</i></u> <u>688 F.3d 958 (8th Cir. 2012)</u>	217, 258, 268
<u><i>Martinez v. Harley-Davidson, Inc.,</i></u> <u>2012 WL 3881615 (E.D. Wis. Sept. 6, 2012)</u>	72, 172
<u><i>McAllister v. Quality Mobile X-Ray Services,</i></u> <u>2012 WL 3042972 (M.D. Tenn. July 25 2012)</u>	127
<u><i>McArdle v. Town of Dracut / Dracut Public Schools,</i></u> <u>2012 WL 6584718 (D. Mass. 2012)</u>	23, 55
<u><i>McClelland v. Communitycare HMO, Inc.,</i></u> <u>19 Wage & Hour Cas.2d (BNA) 1672,</u> <u>2012 WL 5951622 (10th Cir. Nov. 29, 2012)</u>	111
<u><i>McClelland v. CommunityCare HMO, Inc.,</i></u> <u>2012 WL 681455 (N.D. Okla., Feb. 29, 2012)</u>	174, 248
<u><i>McGinnis v. N.Y. Univ. Med. Ctr.,</i></u> <u>2012 WL 251961 (S.D.N.Y. Jan. 25, 2012)</u>	170, 182
<u><i>McGuinness v. East West Inds.,</i></u> <u>857 F. Supp. 2d 259 WH Cases2d 360 (E.D.N.Y. 2012)</u>	195, 237
<u><i>McKenna v. Liberty Mut. Group Inc.,</i></u> <u>468 Fed.Appx. 413 (5th Cir. 2012)</u>	152, 191

<u><i>McLaughlin v. Autozoners, LLC,</i></u> <u>2012 WL 1560157 (S.D. Ind. May 2, 2012)</u>	77, 87
<u><i>Medley v County of Montgomery,</i></u> 2012 WL2913207 (E.D. Pa. July17, 2012)	260, 289
<u><i>Melilli v. Southeastern Penn. Transp. Auth.,</i></u> <u>2012 WL 4473132 (E.D. Pa. Sept. 28, 2012)</u>	151, 249
<u><i>Mena-Valdez v. E.M. T-Shirts Distributors, Inc., et al,</i></u> <u>2012 WL 2389668 (D. P.R., June 26, 2012)</u>	54
<u><i>Mendel v. City of Gibraltar,</i></u> <u>842 F. Supp. 2d 1035 (E.D. Mich. 2012)</u>	26
<u><i>Merritt v. Harrah’s Entertainment, Inc.,</i></u> <u>2012 WL 3061490 (D. Nev. Jul. 26, 2012)</u>	163
<u><i>Mezu v. Morgan State Univ.,</i></u> <u>2012 WL 4041299 WH Cases2d 1147 (4th Cir. Sept. 14, 2012)</u>	277
<u><i>Miedema v. Facility Concession Services, Inc.,</i></u> <u>487 F. App’x 214 (5th Cir. 2012)</u>	81
<u><i>Miles v. Nashville Electric Service,</i></u> <u>2012 WL 3561809 (M.D. Tenn. Aug. 16, 2012)</u>	11, 161
<u><i>Miller v. State of Nebraska Dept. of Economic Development,</i></u> <u>467 Fed.Appx. 536 (8th Cir. 2012)</u>	33, 224
<u><i>Mills v. Temple University,</i></u> 18 WH Cases2d 311 (E.D. Pa. April 3, 2012)	87
<u><i>Mills-Craddock v. Gates, No. 5:10-CV-597-F,</i></u> <u>2012 WL 3594634 (E.D.N.C. Aug. 20, 2012)</u>	6
<u><i>Mondonedo v. Frito-Lay, Inc.</i></u> <u>2012 WL 1632834 (D. Md. May 8, 2012)</u>	66
<u><i>Monroe v. Sisters of Saint Francis Health Services, Inc.,</i></u> <u>2012 WL 2849455 (N.D. Ind., July 11, 2012)</u>	251
<u><i>Moore v. Novo Nordisk, Inc.,</i></u> <u>2012 WL 4472627 (D. S.C. July 26, 2012)</u>	108
<u><i>Moore v. Sprint Communication Co., L.P.,</i></u> <u>2012 WL 4480696 (D. Md. Sept. 27, 2012)</u>	88, 91
<u><i>Moore v. Washington Hospital Center,</i></u> <u>2012 WL 2915165 (D. Md., July 16, 2012)</u>	227, 283

<u><i>Morgan v. Orange County,</i></u> <u>2012 WL 1859666 (11th Cir. May 23, 2012)</u>	235, 249
<u><i>Muhammad-Smith v. Psychiatric Solutions, Inc.,</i></u> <u>2012 WL 2533965 (N.D. Ohio June 29, 2012)</u>	135, 248
<u><i>Murphy v. John Christner Trucking, LLC,</i></u> <u>2012 WL 3428072 (N.D. Okla. Aug. 15, 2012)</u>	49
<u><i>Murphy v. The Ohio State Univ.,</i></u> <u>2012 WL 4499027 (S.D. Ohio Sept. 28, 2012)</u>	113, 238
<u><i>Murphy v. Samson Res. Co.,</i></u> <u>2012 WL 1207210 (N.D. Okla. Apr. 10, 2012)</u>	225
<u><i>Myers v. Kettering Med. Ctr.,</i></u> <u>2012 WL 174807 (S.D. Ohio Jan. 20, 2012)</u>	80, 170
<u><i>Naber v. Dover Healthcare Associates Inc.,</i></u> <u>473 Fed. Appx. 157 (3d Cir. April 2, 2012)</u>	206, 248
<u><i>Nansamba v. North Shore Medical Center,</i></u> <u>2012 WL 1856950 (D. Mass May 21, 2012)</u>	44
<u><i>Neel v. Mid-Atlantic of Fairfield, LLC,</i></u> <u>2012 WL 3264965 (D. Md. Aug. 9, 2012)</u>	266
<u><i>Nelson v. Clermont County Veterans' Service Commission,</i></u> <u>2012 WL 893877 (S.D. Ohio March 15, 2012)</u>	4, 10
<u><i>New-Howard v. Shinsekis,</i></u> <u>2012 WL 2362546 (E.D. Pa., June 21, 2012)</u>	74
<u><i>Nicholl-Kerner v. Lawrenceville Urology,</i></u> <u>2012 WL 1898615 (D. N.J. May 23, 2012)</u>	20, 21, 238, 249, 290
<u><i>Nichols v. City of Mitchell,</i></u> <u>2012 WL 5471159 (Bkrctv. D.S.D. Nov. 9, 2012)</u>	50, 144
<u><i>Nicholson v. Pulte Homes Corp.,</i></u> <u>690 F.3d 819 (7th Cir. Ill. 2012)</u>	65
<u><i>Nilles v. Givaudan Flavors Corp.,</i></u> <u>2012 WL 1537613 WH Cases2d 39 (S.D. Ohio May 1, 2012)</u>	217
<u><i>Nurse v. Windham Community Memorial Hospital,</i></u> <u>2012 WL 6727620 (D. Conn. Dec. 28, 2012)</u>	177, 260
<u><i>O'Connor v. Chicago Bd. Of Educ., 19 WH Cases2d 1875 (N.D. Ill. June 19, 2012)</i></u>	52, 69

<u><i>O’Sullivan v. Siemens Indus., Inc.</i>, 19 WH Cases2d 1121, 2012 WL 4355528 (E.D. Mich. Sept. 24, 2012)</u>	140, 203
<u><i>Oakley v. Verizon Communications Inc.</i>, 2012 WL 335657 (S.D.N.Y. Feb. 1, 2012)</u>	261
<u><i>Olschefski v. Red Lion Area School Dist.</i>, 2012 WL 6003620 (M.D. Pa. Nov. 30, 2012)</u>	19, 284
<u><i>Overfield v. H.B. Macgruder Mem’l Hosp., Inc.</i>, 2012 WL 243341 (N.D. Ohio Jan. 25, 2012)</u>	173, 183
<u><i>Owens v. Connections Community Support Programs, Inc., et al.</i>, 840 F.Supp. 2d 791 (D. Del. 2012)</u>	5, 13
<u><i>Pagan v. Select Specialty Hospital – Youngstown, Inc.</i>, 2012 WL 2296242 (N.D. Ohio June 18, 2012)</u>	63, 195, 214, 238, 248
<u><i>Pagan-Colon v. Walgreens of San Patricio, Inc.</i>, 697 F.3d 1 WH Cases2d 993 (1st Cir. 2012)</u>	242, 268, 269
<u><i>Pagel v. TIN, Inc.</i>, 695 F.3d 622 (7th Cir. 2012)</u>	107, 248
<u><i>Pellegrino v Communications Workers of America</i>, 478 Fed.Appx. 742 (3rd Cir. 2012)</u>	36
<u><i>Penaloza v. Target Corp.</i>, 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)</u>	159, 169, 219, 248, 249
<u><i>Peoples v. Langley/Empire Candle Co.</i>, 2012 WL 171340 (D. Kan. Jan. 20, 2012)</u>	122, 153
<u><i>Pereda v. Brookdale Senior Living Communities, Inc.</i>, 666 F.3d 1269 (11th Cir. 2012)</u>	55, 140
<u><i>Perez-Denison v. Kaiser Found. Health Plan of the Nw.</i>, 2012 WL 1185995 (D. Or. Apr. 9, 2012)</u>	236
<u><i>Peru v. T-Mobile USA, Inc.</i>, 2012 WL 4097279 (D. Col. Sept. 17, 2012)</u>	151, 249
<u><i>Peterson v. Exide Techs.</i>, 477 Fed. Appx. 474 WH Cases2d 19 (10th Cir. Apr. 10, 2012)</u>	226, 248
<u><i>Peterson v. Long Island RR Co.</i>, 2012 WL 2319238 (E.D.N.Y. June 19, 2012)</u>	199, 258

<u><i>Pettus v. Harvey,</i></u> <u>2012 WL 1247111 (Apr. 13, 2012)</u>	152, 190
<u><i>Petty v. United Plating, Inc.,</i></u> <u>2012 WL 2047532 (N.D. Ala.)</u>	289
<u><i>Phillips v. StellarOne Bank,</i></u> <u>2012 WL 3762448 FEP Cases 1473 (W.D. Va. July 16, 2012)</u>	180
<u><i>Poling v. Core Molding Technologies,</i></u> <u>2012 WL 423762 (S.D. Ohio Feb. 9, 2012)</u>	91
<u><i>Poper v. SCA Americas, Inc.,</i></u> <u>2012 WL 3288111 (E.D. Penn. Aug. 13, 2012)</u>	67, 189
<u><i>Porter v. Donahoe,</i></u> <u>484 F. Appx 589 (2d Cir. 2012)</u>	82, 87
<u><i>Powell-Pickett v. AK Steel Corp.,</i></u> <u>--- F. Supp. 2d ---, 2012 WL 5248424 (S.D. Ohio Oct. 24, 2012)</u>	136, 143
<u><i>Powell-Pickett v. AK Steel Corp.,</i></u> <u>--- F. Supp. 2d ---, No. 2010-336, 2012 WL 5248424 (S.D. Ohio Oct. 24, 2012)</u>	51
<u><i>Pozsgai v. Ravenna City Schools Board of Education,</i></u> <u>2012 WL 1110013 (N.D. Ohio March 30, 2012)</u>	25, 29, 197
<u><i>Pulczynski v. Trinity Structural Towers, Inc.,</i></u> <u>691 F.3d 996 WH Cases2d 1017 (8th Cir. 2012)</u>	233, 276, 289
<u><i>Rabanus v. Bank of America, N.A.,</i></u> <u>2012 WL 1656237 (E.D. Mich. May 10, 2012)</u>	220
<u><i>Ramey v. Vacumet Corp.,</i></u> <u>2012 WL 252403 (E.D. Tenn. Jan. 26, 2012)</u>	115, 221
<u><i>Reardon v. Mass. General Hospital,</i></u> <u>2012 WL 948425, 26 A.D. Cases 334 (D. Mass. March 19, 2012)</u>	171, 184
<u><i>Reinhold v. County of York, Pennsylvania,</i></u> <u>2012 WL 4104793 (M.D. Pa., Aug. 31, 2012)</u>	287
<u><i>Reyes v. New York City Health and Hospitals Corp.,</i></u> <u>2012 WL 3764061 (E.D. N.Y. Aug. 29, 2012)</u>	171, 266
<u><i>Reynolds v. Stovall,</i></u> <u>2012 WL 1202026 (W.D. Ark. Apr. 10, 2012)</u>	23, 40, 105, 214
<u><i>Rhodes v. R&L Carriers, 115 FEP Cases 1331 (6th Cir. 2012)</i></u>	270

<u>Richey v. AutoNation, Inc.,</u> <u>149 Cal. Rptr. 3d 280 (Cal. Ct. App. 2012)</u>	125, 237, 264
<u>Ridgeway v. Royal Bank of Scotland Group,</u> <u>2012 WL 1033532 (D.Conn. March 27, 2012)</u>	75
<u>Ritenour v. Tenn. Dep’t of Human Services,</u> <u>2012 WL 3806023 (6th Cir. Aug. 29, 2012)</u>	229
<u>Roark v. LaGrange,</u> <u>2012 WL 1080368 (N.D. Ill. March 30, 2012)</u>	157, 181, 254
<u>Robert v. Bd. of County Comm’rs of Brown County, Kans.,</u> <u>691 F.3d 1211 (10th Cir. 2012)</u>	122, 123
<u>Rodriguez v. Atria Sr. Living Group, Inc.,</u> <u>2012 WL 3457718 (S.D.N.Y. Aug. 13, 2012)</u>	95, 96
<u>Rodriguez v. University of Miami Hosp., 19 Wage & Hour Cas.2d (BNA) 1806,</u> <u>2012 WL 6013170 (11th Cir. Dec. 3, 2012)</u>	104, 111
<u>Roe v. Target Corp.,</u> <u>2012 WL 3257891 (S.D. Ind. Aug. 8, 2012)</u>	229, 254
<u>Rogers v. Or. Trail Elec. Consumers Cooperation, Inc.,</u> <u>2012 WL 1635127 (D. Or. May 12, 2012)</u>	245
<u>Rohrer v. People’s Community Health Centers, Inc.,</u> <u>2012 WL 2450163 (D. Md. June 27, 2012)</u>	241
<u>Roll v. Bowling Green Metalforming, LLC, 18 WH Cases2d 1149 (6th Cir. 2012)</u>	249
<u>Romans v. Michigan Department of Human Services,</u> <u>668 F.3d 826 (6th Cir. 2012)</u>	33, 248
<u>Rounds v. Michigan,</u> <u>2012 WL 2680825 (E.D. Mich. 2012)</u>	37, 285
<u>Roundtree v. Securitas Security Services, Inc.,</u> <u>2012 WL 631848 (D. Conn., Feb. 27, 2012)</u>	84, 89, 93
<u>Rowe v. U.S. Bancorp,</u> <u>2012 WL 733859 (C.D. Ill. March 6, 2012)</u>	145, 170
<u>Rush v. E.I. DuPont DeNemours and Co.,</u> <u>2012 WL 5879776 (S.D. Ohio Nov. 20, 2012)</u>	52, 119
<u>Russo v. Manheim Remarketing, Inc.,</u> <u>2012 WL 2191649 (D. Ariz. June 13, 2012)</u>	275

<u>Ryan v. Pace Suburban Bus Division of the Regional Transportation Authority, 27</u> <u>A.D. Cases 349,</u> <u>2012 WL 5077725 (N.D. Ill. Oct. 18, 2012)</u>	112, 118, 179
<u>Sabourin v. University of Utah,</u> <u>676 F.3d 950 WH Cases2d 1633 (10th Cir. 2012)</u>	175, 248
<u>Sadeh v. Venetian Casino Resort, LLC,</u> <u>2012 WL 3065442 (D. Nev. Jul. 27, 2012)</u>	58, 131
<u>Sams v. Protective Life Corp.,</u> <u>2012 WL 2862604 (N.D. Ala. 2012)</u>	162
<u>Sanders v. Frauenshuh Hospitality Group of KY/IN, LLC,</u> <u>2012 WL 3060934 (W.D. Ken. Jul. 26, 2012)</u>	274
<u>Sanders v. Shinseki,</u> <u>2012 WL 5985469 (D.Kan. Nov. 29, 2012)</u>	263, 288
<u>Santiago v. Butler Company,</u> <u>2012 WL 527699 (D. Conn. Feb. 17, 2012)</u>	63, 64, 73
<u>Santiago v. Connecticut Dep't of Transportation,</u> <u>2012 WL 5398884 (D.Conn. Nov. 5, 2012)</u>	19, 285
<u>Sarker v. Trump Entertainment Resorts, Inc., 19 WH Cases 2d 1363,</u> <u>2012 WL 4609485 (Oct. 1, 2012, D. N.J.)</u>	244
<u>Schrack v. R+L Carriers, Inc.,</u> <u>2012 WL 230965 (S.D. Ohio June 18, 2012)</u>	219, 232
<u>Scott v Grand Prairie Independent School District,</u> <u>2012 WL 1361621 (N.D. Tex. April 19, 2012)</u>	31, 53
<u>Scruggs v. Carrier Corp.,</u> <u>666 F.3d 1269 (7th Cir. 2012)</u>	116, 178
<u>Sechler v. Modular Space Corp.,</u> <u>2012 WL 1355586 (Apr. 18, 2012)</u>	77, 170
<u>Seeger v. Cincinnati Bell Telephone Co.,</u> <u>681 F.3d 274 (6th Cir. 2012)</u>	230
<u>Selshut v. Northwest Home Care, Inc.,</u> <u>2012 WL 1144916 (N.D. Ill. Apr. 5, 2012)</u>	254
<u>Serby v. New York City Dep't of Education,</u> <u>2012 WL 928194 (E.D.N.Y. March 19, 2012)</u>	11, 158, 184

<u>Shelton v. Bridgestone Metalpha, U.S.A, Inc.,</u> <u>2012 WL 1609670 (M.D. Tenn. May 8, 2012)</u>	231
<u>Shirley v. Precision Castparts Corp.,</u> <u>2012 WL 2577535 (S.D. Tex. July 3, 2012)</u>	132
<u>Short v. Hartford Bakery, Inc.,</u> <u>2012 WL 266951 (S.D. Ind. Jan. 30, 2012)</u>	131, 178
<u>Sickels v. Cent. Nine Career Ctr.,</u> <u>2012 WL 266945 (S.D. Ind. Jan. 30, 2012)</u>	110, 221
<u>Silver v. Philadelphia Gas Works,</u> <u>2012 WL 5961756 (E.D.Pa. Nov. 28, 2012)</u>	228
<u>Simonetti v. Broadridge Financial Solutions, Inc.,</u> <u>2012 WL 32931 (D.N.J., Jan. 5, 2012)</u>	105, 254
<u>Singh v. New York State Department of Taxation and Finance,</u> <u>2012 WL 5988547 (W.D. N.Y. Nov. 29, 2012)</u>	19, 160
<u>Sisk v. Picture People, Inc.,</u> <u>669 F.3d 896 (8th Cir. 2012)</u>	214, 237
<u>Sledge v. Comcast ABB Management, LLC,</u> <u>2012 WL 2368319 (N.D. Ill. June 20, 2012)</u>	115, 120
<u>Smith v. City of Marion and Rodney Berry,</u> <u>2012 WL 694314 (D.S.C. Jan. 27, 2012)</u>	9, 263
<u>Smith v. City of Niles,</u> <u>2012 WL 5862088 (6th Cir. Nov. 19, 2012)</u>	69, 89, 171, 247
<u>Smith v. Commonwealth of Virginia Department of Agriculture & Consumer Services,</u> <u>2012 WL 240749 (E.D.Va., June 25, 2012)</u>	273
<u>Smith v. Construction Datafax, Inc.,</u> <u>871 F.Supp.2d 1226 (N.D. Ala. 2012)</u>	60
<u>Smith v. DeTar Hospital LLC,</u> <u>2012 WL 2871673 (S.D. Tex. 2012)</u>	162, 173
<u>Smith v. Hargray Comm. Group,</u> <u>2012 WL 360098 (D.S.C.)</u>	129, 178
<u>Smith v. Southwestern Bell Telephone Co.,</u> <u>456 Fed.Appx. 489 (5th Cir. 2012)</u>	220

<u><i>Smith v. Wynne,</i></u> <u>2012 WL 3553722 (10th Cir., Aug. 20, 2012)</u>	37, 82
<u><i>Souryal v. Torres Advanced Enterprise Solutions, LLC,</i></u> <u>847 F. Supp. 2d 835 (E.D. Va. 2012)</u>	5
<u><i>Sponcey v. Banner-Churchill Hosp.,</i></u> <u>2012 WL 2575345 (N.D. Ill. July 2, 2012)</u>	278
<u><i>Spring v. Sealed Air Corp.,</i></u> <u>483 F. Appx 765 (3d Cir. 2012)</u>	163, 249
<u><i>Spurling v. C&M Fine Pack, Inc.,</i></u> <u>2012 WL 2931206 (N.D. Ind. July 18, 2012)</u>	61, 69, 171
<u><i>Srouder v. Dana Light Axle Manufacturing, LLC,</i></u> <u>2012 WL 1080411 (E.D. Ky. March 30, 2012)</u>	93, 132, 157
<u><i>St. Cyr v. Brandywine Senior Living, LLC,</i></u> <u>2012 WL 2344858 (D. N.J. June 20, 2012)</u>	136, 215
<u><i>St. Hilaire v. Morgan Stanley Smith Barney, LLC, 19 WH Cases2d 597 (D. N.H. 2012)</i></u>	193
<u><i>Staley v. U.S. Bank National Association, 115 FEP Cases 1347 (D. Idaho 2012)</i></u>	150
<u><i>Steers v. Michigan,</i></u> <u>2012 WL 2568169 (E.D. Mich. 2012)</u>	35, 37, 286
<u><i>Steinker v. Enovapremier.,</i></u> <u>2012 WL 3597392 (S.D. Ind., Aug. 20, 2012)</u>	90, 120
<u><i>Stevens v. Board of Trustees,</i></u> <u>2012 WL 3929896 and 2012 WL 3929894 (S.D. Ill. Sept. 9, 2012)</u>	5, 171
<u><i>Stone v. St. Vincent Hosp. and Health Care Ctr.,</i></u> <u>2012 WL 5844748 (S.D. Ind. Nov. 19, 2012)</u>	32, 73, 169
<u><i>Stroud v. Greystar Management Services, LP and JPI Mgm't,</i></u> <u>2012 WL 3136214 (D. Md., Jul 31, 2012)</u>	148, 181
<u><i>Suarez v. City of New York,</i></u> <u>2012 WL 4786383 (S.D.N.Y. Sept. 26, 2012)</u>	192
<u><i>Sullivan-Robinson v. Arkansas Parole Board,</i></u> <u>2012 WL 5354797 (E.D. Ark. Oct. 29, 2012)</u>	80, 137, 143
<u><i>Sutton v. DeRosia,</i></u> <u>2012 WL 4863788 (E.D. Cal. Oct. 12, 2012)</u>	11

<u><i>Talbot v. New Seasons Market, LLC,</i></u> <u>2012 WL 6738271 (D.Or. Dec. 27, 2012)</u>	207
<u><i>Teske v. CCA of Tennessee, LLC,</i></u> <u>2012 WL 3683525 (S.D. Ind., Aug. 24, 2012)</u>	180
<u><i>Tetreault v. Advanced Federal Services Corp.,</i></u> <u>2012 WL 4479977 (E.D. Va. Sept. 28, 2012)</u>	236
<u><i>Teufel v. Sharpshooter Spectrum Venture, LLC,</i></u> <u>2012 WL 161820 (D. Colo. Jan. 19, 2012)</u>	25
<u><i>Thom v. Am. Standard, Inc.,</i></u> <u>666 F.3d 968 WH Cases2d 1132 (6th Cir. 2012)</u>	48, 78, 268
<u><i>Thomas v. Bala Nursing & Retirement Cent.,</i></u> <u>2012 WL 2581057 (E.D. Pa. July 3, 2012)</u>	67
<u><i>Thomsen v. Stantec,</i></u> <u>2012 WL 1863986 (2d Cir. May 23, 2012)</u>	171, 235, 249
<u><i>Tomici v. New York City Dept. of Education,</i></u> <u>2012 WL 6608510 (E.D.N.Y. 2012)</u>	138, 141, 237
<u><i>Towns v. Northeast Mississippi Electric Power Assn.,</i></u> <u>2012 WL 2138255 (5th Cir. June 13, 2012)</u>	69, 73
<u><i>Townsend v. St. John's Hosp.,</i></u> <u>2012 WL 4434713 (C.D. Ill. Sept. 24, 2012)</u>	122, 146
<u><i>Turevsky v. FixtureOne Corp.,</i></u> <u>2012 WL 5199368 (E.D. Pa., Oct. 19, 2012)</u>	171, 234
<u><i>Turner v. City of Paris, Kentucky,</i></u> <u>2012 WL 6706164 (E.D. Ky. Dec. 26, 2012)</u>	215
<u><i>Turner v. Florida Prepaid College Board,</i></u> <u>2012 WL 4208923 (N.D. Fla. Sept. 20, 2012)</u>	110, 147, 276
<u><i>Turner v. McKesson Corp.,</i></u> <u>2012 WL 3542240 (M.D. Ala. Aug. 10, 2012)</u>	102
<u><i>Turner v. Parker-Hannifin Corp.</i></u> <u>2012 WL 1229125 (W.D. Pa. Apr. 12, 2012)</u>	114, 120
<u><i>Upchurch v. Mount Carmel Health System,</i></u> <u>2012 WL 3811802 (S.D. Ohio Sep 04, 2012)</u>	122, 280

<u><i>Valdez v. McGill and Mueller Supply Co.</i></u> <u>462 Fed. Appx. 814 (10th Cir. 2012)</u>	155
<u><i>Valentine v. Cal. Emp’t Dev. Dep’t, et al.</i></u> <u>2012 WL 386682 (C.D. Cal. Feb. 6, 2012)</u>	283
<u><i>Valentino v. Wickliffe City School District Board of Education, 19 WH Cases2d 802</i></u> <u>(N.D. Ohio 2012)</u>	25, 129, 263
<u><i>Varise v. H & E Healthcare, L.L.C.</i></u> <u>2012 WL 5997202 (M.D. La. Nov. 30, 2012)</u>	113, 171, 240, 260
<u><i>Verges v. Honda Manufacturing of Alabama, LLC,</i></u> <u>2012 WL 3260367 (N.D. Ala. Aug. 8, 2012)</u>	59, 130, 219, 254
<u><i>Villalobos v. Vilsack,</i></u> <u>2012 WL 4674056 (N.D. Cal. Oct. 1, 2012)</u>	282
<u><i>Villard v. Whitemarsh Continuing Cate Retirement CMTY.,</i></u> <u>2012 WL 5652767 (E.D. Pa. Dec. 17, 2012)</u>	192, 237
<u><i>Wai v. Federal Express Corp., 18 WH Cases2d 1451 (11th Cir. 2012)</i></u>	69, 265
<u><i>Walker v. Trinity Industries,</i></u> <u>2012 WL 1858935 (E.D. Mo. May 22, 2012)</u>	51, 174
<u><i>Wallace v. Rite Aid Corp.,</i></u> <u>2012 WL 366896 WH Cases2d 1518 (D. Md. Feb. 1, 2012)</u>	89
<u><i>Wanamaker v. Westport Bd. of Educ., et al., 19 WH Cases 2d 1242 (D. Conn. 2012)</i></u>	100
<u><i>Warwas v. City of Plainfield,</i></u> <u>2012 WL 3024423 (3rd Cir. July 25, 2012)</u>	113
<u><i>Washburn v. Gymboree Retail Stores, Inc., et al.,</i></u> <u>2012 WL 3818540 (W.D. Wash., Sept. 4, 2012)</u>	76, 99
<u><i>Washburn v. Gymboree Retail Stores, Inc., 19 WH Cases2d 1634 (W.D. Wash. Sept.</i></u> <u>4, 2012)</u>	101, 138, 142
<u><i>Weade v. School Board of Hillsborough County, Florida,</i></u> <u>2012 WL 2226445 (M.D. Fla June 15, 2012)</u>	232
<u><i>Wegelin v. Reading Hospital and Medical Center,</i></u> <u>2012 WL 5962444 (E.D.Pa. Nov. 29, 2012)</u>	34, 171
<u><i>Wehrley v. American Family Mutual Ins. Co.,</i></u> <u>2012 WL 415421 (D. Colo. Feb. 9, 2012)</u>	173, 205

<u><i>Weidema v State Department of Transportation,</i></u> <u>2012 WL 2873942 (Minn. Ct. App. July 16, 2012)</u>	45, 171, 173
<u><i>Weiler v. Draper Chevrolet Co.,</i></u> 19 WH Cases2d 1728, <u>2012 WL 3758732 (E.D. Mich. Aug. 29, 2012)</u>	152, 272
<u><i>Wells v. Cincinnati Children’s Hosp. Med. Ctr.,</i></u> <u>860 F. Supp. 2d 469 (S.D. Ohio)</u>	148, 219
<u><i>Wells v. West Georgia Technical College,</i></u> <u>2012 WL 3150819 (N.D. Ga. Aug. 2, 2012)</u>	286
<u><i>Whitaker v. Nash County,</i></u> <u>2012 WL 3840375 (E.D. N.C. Sep 5, 2012) aff’d, <i>Whitaker v. Nash County,</i></u> --- <u>Fed.Appx. ----, 2013 WL 136009 (4th Cir. Jan. 11, 2013)</u>	89
<u><i>White v. Telcom Credit Union,</i></u> <u>874 F. Supp.2d 690 (E.D. Mich. 2012)</u>	69, 179, 209, 249
<u><i>Wilder v. Talbot County,</i></u> <u>2012 WL 1901335 (D. Md. May 23, 2012)</u>	121, 238, 249
<u><i>Wiley v. AS America, Inc.,</i></u> <u>2012 WL 1681817 (M.D. Tenn. May 14, 2012)</u>	167
<u><i>Wilkinson v. Greater Dayton Reg’l Transit Auth.,</i></u> <u>2012 WL 5879782 (S.D. Ohio Nov. 21, 2012)</u>	12, 19, 263
<u><i>Williams v. Crown Liquors of Broward, Inc.,</i></u> <u>851 F.Supp.2d 1332 (S.D. Fla. 2012)</u>	54, 98, 205, 212, 237, 248
<u><i>Williams v. New York City Health & Hospitals,</i></u> <u>2012 WL 5506128 (S.D.N.Y. Nov. 13, 2012)</u>	50, 173
<u><i>Williams v. United States Steel Corporation,</i></u> <u>2012 WL 3233736 (N.D. Ind. Aug. 6, 2012)</u>	125, 164
<u><i>Willis v. Legal Aid Defender Ass’n, Inc. and Deierdre Weir,</i></u> <u>2012 WL 246293 (E.D. Mich. Jan. 26, 2012)</u>	87, 91
<u><i>Wilson v. Sharp Mfg. Co. of America,</i></u> <u>2012 WL 489203 (W.D. Tenn. Jan. 27, 2012)</u>	46, 63, 69
<u><i>Wilson v. Virgin Islands Water & Power Auth.,</i></u> <u>2012 WL 745613 (3d Cir. March 8, 2012)</u>	110, 152
<u><i>Winterhalter v. Dykhuis Farms, Inc.,</i></u> 19 WH Cases2d 686 (6th Cir. 2012).....	171, 186

<u>Wirey v. Richland Community College,</u> <u>2012 WL 6681214 (C.D. Ill., Dec. 21, 2012)</u>	59, 152, 219
<u>Womack v. Brown-Forman Corp.,</u> <u>2012 WL 4450892 (E.D. Tenn. Sept. 25, 2012)</u>	139, 189
<u>Worst v. Glynn County School District,</u> <u>2012 WL 1068135 (S.D. Ga. March 29, 2012)</u>	203, 251, 257
<u>Wright v. City of Topeka, Kansas,</u> <u>2012 WL 3600167 (D.Kan. August 21, 2012)</u>	246, 258
<u>Wright v. Sandestin Investments, LLC,</u> <u>2012 WL 6194872 (N.D. Fla. Dec. 12, 2012)</u>	12, 219
<u>Wright v. Stark Truss Co., Inc.,</u> <u>2012 WL 3039092 (D.S.C. July 24, 2012)</u>	66, 249, 256
<u>Zahler v. Empire Merchs., LLC,</u> <u>2012 WL 273698 (E.D. N.Y. Jan. 31, 2012)</u>	154, 173

U.S. CONSTITUTION

Eleventh Amendment	10, 176, 264, 273
Fourteenth Amendment	285, 286

FMLA STATUTORY REFERENCES

29 U.S.C. § 2611(2)(B)(1).....	7
29 U.S.C. § 2612(a)(1)	273, 50
29 U.S.C. § 2612(b).....	50
29 U.S.C. § 2613(a).....	82
29 U.S.C. § 2614(a)(3)(B).....	113, 118
29 U.S.C. § 2615(a)(1)	134
29 U.S.C. § 2615(a)(2)	134
29 U.S.C. § 2617(c)(2)	281

29 U.S.C. § 2652	130
------------------------	-----

FMLA REGULATION REFERENCES

29 C.F.R. § 825.104(d)	6, 18
29 C.F.R. § 825.107(b)	12
29 C.F.R. § 825.111	21, 22
29 C.F.R. § 825.113	39
29 C.F.R. § 825.220(e)	277
29 C.F.R. § 825.300	280
29 C.F.R. § 825.300(b)(1)	78
29 C.F.R. § 825.300(d)(1)	76
29 C.F.R. § 825.300(d)(5)-(6)	80
29 C.F.R. § 825.305(c)	82, 86
29 C.F.R. § 825.308(c)	87
29 C.F.R. § 825.800	21

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(1)	6
Rule 12(b)(6)	10, 127, 142, 274, 166
Rule 23(a)	262
Rule 23(b)(1)	262
Rule 23(b)(3)	262
Rule 50	242
Rule 59(e)	242

CHAPTER 1. HISTORY, STRUCTURE, AND ADMINISTRATION OF THE FMLA

I. OVERVIEW

II. HISTORY OF THE ACT

A. Early Initiatives

1. The Parental and Disability Leave Act of 1985
2. The Parental and Medical Leave Act of 1986
3. The Family and Medical Leave Act of 1987
4. The Parental and Medical Leave Act of 1988
5. The Family and Medical Leave Act of 1989
6. The Family and Medical Leave Act of 1991

B. Enactment of the Family and Medical Leave Act of 1993

1. The 103rd Congress
2. Congressional Findings

C. The 2008 Military Family Leave Amendments (National Defense Authorization Act for Fiscal Year 2008) [New Topic]

D. The 2009 Military Family Leave Amendments (National Defense Authorization Act for Fiscal year 2010) [New Topic]

E. The 2009 Airline Flight Crew Technical Corrections Act [New Topic]

III. PROVISIONS OF THE FMLA

A. General Structure

B. Provisions of Title I

C. Effective Date

D. Transition Issues

1. Effect on Employer Coverage and Employee Eligibility
2. Effect on Leave in Progress on, or Taken Before, the Effective Date

IV. REGULATORY STRUCTURE OF THE FMLA

- A.** The DOL’s Regulatory Authority
- B.** Development of the Interim and Final Regulations

- 1. Chronology of Regulatory Development
 - a. Notice of Proposed Rulemaking
 - b. Interim Final Regulations
 - c. Final Regulations
 - d. 2009 Regulations [New Topic]
 - i. Revisions to the 1995 Regulations [New Topic]
 - ii. “Qualifying Exigency” Leave [New Topic]
 - iii. Military Caregiver Leave [New Topic]
- 2. Judicial Deference to the DOL’s Regulations
 - a. Interim Final Regulations
 - b. Final Regulations

V. THE ROLE OF THE DOL IN ADMINISTERING AND ENFORCING THE FMLA

- A.** Administrative Action
 - 1. Initiation of Administrative Complaints
 - 2. DOL Investigation
 - a. Investigation Authority
 - b. Subpoena Power
 - 3. Resolution of Complaints
 - 4. Posting Violations
 - a. Appealing a Penalty Assessment for a Posting Violation
 - b. Consequences of Not Paying the Penalty Assessed
- B.** Enforcement Action

1. Actions by Secretary of Labor
2. Actions for Injunctive Relief

C. Wage and Hour Division Opinion Letters

VI. THE COMMISSION ON LEAVE

CHAPTER 2. COVERAGE OF EMPLOYERS

I. OVERVIEW

Summarized Elsewhere:

Nelson v. Clermont County Veterans' Service Commission, 2012 WL 893877 (S.D. Ohio March 15, 2012)

II. PRIVATE SECTOR EMPLOYERS

A. Basic Coverage Standard

Barnes v. Greensboro Living Ctr., 2012 WL 2344623 (M.D. N.C. June 20, 2012)

The case came before the district court on the employee's Application for Leave to Proceed *In Forma Pauperis*. In denying the Application, the district court concluded that the employee failed to state a claim upon which relief could be granted under the FMLA. First, the Complaint failed to plead facts indicating the employer was covered under the FMLA. More importantly, the employee worked for the employer for less than 12 months at the time he requested leave as alleged in the employee's Complaint. Therefore, the district court held that the employee was not an "eligible employee" under the FMLA and could not proceed with an FMLA claim on the facts plead.

Adams v. Valega's Professional Home Cleaning, Inc. et al., 2012 WL 5386028 (Nov. 2, 2012 N.D. Ohio)

Plaintiff was hired by a Servpro, a home cleaning company, in August 2009. Servpro had a total of fifteen employees. Servpro utilized the services of two professional employer organizations ("PEOs"). Plaintiff alleged that Servpro controlled her day-to-day duties, but that she was paid by one of the PEOs. In August 2010, plaintiff's husband was diagnosed with cancer. Plaintiff requested and was granted FMLA leave on October 6, 2010. A week later, she was fired for tardiness, disrespect, insubordination, and inappropriate conduct. She sued Servpro, its owner, and the PEOs for, *inter alia*, allegedly violating her rights under the FMLA. Defendants filed a motion for summary judgment arguing that they were not covered by the FMLA.

In granting defendants' motion for summary judgment, the court found that Servpro was plaintiff's employer and that it had only fifteen employees. As such, Servpro was not an employer under the FMLA and, therefore, plaintiff was not an "eligible employee" under the FMLA. As to the PEOs, the court noted that an entity that merely provides human resources services is not a joint employer under the FMLA. It concluded that the PEOs merely performed administrative functions for Servpro and there was no evidence that they had the right to directly hire or fire, or direct or control, Servpro's employees, or benefit from the work Servpro employees performed. Accordingly, the court held that plaintiff could not sue for interference or retaliation under the FMLA.

Souryal v. Torres Advanced Enterprise Solutions, LLC, 847 F. Supp. 2d 835 (E.D. Va. 2012)

Plaintiff alleged that her former employer violated the FMLA by not holding open her position and by terminating her employment. Defendant, a consulting firm headquartered in Virginia, had a contract with the U.S. Department of State to provide administrative support and other services at the U.S. Embassy in Baghdad, Iraq. Plaintiff worked for the company at the Embassy in Baghdad. In May 2009, plaintiff was diagnosed with bronchitis and in June 2009, she was still ill and sought a medical evacuation from Baghdad. She was evacuated to Egypt, where she continued treatment. In late June, plaintiff was discharged from her doctor's care and asked to return to her job in Baghdad. The company responded that no position was available in Baghdad and plaintiff returned to the United States in July 2009.

Plaintiff sued alleging that the FMLA entitled her to take medical leave and that the company's failure to restore her to her prior position violated the FMLA. The company moved to dismiss on the grounds that the FMLA did not apply extraterritorially to cover employees working outside of the United States. In considering whether the FMLA applied to plaintiff, the court first considered whether it was necessary to engage in an analysis of the extraterritorial application of the FMLA. Citing Supreme Court case law under the Fair Labor Standards Act and Title VII of the Civil Rights Act of 1964, the court concluded that the relevant worksite was the location where the plaintiff worked and not the location where the company made the decision to terminate her employment. Concluding that embassies in foreign countries are not U.S. territories that would be covered by the FMLA, the court then considered whether the FMLA applied extraterritorially to foreign worksites of U.S. employers and concluded that it does not. While Congress could have made the FMLA apply extraterritorially to American employees working abroad for U.S. employers, the FMLA is silent on that point. The court concluded that silence meant Congress chose not to have the FMLA apply extraterritorially. On this basis, the court granted the company's motion to dismiss with prejudice.

B. Who Is Counted as an Employee

1. Location of Employment
2. Payroll Status
3. Independent Contractors

Summarized Elsewhere:

Owens v. Connections Community Support Programs, Inc., et al., 840 F.Supp. 2d 791 (D. Del. 2012)

III. PUBLIC EMPLOYERS

Stevens v. Board of Trustees, 2012 WL 3929896 and 2012 WL 3929894 (S.D. Ill. Sept. 9, 2012)

Both opinions denied defense motions—first, a motion to dismiss, and second, a motion for summary judgment. Plaintiff worked for a public university as a specialized research director, and he suffered from a serious spinal condition. Plaintiff repeatedly requested reasonable accommodations, an assistant to help accomplish physical tasks required by the job, and time off to attend to his medical condition. Plaintiff apparently had tenuous relationships with the other employees, including his own supervisor. The supervisor delegated plaintiff’s annual review to one of plaintiff’s peers. Plaintiff received a generally positive job performance review from the peer; however, the peer was candid in his opinion that plaintiff’s “extensive health problems” often required him to direct an assistant or other staff member to accomplish a task. As a result, the peer rated some areas of plaintiff’s performance as “marginal.”

Plaintiff alleged that his department heads and supervisors (who he named as individual defendants) met to discuss his health problems, his request for accommodations, and his FMLA needs, then gave him a termination notice, explaining his termination was “because of circumstances noted in the [performance] review.” Plaintiff resigned and filed a retaliation claim under the FMLA. The individually named defendants moved to dismiss, arguing they could not be individually liable under the FMLA. The court denied the motion, ruling that the individual defendants could be held liable as an “employer” under the FMLA because “[a]s under the FLSA, individuals such as corporate officers ‘acting in the interest of an employer’ are individually liable for any violations of the requirements of FMLA.” 29 C.F.R. § 825.104(d). The court later denied the employer’s motion for summary judgment, finding a factual dispute on the causation element of plaintiff’s claim—i.e., whether he was given the termination notice because of his FMLA use.

A. Federal Government Subdivisions and Agencies

Mills-Craddock v. Gates, No. 5:10-CV-597-F, 2012 WL 3594634 (E.D.N.C. Aug. 20, 2012)

The employee was employed by the federal government for a period of over twelve months and was therefore covered by Title II of the FMLA. Because Title II of the FMLA does not provide for a private right of action, the court dismissed the employee’s FMLA claim for lack of subject matter jurisdiction pursuant to Fed R. Civ. P. 12(b)(1).

Jacober v. U.S. Dep’t of Agriculture Agency, 19 WH Cases2d 1128 (S.D. Ill. 2012)

Plaintiff was employed by the USDA as a loan specialist with the Agency’s Rural Development program at its service center in Edwardsville, Illinois. In early to mid-2007, plaintiff was the subject of a loan fraud investigation involving an outside real estate agent and contractor. In August 2007, plaintiff submitted an informal EEO complaint, and in October 2007 submitted a formal EEOC complaint with the USDA, in which she alleged that her immediate supervisor subjected her to sexual harassment and retaliation. In November 2007, the USDA’s State Director concluded, based on the results of the fraud investigation, that plaintiff should be suspended for five days. Following the EEOC’s dismissal of her charge, plaintiff filed a lawsuit against both the USDA and her immediate supervisor alleging, among other things, violations of the FMLA. In response to motions to dismiss and a motion for summary judgment filed by defendants, plaintiff conceded that prior to filing her lawsuit she did not make any complaint with the Agency or otherwise give notice of her FMLA claim prior to filing suit, and further

asked that the motions to dismiss be denied only as to her retaliation claim. However, plaintiff did assert in her response to the summary judgment motion that she could establish a *prima facie* case of interference under the FMLA.

The district court granted the defendants' motion to dismiss plaintiff's FMLA interference claim because, as a federal employee, she was required to administratively exhaust the claim before filing suit and admitted that she had not done so. However, plaintiff further claimed that she also had a viable FMLA retaliation claim, asserting that she had placed the Agency on notice of a serious health condition (a back injury) and instead of affording her "episodic leave," harassed her until she was forced to resign. The district court rejected this claim as well, concluding *sua sponte* that plaintiff, as an employee of the USDA, was statutorily ineligible to bring a private right of action under Title I of the FMLA. Citing *Weesner v. Glickman*, 59 F. Supp. 2d 783 (N.D. Ind. 1999), the court concluded that because the head of the USDA was appointed by the President of the United States, plaintiff was an "employee" within the definition of 5 U.S.C. § 2105 and thus was precluded from bringing a private right of action under Title I of the FMLA, as set forth in 29 U.S.C. § 2611(2)(B)(1), which precludes such claims against federal agencies absent an express waiver of immunity.

Bonzani v. Shinseki, 2012 WL 3993426 (E.D. Cal. Sept. 11, 2012)

Plaintiff, a former anesthesiologist at the Sacramento VA Medical Center, took four weeks off work to recuperate from knee surgery. He alleged that when he returned to work, his supervisor yelled at him, saying that his absence caused working conditions to deteriorate. He also alleges that his supervisor required him to work extra on-call shifts, failed to return his emails and calls, and would not agree to meet with him. Plaintiff further alleged that he was excluded from the interview and hiring process for an open Staff Anesthesiologist position, and that in January 2010 he was notified in writing that his contract, set to expire in March 2010, would not be renewed. When he questioned his supervisor about the decision, he was allegedly told that it was because he took too long to recuperate from his knee surgery.

Plaintiff files suit and defendants moved to dismiss plaintiff's FMLA claim against defendant the supervisor, arguing that he is not a proper defendant. Defendants contended that because the supervisor was a public employee, he was not an employer subject to individual liability under the FMLA. Moreover, any claim based on action taken in the supervisor's official capacity is equivalent to a claim against the Secretary of Veteran's Affairs. After examining the approach in other circuits, the court concluded that, because the FLSA provides for individual liability to public employees, so too should the FMLA. Therefore, the supervisor could be sued in his individual capacity as a public employee. Further, the court rejected defendants' argument that the supervisor was acting in his official capacity. The court determined that it was a question of fact, not law, whether or not the supervisor's actions were undertaken in his official capacity, and thus denied the motion to dismiss. Lastly, the court granted defendants' motion to strike plaintiff's demand for a jury trial because there is no general right to a trial by jury in actions against the federal government. Instead, a jury trial right must be clearly provided in the legislation creating the cause of action; the FMLA does not contain such language.

1. Coverage Under Title I

2. Civil Service Employees

Bommarito v. Vilsack, 2012 WL 786232 (E.D. Mo. March 9, 2012)

Defendant, the United States Department of Agriculture, filed a motion to dismiss against a pro se plaintiff, including her FMLA claim. Specifically, defendant argued that the federal government had not waived sovereign immunity for cases brought pursuant to the FMLA. Plaintiff's response, that the FMLA granted her a cause of action under Title II of that Act, was rejected given contrary authority from the Fourth, Ninth, Eleventh, and Federal Circuits.

3. Congressional and Judicial Employees

Horen v. Cook, 2012 WL 5877422 (N.D. Ohio Nov. 20, 2012)

Plaintiff was an employee of the Ohio Court of Common Pleas as a research law clerk. In May 2009, plaintiff requested and was granted, two weeks' FMLA leave to care for her daughter after she underwent surgery. Plaintiff then requested and was granted additional time, through and including August 2, 2009 to care for her daughter. On August 13, 2009, Judge Cook, plaintiff's supervisor, met with her to discuss her poor work product and attitude since her return from FMLA leave. After the meeting, the Judge placed plaintiff on a 90-day probationary period. On December 1, 2009, plaintiff requested additional leave time because her daughter required another surgery. On December 2, 2009, plaintiff attended a staff meeting during which human resources told court personnel that they needed to file weekly timesheets that were signed by their supervisor each week. Plaintiff responded that she would not be able to obtain Judge Cook's signature because Judge Cook was "never there." Judge Cook heard about plaintiff's comment and terminated plaintiff's employment on December 16, 2009. The plaintiff claimed the Judge terminated her in violation of the FMLA.

The Judge argued that she was not an FMLA employer and plaintiff was not an FMLA employee because she falls within the "personal staff" exemption to the general definition of an FMLA employee. The court agreed that Judge Cook was not an FMLA employer because individuals sued in their official capacities stand in the shoes of the entity they represent, and a court may not, absent express statutory authority, sue or be sued in its own right. The court also agreed that plaintiff was not an "eligible employee" under the FMLA because a state government employee, not subject to the civil service laws, is not an "employee" for Title VII purposes if she works on an elected official's "personal staff."

B. State and Local Governments and Agencies

Harter v. County of Washington, 2012 WL 1032478 (W.D. Pa. March 27, 2012)

The employee, who was employed full-time as a Jury Commission Assistant for the County of Washington's Court of Common Pleas, was injured on the job and made a claim for workers' compensation. The employee then went on approved FMLA leave. Upon the employee's return from the FMLA leave, the employee's supervisor, a Judge of the Court of Common Pleas, locked her out of her computer, assigned her temporary employee status, and asked the employee to sign a document giving the Judge sole authority to discharge her. The employee was then asked to resign by a different supervisor due to the interpersonal problems

with the judge. Although the employee did not agree to resign, she offered to be transferred to a different position. Two days later, the employee sought an extension of her leave under the FMLA for intermittent leave, which was granted. Three days later, the employee was discharged.

The court dismissed the employee's FMLA claim against her supervisor, the judge, for money damages because the claim was barred by sovereign immunity. The court held that, based on the Third Circuit's finding that the Court of Common Pleas is an entity of the Unified Judicial System of Pennsylvania, it is therefore considered a state entity. Thus, the court held that the employee's claim, which was based on the "self-care" provision of the FMLA and asserted against a state employee acting in her official capacity, is deemed to be a suit against the State. Accordingly, the employee's FMLA claim was barred by the judge's entitlement to the Eleventh Amendment's grant of sovereign immunity.

Jeffers v. Redlands Community College Board of Regents, et al., 2012 WL 137412 (W.D. Okla. Jan. 18, 2012)

Plaintiff filed suit against his individual supervisor for violation of the FMLA. The supervisor filed a motion to dismiss, asserting that as an employee of a public agency, she was not covered as an "employer" under the FMLA. Noting that the Tenth Circuit had not addressed this issue, the court compared the approaches of other circuits. While the Sixth and Eleventh circuits had held that individual public employees cannot be "employers" under the FMLA, the Fourth and Eighth circuits had concluded the opposite. Finding the reasoning of the Fourth and Eighth circuits to be more persuasive, the court denied the supervisor's motion to dismiss.

Smith v. City of Marion and Rodney Berry, 2012 WL 694314 (D.S.C. Jan. 27, 2012)

Plaintiff, a city police chief, was discharged while on leave for hospitalization and subsequent treatment for congestive heart failure. Plaintiff filed suit, alleging FMLA violations, against the city and the city's mayor. The mayor filed a motion to dismiss, contending that he could not be sued in his individual capacity. The court evaluated whether public agency officials can be sued in their individual capacities under the FMLA. After evaluating a split amongst the Circuits on the issue, as well as district courts within the Fourth Circuit, the court held that a public official, as well as other supervising employees, cannot be held individually liable for FMLA violations. The court cited a North Carolina district court decision, which found that interpreting "employer" under the FMLA to include those who merely supervise employees would confuse the line between employer and employee by making all levels of employees "employers" except the person at the very bottom. The court dismissed the claim against the mayor individually.

Hanlon v. Missouri Department of Health and Human Services, 2012 WL 528316 (W.D. Mo. Feb. 17, 2012)

The employee, who was employed by the state department of health, missed work due to back pain and requested leave under the FMLA. The employer denied her requests to work at home and to make up hours missed because of her back pain. As a result, the employee sued the

employer alleging the denial of her rights under the FMLA. The employer filed a motion for summary judgment, which the district court granted. The court concluded that the employee's claim was barred by the Eleventh Amendment. The employee argued that the state implicitly waived its sovereign immunity by implementing a workplace policy referencing the FMLA. The court held that, in order to waive sovereign immunity, the state policy must specifically reference the state's intent to submit itself to federal jurisdiction. Because this policy did not, the court concluded that the employee's FMLA claim was barred by sovereign immunity.

Nelson v. Clermont County Veterans' Service Commission, 2012 WL 893877 (S.D. Ohio March 15, 2012)

Plaintiff, an administrative assistant at a county public agency, was granted five weeks of FMLA leave to care for her daughter during a mental health crisis as well as for plaintiff to cope with her own mental health condition; both resulted from a traumatic assault the daughter suffered. After she returned to work, plaintiff alleged that she was instructed to submit an amended time report for unauthorized overtime and was subsequently told by her supervisor that he had lost all confidence in her. Plaintiff further alleged that when she proposed that she work a modified schedule, she was told that she could either resign or be fired. Plaintiff was subsequently issued a letter informing her that a pre-disciplinary hearing was scheduled to address the charges against her.

Plaintiff later filed suit against the public agency as well as against the county board of commissioners. Defendant board filed a motion to dismiss on the grounds that, *inter alia*, it was not an employer for purposes of the FMLA as it was not responsible for supervising, hiring, or firing plaintiff. Plaintiff asserted that employees of the public agency were treated as employees of the county, were subject to the county's policy and procedures manual, and received paychecks signed by the county auditor.

The district court noted that, under Ohio law, the agency, rather than the county board, has the authority to hire, fire, supervise, and pay its own employees, and that the agency is a separate governmental entity with its own budget. Applying the standard set out in *Sutherland v. Michigan Dept. of Treasury*, 344 F.3d 603, 611-12 (6th Cir.2003), the court found that because plaintiff had not alleged that the county board supervised agency employees' day-to-day activities, hired or fired agency employees, controlled agency work assignments, issued instructions to the agency, or conducted any other activities commonly performed by employers, the board was not the entity with the authority to make employment decisions regarding plaintiff and was not the plaintiff's employer for purposes of the FMLA. Having found that plaintiff had not pleaded facts sufficient to show an actual employment relationship between plaintiff and the county board, the district court dismissed with prejudice all claims against the board.

Hughes v. New Jersey, 2012 WL 761997 (D. N.J. March 7, 2012)

On defendant's motion to dismiss plaintiff's FMLA claim pursuant under Rule 12(b)(6), the court found that because plaintiff sought leave for "self care," as opposed to "family care," his claim against the state and its Office of Public Defender were barred by the Eleventh Amendment. By contrast, his FMLA claim against his immediate supervisor could proceed.

Sutton v. DeRosia, 2012 WL 4863788 (E.D. Cal. Oct. 12, 2012)

Plaintiff was an administrative secretary for the City of Delano Police Department, and was supervised by police chief DeRosia. Plaintiff alleged she was retaliated against for taking medical leave and for filing a complaint with the Department of Fair Employment and Housing (“DFEH”). Defendants moved for summary judgment, arguing that plaintiff could not show that she was retaliated against or that her position was eliminated because she took leave or filed a complaint with the DFEH. Further, defendants argued that DeRosia could be individually liable.

The court first addressed the question of DeRosia’s individual liability. It acknowledged a circuit split as to whether a public employee can be individually liable as an employer under the FMLA. Further, it noted that the Ninth Circuit has yet to provide a controlling decision on the issue. Thus, without binding authority, the court examined the text of the statute itself. The court held that the plain reading of the statute shows that individuals can be liable under the FMLA, because the statute states that the term employer includes “any person who acts...in the interest of an employer.” Further, the court noted similarities between the definition of employer in the FMLA and FLSA, and reasoned that because the Ninth Circuit had held that the FLSA defines the term “employer” broadly, the term in the FMLA should be defined the same. The court ultimately agreed with the Third Circuit’s reasoning that there is no reason to distinguish between public agencies and private employers under the FMLA insofar as individual liability is concerned.

Next, the court examined whether plaintiff’s FMLA claim was one alleging retaliation or interference. The court noted that, although plaintiff labeled her claim as one of retaliation, it was nonetheless an interference claim, and that the substance of the claim, not its labeling controls. The court then asked whether or not DeRosia impermissibly considered plaintiff’s FMLA leave when deciding to move her office, suspend her, issue her a written reprimand, and give her extra job duties. The court noted the temporal proximity of these acts to her FMLA leave, the sharp decline in her performance evaluations after her leave, and DeRosia’s comments complaining of her absence. Considering this evidence, the court denied defendants’ motion to dismiss, holding that plaintiff presented sufficient evidence that the trier of fact could conclude her FMLA leave was a negative factor in the adverse employment actions against her.

Summarized Elsewhere:

Haybarger v. Lawrence Cnty. Adult Probation & Parole, 776 F.3d 408, 18 WH Cases2d 1467 (3d Cir. 2012)

Cox-Frietch v. Ohio Bureau of Worker’s Compensation, 2012 WL 508977 (S.D. Ohio Feb. 15, 2012), aff’d, No. 12-3305, 2012 WL 6051972 (6th Cir. Dec. 6, 2012)

Serby v. New York City Dep’t of Education, 2012 WL 928194 (E.D.N.Y. March 19, 2012)

Coleman v. Maryland Court of Appeals, 132 S. Ct. 1327 (2012)

Miles v. Nashville Electric Service, 2012 WL 3561809 (M.D. Tenn. Aug. 16, 2012)

Cotora v. Lee County, 2012 WL 2996550 (M.D.Fla. July 23, 2012)

Horen v. Cook, 2012 WL 5877422 (N.D. Ohio Nov. 20, 2012)

Wilkinson v. Greater Dayton Reg'l Transit Auth., 2012 WL 5879782 (S.D. Ohio Nov. 21, 2012)

Fields v. Dep't of Public Safety, 2012 WL 6005775 (M.D. La. Nov. 27, 2012)

IV. INTEGRATED EMPLOYERS

V. JOINT EMPLOYERS

Summarized Elsewhere:

Adams v. Valega's Professional Home Cleaning, Inc. et al., 2012 WL 5386028 (Nov. 2, 2012 N.D. Ohio)

- A. Test
- B. Consequences
- C. Allocation of Responsibilities

VI. SUCCESSORS IN INTEREST

- A. Test

Wright v. Sandestin Investments, LLC, 2012 WL 6194872 (N.D. Fla. Dec. 12, 2012)

Plaintiff, an executive administrative assistant at a resort, was granted FMLA leave for the birth of her child by her employer. During her absence, the employer sold the resort a new employer. Plaintiff called her new employer and was informed that her position had been eliminated during the transition of ownership of the resort. Plaintiff alleged that the employer interfered with her right to FMLA leave by terminating her employment while she was on leave. The district court denied motions to dismiss filed by both the employer and plaintiff.

The court first considered whether the new employer was a successor in interest of the old 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. The court noted that the Sixth Circuit has explained that the enumerated factors are part of a three part test considering the equities of imposing a legal obligation on a successor, in which courts consider (1) the employee's interests, (2) the employer's interests, and (3) the federal policy of the statute. The court determined that the new employer was a successor in interest to the employer. The court found that because the new employer chose not to honor the old employer's FMLA leave and any changes in policies or benefits that impacted employees occurred after the transition of ownership, the employer did not

set forth any genuine issue of material fact that impacted the equitable considerations in favor of the employer's interest.

The court next considered plaintiff's partial motion for summary judgment as to the employer's liability. Plaintiff argued that because the employer is a successor in interest, plaintiff was entitled to partial summary judgment for FMLA interference based on strict liability and the failure to reinstate. The court rejected this argument. According to the court, the successor in interest issue only establishes that the employer is subject to liability under the FMLA; however, this finding is not equivalent to finding the employer liable for an FMLA violation.

Finally, the court denied the employer's motion for summary judgment as to plaintiff's FMLA interference claim. The employer argued that it would have terminated the plaintiff regardless of her use of FMLA leave, and that the plaintiff could not demonstrate a prima facie case of retaliation. The court rejected this argument, reasoning that the plaintiff set forth a prima facie case of retaliation and interference because she was terminated while on maternity leave, which demonstrated a close temporal proximity between the plaintiff's use of FMLA leave and her termination.

B. Consequences

VII. INDIVIDUALS

Owens v. Connections Community Support Programs, Inc., et al., 840 F.Supp. 2d 791 (D. Del. 2012)

The day following her return from FMLA leave, plaintiff was reassigned to work at a different location and with a different caseload. Plaintiff had previously worked as an employment specialist with a community support organization and was reassigned to an alcohol and drug residential program. Plaintiff had difficulties meeting her quota at the new location due to different clientele, and she was told not to worry. Several months later, defendant announced that employment specialists who did not meet their quotas would be subject to progressive discipline. Plaintiff expressed concern about this development, and she was again told not to worry. Plaintiff was discharged for failing to meet her quota approximately one month later. Plaintiff brought suit alleging, in part, that defendants violated the FMLA by failing to restore her to the position she had prior to her leave. Individual defendants filed a motion to dismiss, arguing that employees of a non-public entity may be not sued in their official capacity.

The court granted Individual defendants' motion, dismissing the claims against them in their official capacity. The court found that the concept of a suit against an individual in his or her official capacity is not applicable to suits against private parties where an entity is also susceptible to suit. The court reasoned that plaintiff's claims against the individuals were actually claims against the employer. Therefore, the claims against the individuals in their official capacities were redundant of the claim against the employer and should be dismissed.

Haybarger v. Lawrence Cnty. Adult Probation & Parole, 776 F.3d 408, 18 WH Cases2d 1467 (3d Cir. 2012)

Plaintiff, who worked as an office manager for a county probation and parole agency, filed a post-termination lawsuit against the county, the county agency, and her supervisor, alleging violations of the FMLA and other federal and state statutes. The supervisor moved for summary judgment on plaintiff's FMLA claim. The United States District Court for the Western District of Pennsylvania granted the motion, holding that plaintiff failed to present sufficient evidence that her supervisor was an "employer" for FMLA liability purposes, because the supervisor did not have final authority to discharge plaintiff.

The Third Circuit reversed. The court held, as a matter of first impression, that the FMLA permits individual liability on the part of a supervisor in a public agency. First, the court determined that an "employer" under the FMLA includes an individual, reasoning that the statutory language including "any person who acts, directly or indirectly, in the interest of an employer" plainly contemplates that liability for FMLA violations may be imposed upon an individual person who would not otherwise be regarded as the plaintiff's "employer." The court also noted that the DOL regulations explicitly provide for individual liability, and inferred that in drafting the FMLA, Congress used the definition of "employer" that is materially identical to the definition in the FLSA. Therefore, Congress intended that decisions interpreting the FLSA be used as guidance in interpreting the FMLA. Second, the court followed the Fifth and Eighth Circuits—and declined to follow the Sixth and Eleventh Circuits—in holding that individual liability applies equally to supervisors at public agencies and private employers. Because the definition of "employer" includes public agencies, and an employer may include individuals, the court reasoned that an individual supervisor at a public agency may be subject to liability.

The court also determined that a fact issue existed as to whether the supervisor was plaintiff's employer under the FMLA. Discussing the economic reality test under the FLSA, the court noted that whether an individual functions as an employer depends on the totality of the circumstances, which may include (1) the power to hire and fire, (2) supervision or control over work schedules or conditions of employment, (3) determining rate and method of payment, and (4) maintaining employment records. Here, plaintiff proffered evidence that the supervisor acted in the interest of the county probation agency when he supervised her and recommended that she be discharged. The evidence indicated that the supervisor exercised substantial authority over the decision to discharge plaintiff—as he advised the judge who headed the department to terminate her, and drafted the termination letter. Further, the supervisor supervised her work, issued discipline to plaintiff and prepared her performance reviews. Thus, the court concluded that a rational jury could find that the supervisor was plaintiff's employer and vacated the district court's grant of summary judgment.

Bellow v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, et al., 2012 WL 6697180 (E.D. La. Dec. 21, 2012)

Plaintiff, while employed by defendant, was diagnosed with a facial tumor that required surgery. Plaintiff applied for, was granted, and took eight weeks of FMLA leave for her surgery. Plaintiff's supervisor discharged her when she returned to work from her FMLA leave.

Plaintiff sued both the employer and her supervisor claiming that her discharge violated the FMLA. Both defendants filed a motion to dismiss based on sovereign immunity. The

district court granted the motion and dismissed plaintiff's claim against the company defendant, a state university, but denied the motion as to the defendant supervisor, a government official.

The court acknowledged that a government official may be entitled to qualified immunity for allegedly violating a "clearly established right" (like that afforded by the FMLA), but added that such qualified immunity is not available for a government official whose conduct was not "objectively reasonable in light of clearly established law at the time of the incident." The court explained that a government official had no immunity and faced liability if the official had "fair warning" that the conduct alleged was impermissible. Because the case was before the court on the defendants' motion to dismiss, the well-pleaded facts alleged in the complaint were presumed true. Based on those facts, the court concluded that the defendant supervisor had "fair warning" that his discharge of plaintiff may violate the FMLA, and denied the defendant supervisor's motion to dismiss.

Freeman v. Philadelphia Housing Authority, 2012 WL 3235323 (E.D. Pa. Aug. 8, 2012)

During plaintiff's work tenure with defendant, plaintiff suffered from diabetes and, in 2006, began experiencing problems with his foot. In June 2009, plaintiff submitted his Request for Leave of Absence form and the "Certification of Health Care Provider" form and plaintiff's doctor certified plaintiff suffered a serious medical condition and was unable to do any work for three to four months. According to plaintiff, over the next eight months his attempts to return to work were obstructed by the employer. Ultimately, in February 2010, plaintiff was notified his FMLA had expired and his termination was effective immediately. Plaintiff contended he was unaware he was on FMLA leave until receipt of the letter. After his termination, plaintiff sued defendant and his former supervisor alleging a number of causes of action, including interference and violation of the FMLA. Defendant moved to dismiss on the grounds that plaintiff's claims were filed outside the applicable statute of limitations, plaintiff failed to properly plead a violation of the FMLA and failed to properly plead an interference claim against the individual defendant. Defendant's motion to dismiss was granted in part and denied in part.

This district court denied defendant's motion to dismiss plaintiff's FMLA claims as outside the two year statute of limitation. The court held, while the FMLA generally has a two year statute of limitations, plaintiff alleged defendant willfully violated the FMLA, which has a three year statute of limitations, and, thus, the claim was timely. The court also denied defendant's motion to dismiss for failure to state a claim. The court held plaintiff properly gave notice of his need for FMLA leave and the employer's act of misleading plaintiff into believing that he was not on FMLA leave until it technically expired and then immediately terminating him could be a "denial" of plaintiff's FMLA rights.

The district court granted the individual defendant's motion to dismiss because plaintiff's claim alleged no facts that indicated defendant had supervisory authority over him or that he exercised sufficient control over plaintiff's termination or FMLA leave. The Court noted individual liability is available under the FMLA and most courts apply the "economic realities" test. Courts consider whether the individual supervisor carried out the functions of an employer with respect to the employee and whether the individual (1) had the power to hire and fire the employee, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. The

court held plaintiff's sparse allegations were insufficient to establish a cognizable cause of action. However, the court provided plaintiff the opportunity to amend the complaint because (1) the case was in the earliest stages of litigation (2) the law regarding when an individual is an "employer" for purposes of FMLA liability is not well developed.

Cullison v. Dauphin County, PA, 2012 WL 3027776 (M.D. Pa. May 18, 2012)

A county employee missed 28.5 days of work due to medical reasons. He utilized accrued leave for those absences. No one from the employer told him that he could take FMLA leave during that period. Some 13 to 14 months later, the employee was discharged for providing false information regarding a motor vehicle accident. He sued the county and two individuals claiming, among other things, FMLA interference and FMLA retaliation.

As a preliminary issue, one of the individual defendants sought summary judgment contending she was not an "employer" under the FMLA. The court found that a reasonable fact-finder could conclude that the individual defendant was the plaintiff's "employer." Although the individual defendant did not have the authority to hire or fire the plaintiff, she had a supervisory role over the terms and conditions of his employment. The individual defendant also determined that the plaintiff could not perform the functions of his job safely. Additionally, the individual defendant provided the supervisor who made the termination decision with evidence that documents were falsified by plaintiff. Consequently, the court determined that the individual defendant was not entitled to summary judgment on the basis of not being an "employer" within the meaning of the FMLA.

However, the court went on to grant summary judgment to defendants on both the FMLA interference and FMLA retaliation claims. The interference claim was based solely on the county's alleged failure to provide plaintiff with notice of his FMLA rights when he was unable to work. However, the court found that plaintiff was required to first utilize accrued leave before the application of FMLA leave, pursuant to county policy, and therefore plaintiff could not show that he was denied benefits to which he was entitled under the FMLA. With regard to the retaliation claim, the court found that plaintiff failed to establish a causal relation between his leave and his dismissal some 13 months later. The court noted that in most cases, the temporal proximity between the occurrences has "generally been in terms of hours or days, not months." In the case before the court, there was no other evidence to support the existence of a causal connection between the leave and the termination, so the court held that a prima facie case of FMLA retaliation had not been made.

Law v. Hunt County, Texas, et al., 19 WH Cases2d 482 (N.D. Tex. 2012)

Plaintiff, a former county employee, sued the county and the justice of the peace for whom the plaintiff worked for violation of his rights under the FMLA and retaliation in violation of the FMLA. In May 2010 plaintiff underwent an angioplasty, which caused him to miss a few days of work. On June 4, 2010, plaintiff was discharged, effectively immediately. Plaintiff's complaint alleged that defendants gave him no reason for his termination and stated only that "it was not working out."

The individual defendant, the justice of the peace, moved for summary judgment, arguing that she was entitled to qualified immunity. The court denied the motion. The court found that the question of individual public employee liability under the FMLA was "clearly established" in the Fifth Circuit. The individual defendant also argued that she was entitled to qualified immunity because she was not the plaintiff's "employer" under the FMLA. The court concluded that there was sufficient evidence to suggest that the justice of the peace was plaintiff's employer for purposes of the FMLA. The individual defendant's own motion for summary judgment stated that she was the one who hired plaintiff in 2009 and discharged him in 2010.

With regard to the merits of the FMLA claims against the county and the justice of the peace, the court granted the defendants' motion for summary judgment on the interference claim. There was undisputed evidence that plaintiff was fired two days after he was cleared for regular duty, so defendants did not interfere with his FMLA rights at that time. Additionally, the court rejected plaintiff's claim that the scheduling of a future doctor appointment (in August 2009, more than two months after his termination) constituted a request to take FMLA leave. The court stated that mere existence of such an appointment was "clearly not sufficient" notice of the intention to take FMLA leave. However, with regard to the retaliation claim, the court denied the defendants' motion for summary judgment. The court found that there were material factual disputes whether defendants discriminated against plaintiff because he had exercised his FMLA-protected rights.

***Ambs v. Sir Home Improvement*, 2012 WL 1909355 (W.D. Mich. May 25, 2012)**

Plaintiff was employed as a salesman by defendant. In mid-March 2011, the employee was in the hospital with this wife for the birth of their child and asked the employer for two weeks of FMLA leave. During that time, the employer demanded that the employee follow up on a sales lead. The employee responded that he was on "leave time" but followed up on one sales lead anyway. The employer continued to deny the employee's requests for leave until the employee advised that he would not follow up on any more leads because he was taking two weeks of FMLA leave. The employer then terminated the employee and the employee filed suit, alleging that the employer and its owner violated the FMLA. Employer filed – but later dismissed – a counterclaim alleging that the employee was paid but did not earn commissions the employer paid him. The employee then amended his complaint to add a claim alleging that the counterclaim was in retaliation for enforcing his FMLA rights.

The employer moved for summary judgment seeking dismissal of the retaliation claim against the owner and retaliation claim regarding the employer's counterclaim. The court denied summary judgment as to both. As to the first, the court held that there were disputed issues of fact concerning the owner's role in the employee's termination. Despite the employer's argument that he did not take part in the decision to terminate the employee, the record reflected, among other things, that he had knowledge of and had conversations about the employee's leave prior to him taking such leave. In addressing the second grounds of employer's summary judgment motion, the court noted the existence of a division of authority regarding retaliatory counterclaims. The Court ultimately held that it would recognize such a claim. The court denied summary judgment because of disputed issues of facts regarding the merits of the counterclaim filed by the employer and whether there was retaliatory animus in filing it. In particular, while

the employer relied on an audit showing overpayments of commissions to the employee, the employee challenged the accuracy of the audit and showed that the employer allowed additional commissions to other employees. Additionally, the employee showed that the employer did not file a counterclaim against two other employees seeking commissions in a state court action.

Benton v. Belk, Inc., 2012 U.S. Dist. Lexis 156933 (D.S.C. Sept. 20, 2012), adopted, 2012 U.S. Dist. Lexis 155997 (D.S.C. Oct. 31, 2012)

Plaintiff was formerly a cosmetic counter manager for defendant company, who filed suit against both her employer and her immediate supervisor under the FMLA, alleging that defendants harassed and retaliated against her for, among other things, having taken FMLA leave. The individual defendant moved to dismiss the FMLA claims against her, asserting that the FMLA did not impose liability on private employees in their individual capacities. The district court noted that whether individual liability existed under the FMLA was an open question in the Fourth Circuit.

First, the district court noted that the majority of federal courts addressing the issue had concluded that individual liability *was* available under the FMLA. However, the defendant further contended that even so, no liability existed in this case because plaintiff had not alleged that she (the supervisor) possessed sufficient authority to subject her to individual liability. The court noted that under the FMLA, a fact finder must conclude that the individual has “sufficient responsibility or stature within [the defendant employer] to warrant imposition of personal liability under the [Act],” for example, “individuals such as corporate officers acting in the interest of an employer” (*citing* 29 C.F.R. § 825.104(d)). The test for determining individual liability “is whether the defendant had the ability to control, in whole or in part, whether the plaintiff could take a leave of absence and return to the position.” Simply holding the position of a “front line supervisor” typically is not enough to satisfy the test. In the instant case, the court afforded the plaintiff an opportunity to amend her complaint, to the extent that she could do so to sufficiently allege that the individual supervisor possessed such authority, and denied the individual defendant’s motion to dismiss.

Ainsworth v. Loudon Cnty. Sch. Bd., 851 F. Supp. 2d 963 (E.D. Va. 2012)

Plaintiff, a former teacher’s assistant alleged that the county school board and its individual officials violated her FMLA rights by failing to reinstate her to the same position after her FMLA leave and terminating her employment in retaliation for exercising her FMLA rights. The plaintiff was approved for FMLA leave in 2008 to have a brain tumor removed. The plaintiff took FMLA leave until December 2008 to recuperate. After her FMLA leave expired, defendants allowed plaintiff to remain on non-FMLA leave until the following month, when she was cleared to return to work on a part-time basis. At the end of the school year, defendants informed plaintiff that her classroom position had been filled, she would need to find another position for the next academic year, and her salary would be decreased. Plaintiff found a different full-time position as instructed for the 2009-10 school year. After taking a second FMLA leave in 2010 as a result of her tumor, plaintiff began to receive poor performance reviews and eventually the school board declined to renew her contract.

The court first addressed the threshold issue of whether plaintiff could hold the individual school board officials liable for violating her FMLA rights. The court was persuaded by the majority view that public employees may be held individually liable because the FMLA plainly includes in the definition of employer any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer. The court next addressed plaintiff's claims of interference and retaliation. The basis of plaintiff's interference claim was the school board's failure to reinstate her to her classroom position following the expiration of her 2008 FMLA leave. However, because plaintiff returned to work a month after the expiration of her 2008 FMLA leave, the court found that she did not sufficiently plead her interference claim and entered summary judgment for the defendants on this issue. The basis of plaintiff's retaliation claim was that the school board terminated her for taking FMLA leave. The court found that the temporal proximity between the termination and plaintiff's 2010-2011 FMLA leave created a causal connection between the two events and denied summary judgment for defendants on this issue.

Summarized Elsewhere:

Hughes v. New Jersey, 2012 WL 761997 (D. N.J. March 7, 2012)

Olschefski v. Red Lion Area School Dist., 2012 WL 6003620 (M.D. Pa. Nov. 30, 2012)

Singh v. New York State Department of Taxation and Finance, 2012 WL 5988547 (W.D. N.Y. Nov. 29, 2012)

Malena v. Victoria's Secret Direct, LLC, -- F. Supp. 2d --, 2012 WL 3542192 (S.D.N.Y. Aug. 16, 2012)

Santiago v. Connecticut Dep't of Transportation, 2012 WL 5398884 (D.Conn. Nov. 5, 2012)

Kurtzman v. University of Cincinnati, et al., 2012 WL 1805486 (S.D. Ohio May 17, 2012)

Fleck v. Wilmac Corp., 2012 WL 1033472 (E.D. Pa. Mar. 27, 2012)

Wilkinson v. Greater Dayton Reg'l Transit Auth., 2012 WL 5879782 (S.D. Ohio Nov. 21, 2012)

CHAPTER 3. ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. OVERVIEW

Summarized Elsewhere:

Nicholl-Kerner v. Lawrenceville Urology, 2012 WL 1898615 (D. N.J. May 23, 2012)

II. BASIC ELIGIBILITY CRITERIA

Cotto v. Municipality of Aibonito, 2012 WL 1110177 (D.P.R. April 2, 2012)

The employee, her husband, and the "conjugal partnership" established between them brought a FMLA claim against defendant. The district court considered whether the husband and the conjugal partnership have standing to bring suit pursuant to the FMLA *sua sponte*. The district court found that the husband and the conjugal partnership were not employees of defendant. Because the husband and the conjugal partnership were not eligible employees under the FMLA, they lacked standing to bring a FMLA claim. As such, the district court dismissed their FMLA claim.

Dennis v. County of Atlantic County, 2012 WL 1059420 (D. N.J. March 28, 2012)

The employee was hired on a probationary basis, pending successful completion of the employer's training academy. By statute, the academy gives probationary employees two chances for successful completion. It also requires at least eighty percent attendance at physical training or else the employee is dismissed from the academy. The employee lost his first opportunity at the academy when he failed his pre-academy physical. On the employee's second attempt, he became lightheaded during a day of training and was required to undergo a series of medical tests, which caused him to exceed the allowable number of absences. The employee therefore requested to be medically withdrawn from the academy, which would allow him to restart a session if his tests came back normal. However, this request was denied. The employee's test results returned showing no physical limitations, yet two days prior to his clearance to return to training, the employee had exceeded the number of absences and was dismissed from the academy. On the same day that the employee was dismissed from the academy, the employee also submitted a request for FMLA leave for injuries he sustained that day after slipping on ice. Although the employee was dismissed from the academy, at the time he requested his leave he was still employed. Yet the employer failed to fully submit the employee's FMLA request.

The District Court of New Jersey denied the employer's motion for summary judgment regarding the employee's interference claim under the FMLA. The employee asserted that the employer interfered with his FMLA rights when he made his request for his injury after slipping on the ice. The employer made two arguments in support of its motion for summary judgment: (1) the employee was discharged prior to requesting his leave; and (2) even if the employee was on FMLA leave at the time of his suspension, he would have been discharged anyway for failure to complete the academy. The court held that both of the employer's arguments failed. Even if the employer was contemplating discharging the employee because of his dismissal from the academy, he was still officially employed at the time he submitted his FMLA request. Secondly,

the employer's "legitimate business purpose" [for terminating the employee] cannot absolve its conduct if it nonetheless interfered with [the employee's] rights under the FMLA." Because the employee provided evidence that he completed his FMLA request, that it was accepted by the employer but then not processed due to the employee's pending discharge, the court held that the evidence supported a finding that the employer interfered with the employee's FMLA rights by refusing to authorize his leave.

Cousins v. Hastings Manufacturing Co., LLC, 2012 WL 6690398 (W.D. Mich. Dec. 21, 2012)

Plaintiff worked at the employer's production facility in China. After resigning, plaintiff brought an action alleging an FMLA violation by the employer. The employer moved for summary judgment on the grounds that plaintiff was not an "eligible employee" under the FMLA because he was not "employed in any state of the United States, the District of Columbia, or any Territories or possession of the United States." 29 C.F.R. § 825.800. The district court granted the employer's motion, agreeing that the employee was not an "eligible employee" under the FMLA because he was stationed in China, not the United States. Plaintiff relied on 29 C.F.R. § 825.111, which defines an employee's "worksites" as the "site the employee reports to," arguing that his employment contract specified that he would report to company headquarters in the United States. The court rejected this argument because the term "worksites" is defined in that section for the purpose of determining whether 50 employees are employed within 75 miles of the employer, and for purposes of determining the worksite of an employee with no fixed worksite. According to the court, this regulation does not override the extraterritoriality exception to the definition of "eligible employee."

Ferguson v. N. Broward Hosp. Dist., 478 F. App'x 565, 18 WH Cases2d 1847 (11th Cir. 2012)

Plaintiff was a former hospital employee who sued the employer for interfering with his right to take intermittent leave under the FMLA. The district court granted the employer's motion for summary judgment, and the employee appealed. The Eleventh Circuit found that the employee failed to meet the first prong of his interference claim. Although he was diagnosed with diabetes, which qualified as a serious medical condition under the FMLA, his doctor did not state the condition was incapacitating. Further, the employee admitted he could fully perform his job despite the condition. The employee also failed the second prong because there was evidence that defendant discharged him not because he requested leave but because he had received several disciplinary reports and his attendance was poor. Finally, the employee failed to meet the third prong of his interference claim – establishing causality. Procedurally, he failed to challenge the reason for his termination before the judgment was issued. Regardless, the record showed "overwhelming evidence that he was fired for disregarding the company rules, not for a request of leave" submitted one month before his termination. The court affirmed summary judgment for defendant.

Nicholl-Kerner v. Lawrenceville Urology, 2012 WL 1898615 (D. N.J. May 23, 2012)

Plaintiff was employed as a certified research coordinator by the employer. In 2010, she asked for and was granted 12 weeks of FMLA leave by her employer. In November 2012, the employer terminated her due to lack of enrollment in studies the employer conducted and

because she was less senior to other certified research coordinators. The employee filed suit against the employer, alleging both interference and retaliation claims under the FMLA. The employer moved for summary judgment, which the court granted in part and denied in part.

The employer argued, as preliminary matter, that she was not eligible for FMLA leave. In rejecting that argument, the court explained that common law principles of equitable estoppel applied and barred the employer from, on the one hand, advising the employee that she was covered by FMLA, but, on the other, later contending that she was not. The court granted summary judgment on the employee's interference claim explaining, in just one sentence, that she had failed to produce any evidence to support that claim. However, the court ruled that a triable issue of fact existed on the employee's retaliation claim. The court reasoned that, even assuming that the employer adduced a legitimate, non-discriminatory reason for discharging her, the employee had offered sufficient evidence that the employer's reasons were pretextual. This was due, in part, to the temporal proximity between employee's FMLA leave and her discharge.

Hill v Walker, 2012 WL 1439628 (E.D.Ark. April 26, 2012)

Plaintiff requested a disability accommodation as well as FMLA leave. However, plaintiff had not worked for her employer for one year when she requested leave and was not, therefore, covered by the FMLA at that time. Nonetheless, the employer granted plaintiff compensated sick leave and provided her with FMLA paperwork that she could submit once she became eligible for FMLA. However, soon thereafter, the employer withdrew permission for plaintiff's sick leave and demanded that she return to work. But plaintiff, who had relied upon the grant of sick leave, could not return to work immediately. Shortly after returning to work several weeks later – but still before she was eligible for FMLA leave - the employer discharged plaintiff. Plaintiff alleged that the employer retaliated against her and interfered with her in violation of the FMLA. Specifically, plaintiff alleged that she was terminated from employment after she requested FMLA leave in order to keep her from becoming eligible for FMLA rights.

The district court held that plaintiff failed to state an FMLA retaliation claim because her complaint failed to allege that plaintiff—who was undisputedly ineligible for FMLA leave—was terminated in retaliation for requesting FMLA leave to begin after she had attained eligibility. Instead, plaintiff requested FMLA leave for a period beginning and ending before she would actually have been eligible for FMLA rights. Such a request is not protected by the FMLA.

Cousins v. Hastings Manufacturing Co., LLC, 2012 WL 6690398 (W.D. Mich. Dec. 21, 2012)

The employee worked as the president of the employer's production facility in China. After resigning, the employee brought an action alleging an FMLA violation by the employer. The employer moved for summary judgment on the grounds that the employee was not an "eligible employee" under the FMLA because he was not "employed in any state of the United States, the District of Columbia, or any Territories or possession of the United States." The district court granted the employer's motion, agreeing that the employee was not an "eligible employee" under the FMLA because he was stationed in China, not the United States. The employee relied on 29 C.F.R. § 825.111, which defines an employee's "worksite" as the "site the employee reports to," arguing that his employment contract specified that he would report to company headquarters in the United States. The court rejected this argument because the term

“worksite” is defined in that section for the purpose of determining whether 50 employees are employed within 75 miles of the employer, and for purposes of determining the worksite of an employee with no fixed worksite. According to the court, this regulation does not override the extraterritoriality exception to the definition of “eligible employee.”

Summarized Elsewhere:

Barnes v. Greensboro Living Ctr., 2012 WL 2344623 (M.D. N.C. June 20, 2012)

III. MEASURING 12 MONTHS OF EMPLOYMENT

Summarized Elsewhere:

Reynolds v. Stovall, 2012 WL 1202026 (W.D. Ark. Apr. 10, 2012)

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

McArdle v. Town of Dracut / Dracut Public Schools, 2012 WL 6584718 (D. Mass. 2012)

Plaintiff, an eighth grade English teacher, brought suit against his former employer claiming that his discharge violated the FMLA. Struggling with a 2008 divorce and its “collateral damage,” the then twelve-year veteran teacher was sporadically absent on numerous occasions, working a total of only 82 days during the 2008-2009 school year. On September 1, 2009, the teachers’ reporting day for the 2009-2010 school year, plaintiff failed to appear and informed the principal that he had made a last-minute decision not to return. Plaintiff sought leave under the FMLA for unspecified reasons, but he did not, however, submit a written request for FMLA leave. In mid-October 2009, plaintiff’s employment was terminated.

Plaintiff claimed the employer violated the FMLA because he was not afforded FMLA leave as requested and the employer failed to comply with the notice requirements of the FMLA. Despite plaintiff’s verbal request for FMLA leave, the district court granted summary judgment to the employer on the grounds that plaintiff was not an “eligible employee” within the meaning of the FMLA at the time he made the request. The school records established that plaintiff worked only 82 days during the twelve-month period preceding September 1, 2009, the date on which plaintiff claims to have requested FMLA leave. Under the controlling collective bargaining agreement, teachers’ workdays were not to exceed 7.5 hours per day. He therefore only worked for a total of only 615 hours during the relevant period, far fewer than the 1,250 hours required to be deemed an eligible employee. The district court also rejected plaintiff’s FMLA interference claim based on inadequate notice because the evidence established that plaintiff “failed to qualify for FMLA leave wholly irrespective of any action (or inaction) of the school district.”

Donnelly v. Greenburgh Central School District No. 7, 691 F.3d 134, 19 WH Cases2d 865 (2nd Cir. 2012)

Plaintiff, a high school teacher, alleged that his school district denied him tenure in retaliation for him taking FMLA leave for surgery. Defendant moved for summary judgment, arguing that (1) plaintiff was not eligible for FMLA leave because, as calculated under his union's collective bargaining agreement ("CBA"), he had worked only 1,247 hours in the preceding year and (2) even if plaintiff were eligible for FMLA leave, he could not show that the employer acted unlawfully in denying him tenure. The Second Circuit concluded that (1) plaintiff presented a genuine issue of material fact as to whether he qualified for FMLA leave and (2) he presented sufficient evidence to permit a reasonable jury to find unlawful retaliation and thus defeat a motion for summary judgment. As such, the Second Circuit reversed the Southern District of New York's grant of summary judgment in favor of defendant and remanded the case to the district court for trial.

The Second Circuit looked to the FMLA regulations which specifically address the situation of full-time teachers and require that if an employer does not maintain an accurate record of hours worked by an employee, the employer has the burden of showing that the employee has not worked the requisite 1,250 hours to qualify for FMLA leave. Defendant did not maintain records of hours worked, instead relying solely on the maximum number of daily work hours provided for in the CBA multiplied by the number of days plaintiff worked in the 12 months preceding his surgery. The Second Circuit announced it was adopting a standard similar to that expressed by the Sixth Circuit – in cases where a plaintiff avers that a relevant compensation agreement (including a CBA) does not accurately reflect all of the hours the employee has worked, the employer has the burden of showing that the employee has not worked the requisite hours. The employer's burden is not heavy, but it is specific. To succeed on a motion for summary judgment, a defendant must show that either the hours alleged could not have occurred or the hours alleged are not compensable as a matter of law according to the principals established under the FLSA.

As to plaintiff's retaliation claim, the Second Circuit found that plaintiff met his burden of showing a prima facie case. The Court emphasized that the standard for showing qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal: plaintiff must show only that he held the basic qualifications to be eligible for promotion (tenure). Regarding the fourth element (inference of retaliation), the Second Circuit found that plaintiff established a basis for causal inference of retaliatory intent by demonstrating the very close temporal proximity between taking medical leave and receiving poor performance evaluations (which counted against him in the tenure decision). The Court noted that although it had "never definitively applied the burden-shifting framework from the context of employment discrimination to FMLA retaliation," it did not have to in this case since plaintiff provided direct evidence (in the form of performance evaluations criticizing plaintiff's excessive absences including his medical absences) that his arguably FMLA-protected leave was held against him in the tenure process.

Fazio v. NJ Turnpike Authority, 2012 WL 71749 (D.N.J.)

In 2007, while employed by defendant, plaintiff was diagnosed with a mental disorder by a company physician. As a result of this diagnosis, she was placed out of work on temporary disability. In September 2008, the same doctor allowed her to return to work with restrictions.

However, in March 2010, she was again placed out of work due to her mental disorder. Plaintiff filed a lawsuit pursuant to the ADA alleging discrimination, failure to accommodate, and retaliation for asking for reasonable accommodation. Plaintiff also filed claims under the FMLA for improperly denying her leave and retaliating against her for requesting leave under the FMLA.

The Court denied defendant's motion to dismiss and granted plaintiff's motion for leave to amend her complaint. The Court allowed plaintiff twenty days to file an amended complaint in order to plead that she was an "eligible employee" under the FMLA. The Court reasoned that plaintiff had not alleged that she had worked 1,250 hours from the period of March 2009 through March 2010 in her original complaint.

Summarized Elsewhere:

Valentino v. Wickliffe City School District Board of Education, 19 WH Cases2d 802 (N.D. Ohio 2012)

Pozsgai v. Ravenna City Schools Board of Education, 2012 WL 1110013 (N.D. Ohio March 30, 2012)

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

Teufel v. Sharpshooter Spectrum Venture, LLC, 2012 WL 161820 (D. Colo. Jan. 19, 2012)

Plaintiff worked for defendant, which employed photographers at ski resorts and other vacation hotspots. As a result, the size of defendant's workforce fluctuated significantly from month to month. In December 2009, plaintiff inquired about the possibility of FMLA leave for muscle spasms and gastric by-pass surgery. Defendant provided plaintiff with a memorandum and forms he needed complete to apply for FMLA leave, but he failed to complete the paperwork. In June 2010 plaintiff again sought FMLA leave for his diabetes and this time completed the paperwork, indicating that he would need intermittent leave. Following several absences in the summer of 2010, defendant discharged plaintiff.

The central question for the district court in deciding defendant's motion for summary judgment was whether plaintiff was an "employee" under the FMLA. Defendant contended it employed less than 50 employees within 75 miles of plaintiff's worksite in June 2010, when plaintiff sought FMLA leave for diabetes. Defendant did employ at least fifty employees in this radius in December 2009 but did not in June 2010. Plaintiff argued that he first provided notice of his need for FMLA leave in December 2009 and that this notice covered his absences in the summer of 2010. Defendant argued that the December 2009 notice was irrelevant because it was for a different serious health condition than the condition that caused his absences in the summer of 2010. The court found that employees must provide independent notice of the need for FMLA leave for each serious health condition. As a result, the court agreed with defendant and held that the relevant notice was provided in June 2010, when defendant did not employ the requisite number of employees within a seventy-five-mile radius.

A. Determining the Number of Employees

Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035 (E.D. Mich. 2012)

The employee, a dispatcher in the city police department, failed to report to work for five scheduled shifts. The employer sent the employee a letter, stating that it considered the employee to have voluntarily resigned. The employee claimed that his termination violated the FMLA. The employer argued that the employee was not an eligible employee under the FMLA because the employer employed less than 50 people within 75 miles of the employee's worksite. It was undisputed that the employer employed 41 employees, but the employee argued that "volunteer" firefighters were also employees—if this were true, the 50 employee threshold would be met.

The United States District Court for the Eastern District of Michigan found that the firefighters at issue, while not necessarily "volunteers," were also not employees for purposes of the FMLA. The court noted that the firefighters were paid \$15 per hour for responding to calls and maintaining equipment, and as such, they were not traditional volunteers. At the same time, the court noted that the firefighters attend mandatory trainings and take tests without compensation, they are not required to respond to fire calls, and they receive no insurance or other benefits. The court explained that while there are several tests for determining whether an individual is an employee, all of them share one common theme: control. Here, the court found that the employer lacked sufficient control over the firefighters for them to be "employees" under the FMLA. The court found it especially significant that the firefighters were not required to respond when the employer called them to respond to a fire emergency, and also noted that the firefighters were not subject to discipline for failing to report and were not economically dependent on the employer. Because the firefighters were not employees, the employer did not have 50 employees, and the employee was not eligible for FMLA leave. The court therefore granted summary judgment for the employer.

Imbornone v. Tchefuncta Urgent Care, Inc., 2012 WL 3440136 (E.D. La. Aug. 15, 2012)

The employee, a radiology technician, alleged that her employer violated the FMLA by denying her medical leave after the employee sustained injuries in a car accident. The employer moved to dismiss the employee's FMLA claim on the basis that the employer was not an eligible employee. The court granted the employer's motion to dismiss, finding that the employee had failed to allege facts sufficient to show that her employer qualified as an eligible employer under the FMLA.

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

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

Demyanovich v. Cadon Plating & Coatings, LLC, 2012 WL 6025762 (E.D. Mich. Dec. 4, 2012)

Plaintiff was diagnosed with heart disease, and Type II Diabetes. Following the diagnoses in 2009, his treating physicians imposed various work restrictions, including prohibiting him from heavy lifting or working in excess of forty-hours in one week. Plaintiff frequently took time off from work due to his medical conditions. The plaintiff received multiple warnings for violations of the employer's long-standing attendance policy, including warnings in 2009 and 2010. Plaintiff's employment was terminated for multiple attendance violations in 2010.

Plaintiff filed a lawsuit alleging violations of the FMLA and ADA, among other claims. The court granted the employer's motion for summary judgment, finding that plaintiff could not establish a prima facie case of FMLA interference. The evidence showed that the plaintiff could not return to work even if his FMLA request been granted, and thus the plaintiff was not an "eligible employee." Plaintiff's social security disability benefits application included a statement by a doctor that the plaintiff was advised to quit work because of his medical condition. The court noted that it was not relying on the qualification for social security benefits to reach that determination, but rather the statements made in connection with the qualification process, which indicated that plaintiff could no longer perform the job.

Although the court found plaintiff could state a prima facie case of retaliation, he could not establish pretext. The employer presented evidence that the plaintiff received sixteen warnings since 2001 for attendance issues, he was given a final warning five times, and at the time of his discharge, he was in violation of the policy, which provided for employment termination under the circumstances. Further, the evidence established that the employer learned before the termination decision that the plaintiff could not return to work given his condition, so the employer was "shielded from liability from an FMLA retaliation claim."

Corral v. Hersha Hosp. Mgm't, Inc., 2012 WL 4442666 (D.N.J. Sept. 24, 2012)

Plaintiff began working for the company as a regional executive housekeeper in October 2008. In July 2009, plaintiff notified her employer that she was pregnant and that she would be taking leave after the child's birth in January 2010. Plaintiff alleged that she was discharged less than a month later in August 2009. The employer contended that plaintiff was discharged for performance reasons; however, plaintiff claimed she had never previously been advised on any performance issues during her employment. The plaintiff also claimed that her supervisor advised her to consider resigning from her employment or accepting a "lower position" because of her pregnancy.

Plaintiff subsequently filed a charge of discrimination with the EEOC for pregnancy discrimination and retaliation. The EEOC found reasonable cause as to plaintiff's claims and referred the matter to conciliation. However, the employer refused to conciliate. Thereafter, plaintiff filed suit alleging FMLA interference as well as pregnancy discrimination, hostile work environment, and retaliation under federal and local laws. The employer moved to dismiss plaintiff's FMLA claims, arguing that plaintiff was ineligible for FMLA leave on the date she informed the employer of the future need for leave. In ruling on the employer's motion to dismiss, the court framed the narrow issue under consideration as "whether the FMLA protects a non-eligible employee who requests leave that would commence after she gains eligibility under

the Act." The court answered this question in the affirmative and denied the employer's motion to dismiss. Specifically, the court ruled that pre-FMLA eligible employees are entitled to FMLA rights and may lawfully attempt to exercise those rights – which include the right to foreseeable future leave once eligibility is gained. The court found that, to rule otherwise, would be inconsistent with the FMLA's requirement that employees must give a minimum of thirty days' notice in the case of foreseeable leave requests.

Doolin v. Hinkle Contracting Corp., 2012 WL 3028510, 115 FEP 1627 (E.D. Ky. July 25, 2012)

Plaintiff was hired as a truck driver trainee, whose primary responsibility was driving a truck. Plaintiff was also required to “flag” (stand at the edge of a construction site and hold a sign signaling to oncoming traffic to stop or slow down). Plaintiff became pregnant and informed her supervisors; within two weeks her job responsibilities changed to include more physically demanding tasks and a dramatic increase in flagging. The employer’s human resources manager instructed plaintiff—without any prompting from plaintiff or other indication that her pregnancy required restrictions of employment tasks—that she *needed* a letter from her doctor outlining exactly what restrictions she was under during her pregnancy and that if she did not provide one, the company would take her off work when they thought it was right. The HR manager also said that if it was his wife, he wouldn’t want her working at a place like this when she was pregnant. Plaintiff obtained a letter generally restricting her from working overtime, limiting the amount of heavy physical work, and prohibiting her from lifting over 25 pounds. She was not restricted from driving a truck. A few weeks later, she was told they were concerned about a decline in her load count. She countered that her load count could not be accurately compared to other drivers because of the change in her job duties after she became pregnant. She experienced stomach pain one day while flagging and was told to go home, that she was not to return to work due to her pregnancy, and that she needed to have a doctor “put her off for good.” Plaintiff got a note from her doctor telling her to stay off work until 6 weeks after her delivery. She did so and then asked to return to work at the end of her leave, as her supervisor promised she would be able to get her job back, but the employer said it was not hiring due to the economy.

Plaintiff filed suit, alleging the employer interfered with her entitlement to FMLA leave. The court granted summary judgment in favor of the employer. First, the court held that plaintiff was discharged the day she was told not to return to work, which was before she requested FMLA leave, so she was not an eligible employee under the FMLA. Alternatively, as the employer asserted, plaintiff showed up with the note and quit, saying she was taking another job. Again, the court found she would not have been an eligible employee under those facts. Finally, under a third fact scenario in which plaintiff was requesting FMLA leave the day she brought the note in, the request was for leave until 6 weeks after her due date, which was far longer than twelve weeks allowed under the FMLA. The court noted that an employer does not violate the FMLA when it fires an employee who is indisputably unable to return to work at the conclusion of the twelve week statutory period.

Summarized Elsewhere:

Pozsgai v. Ravenna City Schools Board of Education, 2012 WL 1110013 (N.D. Ohio March 30, 2012)

VII. EXCEPTION FOR CERTAIN AIRLINE EMPLOYEES [New Topic]

CHAPTER 4. ENTITLEMENT OF EMPLOYEES TO LEAVE

I. OVERVIEW

Kirmer v Goodyear Tire & Rubber Co., 2012 WL 1424415 (E.D.La. April 24, 2012)

Plaintiff, a service manager at three of the employer's stores, had been transferred three times. Plaintiff alleged that he was discriminated against, wrongfully transferred, and terminated in violation of various federal and state employment discrimination laws. Regarding the FMLA, plaintiff alleged that defendant violated the Act by not permitting him to take FMLA leave and retaliating against him by terminating him for asserting his rights under the FMLA.

The district court held that plaintiff was unable to prove that he was denied benefits to which he was entitled under the FMLA. Specifically, with one exception, plaintiff was allowed to go to his doctor's appointments without incident. On that one occasion, plaintiff's supervisor asked him to return to the store because it was busy. However, plaintiff claimed that the store was not busy when he did cancel his doctor's appointment and return to work; but, plaintiff admitted that he rescheduled that appointment for another date without incident. The court held that these facts do not indicate that plaintiff was denied the right to take leave. Moreover, plaintiff presented no evidence that he was treated less favorably than an employee who had not requested leave under the FMLA or that he was subjected to an adverse decision because he sought FMLA leave.

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

Summarized Elsewhere:

Anderson v. Lockheed Martin Corp., 2012 WL 933215 (D. Md. March 16, 2012)

Davis v. Navy Fed. Cred. Union, 2012 WL 73233 (E.D.Va.)

1. Eligible Family Relationships

Summarized Elsewhere:

Harrelson v. Unlimited Development, Inc., 2012 WL 3715493 (S.D. Ill. Aug. 27, 2012)

- a. Spouse

Copeland v. Mid-Michigan Regional Medical Center, 2012 WL 511534, 18 Wage & Hour Cases 2d 1611 (E.D. Mich. Feb. 16, 2012)

The employee was the primary caregiver to her same-sex partner who had been diagnosed with brain cancer and missed work to care for her partner when she underwent emergency surgery to treat brain cancer. While the employee was not eligible for FMLA leave to care for her partner, because her partner was not a “spouse” as defined under the Act, the employer offered the employee personal leave, which she declined. Later, the employer encouraged the employee to apply for FMLA leave when the employee indicated that she was having difficulty dealing with her partner’s illness. The employee obtained and completed the FMLA forms seeking intermittent leave for her own depression. When the employee obtained the application for FMLA leave, she was provided with the Certification of Health Care Provider form and instructed to return the completed form within fifteen days. The employee, however, did not return the completed certification form. Thereafter, the employee was counseled for failing to inform her supervisor of her absence more than an hour before her shift started. She asserted that she was unable to call her supervisor due to her illness. The employee ultimately was placed on an action plan to address her performance deficiencies for which she had been repeatedly counseled. This action plan required her to notify her supervisor if she was leaving the department during her shift. A few months later, the employee left the department during her shift without informing her supervisor. She went to visit her partner who was being treated at the employer hospital, and she was delayed in returning to her department in order to have a conversation with her partner’s healthcare providers regarding her care. In accordance with the progressive discipline policy, the employee was discharged.

The employee sued the employer for interference with her rights under the FMLA, and the employer moved for summary judgment on the employee’s claims. The court granted the employer’s motion finding that the employee had failed to state a claim under the FMLA. Specifically, the employee’s first claim was based on her assertion that she was denied leave for her own serious health condition. However, the court concluded that this claim was untimely as it was filed more than two years after the employee purportedly was denied leave. Next, the employee asserted that the employer failed to provide her leave, demoted her, and put her on probation as a result of her absences due to providing care for her partner. The court recognized that the employee could prevail only if she could show that she was denied a right under the FMLA to which she was entitled. This claim turned on the meaning of the term “spouse,” which was dependent on state law. In particular, the court noted that the FMLA defines the term “spouse” as a “husband or wife defined or recognized under State law for the purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.” The court concluded that Michigan does not recognize same-sex marriages and common law marriages were abolished in 1957. Thus, the employee’s partner was not her “spouse” as defined under the FMLA, and the employee was not denied any right under the FMLA. The employee argued that the employer’s handbook defined the term “spouse” broader than the FMLA; however, the court held that a violation of an internal policy in a handbook does not provide a basis for a claim under the FMLA.

Scott v Grand Prairie Independent School District, 2012 WL 1361621 (N.D. Tex. April 19, 2012)

Plaintiff, a middle school teacher, was notified by defendant that he was being transferred to a school that would make his commute twenty-five to thirty minutes longer. At or about the

same time, he informed the school principal that his wife had been diagnosed with cancer and he would need to remain at a campus closer to work and he would need to take a leave of absence under the FMLA. The principal told plaintiff that he would be considered for a transfer to a closer-to-home school if a job opened up. Plaintiff alleged that two positions at a nearby school were filled by teachers with no public school teaching experience and holding only probationary teaching certificates. Plaintiff's filed a complaint alleging three claims that included gender discrimination, retaliation in violation of the FMLA, and retaliation in violation of Title VII.

The district court granted in part and denied in part defendant's motion to dismiss for failure to state a claim. Specifically, with regard to plaintiff's FMLA retaliation claim, plaintiff alleged that he had been rejected for the transfer to a nearby school because he had requested FMLA leave. In effect, he alleged he had been retaliated against by being denied a transfer to an open position in a school that was closer to his home. The court said his case could go forward after plaintiff outlined all the negative factors his teaching position in the school that was farther away from his home entailed. He said he lost campus seniority, taught more-difficult students, had to complete more paperwork and had a commute that took three times as long. The court said the conditions were adverse enough to dissuade a reasonable employee from requesting FMLA leave.

Summarized Elsewhere:

Bright v. Evonik Cyro, LLC, 2012 WL 811221 (E.D. Ark. March 12, 2012)

- b. Son or Daughter

Summarized Elsewhere:

Stone v. St. Vincent Hosp. and Health Care Ctr., 2012 WL 5844748 (S.D. Ind. Nov. 19, 2012)

- c. Parent

Dye v Indiana Dept. of Correction, 2012 WL 1390206 (April 20, 2012)

Plaintiff filed a complaint against the employer, while she was still employed, stating that she was the victim of gender, national origin, and race discrimination. She also alleged that, after making the complaint, she was retaliated against for taking FMLA leave on two occasions to care for her ailing parents. Specifically, plaintiff alleged that her employer treated her unfairly by issuing discipline and negative performance appraisals to her after she took FMLA leave.

The district court granted the employer's motion for summary judgment because plaintiff failed to establish that she suffered adverse employment actions that were motivated, at least in part, to retaliate against her for exercising her right to take FMLA leave under the direct or indirect method of proof. Specifically, plaintiff was unable to put forth any direct or circumstantial evidence showing that her employer's decision to take the adverse job action against her was motivated by an impermissible purpose, such as the exercise of her FMLA rights. Furthermore, plaintiff could not use the "indirect method" to prove that she was being subjected to retaliation for taking FMLA leave because her broad generalization that she was

treated differently than all other employees in her position was insufficient to raise an inference of discrimination. Plaintiff failed to come forward with specific evidence, such as the name of at least one other similarly situated employee, the name of that employee’s supervisor, and a specific circumstance—comparable to hers—in which she was treated less favorably than that other employee who did not take FMLA leave.

Ghawanmeh v Islamic Saudi Academy, 857 F.Supp.2d 22 (D. D.C. 2012)

Plaintiff, an elementary school teacher, brought an action against her employer alleging violations of Title VII, FMLA, breach of contract, and slander. With regards to the FMLA claim, plaintiff alleged that her employer interfered with her rights by denying certain leave requests and also by retaliating against her for taking leave. Specifically, plaintiff claimed that because she had not used the full leave that she requested, she had a “balance” of FMLA leave that the school should have known that she was using when she requested additional leave. However, the district court held that plaintiff failed to provide the school with notice of her intention to take FMLA leave, as required for school’s denial of her request for leave to be considered an interference with her FMLA rights. Consequently, the court concluded that plaintiff’s FMLA claim was a *post hoc* rationalization for her unauthorized leave. With regard to plaintiff’s FMLA retaliation claim, the court held that there was no proven causal connection between plaintiff’s termination and her leave. Therefore, plaintiff’s FMLA claims failed.

Summarized Elsewhere:

Miller v. State of Nebraska Dept. of Economic Development, 467 Fed.Appx. 536 (8th Cir. 2012)

- d. Certification of Family Relationship
- 2. “To Care For”

Romans v. Michigan Department of Human Services, 668 F.3d 826 (6th Cir. 2012)

The employee, who had been employed for eight years, was discharged. Prior to his discharge, he was suspended for one day when he left his shift early after receiving a call from his sister indicating that his mother, who was suffering from cancer and renal failure, was unlikely to survive the night. Before this call, the employee had submitted paperwork indicating that he was his mother’s health care provider and held a power of attorney for her. As a result, he received permission to use his cell phone at work so he could be alerted to emergencies. The employee initially intended to attend to his mother at the conclusion of his shift at 11:00 p.m. However, at 10:30 p.m., he was notified that he needed to stay to work a double shift as another employee had called in sick. The employee told his supervisor that he found another employee to cover his shift, but the supervisor refused to approve it. The employee’s supervisor told him that he would be fired if he left. The employee left, but later returned out of concern for his employment. Subsequently, another supervisor allowed him to leave during the course of the second shift. Ultimately, the employee was discharged based, in part, on this one-day suspension.

The employee then filed suit, alleging that the employer interfered with his rights under the FMLA and suspended and discharged him for exercising his FMLA rights. The district court granted summary judgment in favor of employer, but the Sixth Circuit reversed and remanded the case for further proceedings. The court concluded that the employee demonstrated a disputed issue of fact as to whether the employer denied him a benefit to which he was entitled to state a claim for interference under the FMLA. It found that, in order to qualify for FMLA leave, the employee must be needed to care for the family member, which includes the need to make decisions with a sibling regarding the care of their mother. It rejected the district court's reasoning that "the need to care for" provision under the FMLA did not allow for all family members to be together to care for a third family member. The fact that the employee's sister was present to care for their mother did not deprive the employee of the right to FMLA leave to make decisions with his sister regarding their mother. Additionally, the employee was entitled to leave "to make arrangements for changes in care," which included the decision regarding whether the employee's mother should continue on life support. The court further concluded that the employer failed to show that the reason for the suspension was unrelated to the exercise of FMLA rights. Likewise, the court concluded that there was a disputed issue of fact regarding whether the employer's reasons for the action – that the employee failed to follow proper procedures and abandoned his post – were pretext for retaliation based on his exercise of rights under the FMLA. Finally, the court held that there was a disputed issue of fact regarding whether the employee was harmed by this suspension.

Wegelin v. Reading Hospital and Medical Center, 2012 WL 5962444 (E.D.Pa. Nov. 29, 2012)

Plaintiff was employed by defendant as a technician assistant. The employee had a daughter with pervasive developmental disorder and congenital blindness in one eye, which required that her daughter be supervised at all times. While the employee was at work, the child would be watched at a day care that required parents to pick up their children promptly at 5:30PM, except in rare emergency situations for a fee. In January 2010, the employee used a stolen parking pass to park closer to the facility in violation of the employer's rules. The employee was disciplined by requiring her to park in a parking lot farther from the employer's facility. This change prevented the employee from being able to pick up her child from the day care facility in a timely manner. As a result, the employee was required to find alternative day care for her child as the child could not be left unsupervised for any amount of time. The employee took paid time off to search for a day care, but was unsuccessful. The employee notified her supervisor that the employee needed more time, and she was given a week to find alternative day care. The employee searched but was unsuccessful at finding a day care that was open until 6:00 PM and cared for children with special needs. When the employee did not report after a week of paid time off, the employer discharged the employee.

The employer filed a motion for summary judgment on the grounds that the employee's need to find day care arrangements for the child do not constitute a "need to care for" the child under the FMLA, and that there lacked a nexus between the child's health condition and the need to find alternative day care. The district court rejected the employer's arguments and denied its motion for summary judgment on the ground that the employee had testified that she had to find a day care center that was qualified to care for her child with special needs which constituted a "change in care" as described in the regulations.

Summarized Elsewhere:

Steers v. Michigan, 2012 WL 2568169 (E.D. Mich. 2012)

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

Bellanger v. H&E Healthcare, L.L.C., 2012 WL 4325633 (M.D. La. Sept. 20, 2012)

Plaintiff, who worked for a Louisiana nursing home, was frequently absent from work in early 2010 for dental work and breast reduction surgery. Plaintiff was promoted to Activities Director on April 16, 2010; however, she did not start this new job because she took additional leave. On April 29, 2010, plaintiff underwent additional cosmetic surgery and, on May 26, 2010, underwent a hysterectomy. Plaintiff was absent from work from April 29, 2010 until her discharge on June 17, 2010 for excessive absenteeism.

After her discharge, plaintiff filed suit against the employer for FMLA interference and retaliation. The court denied the employer's motion for summary judgment as to the FMLA interference claim, but granted summary judgment as to plaintiff's FMLA retaliation claim. First, the court ruled that plaintiff's cosmetic surgery was not an FMLA-covered condition given that no complications arose from this surgery. However, the court did find that questions of material fact existed as to whether the plaintiff provided adequate, timely notice of her need for FMLA leave for the hysterectomy. Second, the court ruled that the employer was entitled to summary judgment as to plaintiff's FMLA retaliation claim because she could not show that the employer's two reasons for terminating her employment were pretextual. Here, the two reasons given for plaintiff's discharge were: (1) excessive absenteeism; and (2) plaintiff's failure to return from her unpaid leave on the date she was scheduled to begin her new job as Activities Director. The court found that the only evidence plaintiff presented to challenge the employer's reasons was her own opinion, which was insufficient to rebut the employer's legitimate termination reasons.

Jones v. C&D Techs, Inc., 684 F.3d 673 (7th Cir. 2012)

The employee, a machine operator, suffered from back and leg pain and bouts of anxiety. As a result, he typically visited with his physician every two to three of months and took prescription medication. He was granted FMLA leave to go to an appointment with a back specialist on the afternoon of October 1, 2009. Rather than taking just the afternoon of October 1 off for his appointment, the employee took the whole day off. In the morning, he picked up his paycheck from work, stopped by his primary care physician's office to get a prescription refill and ensure his paperwork was in order for his referral to the back specialist, and refilled a prescription at Walgreens. He then drove to his afternoon medical appointment.

After investigating, the employer determined that the employee was not receiving treatment for his serious health condition on the morning of October 1. It therefore assessed him half an attendance point for his morning absence, putting his attendance point total over the limit under company policy and resulting in his discharge. The employee sued, alleging that his

employer interfered with his right to take FMLA leave for his visit to his primary care physician in the morning and his trip to Walgreens to refill his prescription.

The Seventh Circuit affirmed the grant of summary judgment for the employer. The court explained that to qualify for FMLA leave, an employee must not only have a serious health condition, but he also must be incapacitated from working as a result of the condition. If an employee is receiving unnecessary treatment or no treatment, he is not incapacitated from working. Applying this rule, the court found that the employee's morning visit to his physician did not constitute "treatment" under the FMLA because his doctor did not evaluate, treat, or even physically examine the employee. Rather, the employee arrived at his doctor's office without an appointment and only spoke briefly with his physician in the office lobby. The court also found that the employee's trip to Walgreens to refill his prescription was not treatment because it did not constitute evidence that he received treatment that required him to be absent from work that morning. The court noted that a prescription-refill note might in some circumstances be evidence of an employee's serious health condition, but not evidence that the employee is required to be absent from work to receive treatment.

Diehl v Bank of America, N.A., 470 Fed.Appx. 771 (11th Cir. 2012)

Plaintiff took FMLA leave for breast cancer treatment. While she was on leave, her employer concluded that it had to cut costs. The employer determined that plaintiff performed the same tasks as another employee. Therefore, the employer decided that the two jobs could be combined into one. Notes taken at that time included a discussion of how the co-worker was better suited to fill the newly created position. The bank then decided to move plaintiff to another position when she returned from FMLA leave. Although the new job paid the same, it did not have the same level of duties. As the employer continued to look for ways to cut costs, it decided to eliminate the new position that plaintiff had been transferred to. After plaintiff was discharged, she sued, alleging among other things that she had been terminated in retaliation for taking FMLA leave.

However, the Eleventh Circuit ruled against plaintiff because the employer was able to present documentation showing that its fiscal needs – rather than FMLA leave – drove the decision to first consolidate the two jobs and then to terminate plaintiff's employment.

Pellegrino v Communications Workers of America, 478 Fed.Appx. 742 (3rd Cir. 2012)

While she was on FMLA leave for surgery, plaintiff traveled to Mexico, where she stayed for a week. There was no medical or family reason for the trip, nor had she secured the employer's prior consent to travel outside of the immediate vicinity of her home during leave. Consequently, plaintiff was terminated from employment for violation of the employer's leave policies. Plaintiff filed suit alleging that her termination violated the FMLA. In response, her employer moved for summary judgment alleging that the FMLA did not protect plaintiff from termination for a reason unrelated to her FMLA leave - namely, violation of the employer's policy restricting unapproved travel for someone receiving paid sick leave benefits. The employer argued that it would have terminated plaintiff irrespective of her status under the FMLA as it had the right to enforce its policies restricting unapproved travel where an employee is on paid sick leave.

The Third Circuit agreed with the employer and awarded summary judgment to the employer. Specifically, it held that the FMLA does not shield an employee from termination if the employee was allegedly involved in misconduct related to the use of FMLA leave. So long as an employer's policies do not conflict with or diminish an employee's FMLA rights, the FMLA "in no way prevent[s] an employer from instituting policies to prevent the abuse of FMLA leave." Here, the employer terminated plaintiff because she violated her employer's policy by leaving the immediate vicinity of her home without prior approval, or for any other permissible reason. The Court reasoned that the policy served the legitimate purpose of ensuring that the privilege of paid sick leave is not abused. Furthermore, the Court determined that the policy did not discourage employees from taking FMLA leave.

Dawson v. Jetty Partners, LLC, 2012 WL 439672 (D. Md. Feb. 8, 2012)

Plaintiff alleged that his former employer violated the FMLA by failing to notify him of his right to FMLA leave and by terminating his employment without notice of his rights under the statute. Before any discovery, the company filed a motion for summary judgment, arguing that plaintiff did not suffer from a serious health condition within the meaning of the FMLA. The court denied the motion. First, the court concluded that it was uncertain, at least in the early stages of the case, whether plaintiff's back injury was a serious health condition under the FMLA. Plaintiff hurt his back on May 9, 2010, visited his doctor and received two prescriptions on May 10 before going to work that day and the next, and then was unable to work on May 14. He was under the care of his doctor and underwent physical therapy until July 2010. The court concluded that a reasonable jury could find that plaintiff was incapacitated for more than three days, at least based on the facts in the record before discovery occurred. Therefore, summary judgment for lack of a serious health condition was inappropriate.

Summarized Elsewhere:

Smith v. Wynne, 2012 WL 3553722 (10th Cir., Aug. 20, 2012)

Rounds v. Michigan, 2012 WL 2680825 (E.D. Mich. 2012)

Steers v. Michigan, 2012 WL 2568169 (E.D. Mich. 2012)

Breidenbach v. Shillington Box Co. et al., 2012 WL 85276 (E.D.Mo. 2012)

Fazio v. NJ Turnpike Authority, 2012 WL 71749 (D.N.J.)

- 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

Green v. U.S. Steel Corp., 2012 WL 4478967 (N.D. Ala. Sept. 26, 2012)

Plaintiff sued her former employer, claiming that she was discharged after suffering a serious health condition under the FMLA. Following a jury trial in which the jury found for the employer, plaintiff filed a Motion for Judgment Notwithstanding the Verdict/Motion for New Trial. Plaintiff claimed that as a matter of law, she suffered from a serious health condition, as she missed work for eight consecutive days and was treated by a doctor at least twice during that time period. She alleged the jury was not properly charged with the regulation definition of a serious health condition, and instead was simply charged with the FMLA pattern instruction. The court found that the jury had all information it needed to reach a decision, had found that her illness did not have the necessary complications to raise it to the level of a serious medical

condition, and that a reasonable jury could have found that the illness did not constitute a “serious health condition.” The court therefore denied plaintiff’s motion.

Giddens v. UPS Supply Chain Solutions, 2012 WL 2524396 (D. Del. June 28, 2012)

Plaintiff, was employed with the employer as a collection associate, and was initially terminated for absenteeism, but was reinstated after the employer found a violation of the FMLA. After his reinstatement, plaintiff had further attendance issues and was issued a final written warning. The written warning notified plaintiff that any further violations of the attendance policy would result in termination. At some point later, the employee was absent from work due to the flu. Upon returning to work, the employee failed to provide proper medical documentation for his absences. Instead, the doctor’s note simply asked that the employee be excused from work for the period the employee was absent and failed to provide any diagnosis or information about the employee’s illness. The employer subsequently began initiating the process for discharging the employee for violation of the company’s attendance policy. The employee thereafter filed a short-term disability claim, and informed his supervisor that he was unsure when he would be able to return to work as he had not yet seen his physician. Upon his return, nine days later, the employee was discharged.

The employee filed suit alleging, among other things, violations of the FMLA. The district court granted the employer’s motion to dismiss finding that the employee had failed to adequately plead his FMLA claims. The court found that although the employee alleged he suffered from the flu, under the definitions provided in 29 C.F.R. § 825.113, his complaint failed to allege that he suffered from a serious medical condition qualifying him for leave under the FMLA. As such, the court dismissed the employee’s FMLA claims without prejudice.

A. Overview

Erdman v. Wachovia, 2012 WL 728917 (D.S.C. Feb. 16, 2012), adopting report and recommendation, 2012 WL 716595 (D.S.C. Mar. 6, 2012)

The employee, who was employed for fifteen years by defendant, was discharged. About five years prior to her discharge, the employee had requested and was granted leave under the FMLA because she was undergoing treatment for breast cancer. After her requested leave expired, the employee returned to work. About six months’ prior to her discharge, the employee began experiencing weight loss and thinning hair due to a thyroid problem. She told one person of her thyroid condition and told her other colleagues that she was intentionally losing weight due to a diet. The employee never requested or took leave because of this thyroid problem. Several months later, the employer discovered that the employee had violated its policy regarding cash shortages and discharged her.

The employee sued the employer alleging that it interfered with her rights under the FMLA. The employer filed a motion for summary judgment, and the magistrate judge entered a report and recommendation recommending that the district court grant the employer’s motion. The magistrate judge concluded that, in order to state a claim for interference, the employee must show that she suffered from a serious health condition and that she put the employer on notice of the need to exercise rights under the FMLA. The employee failed to establish both of these

elements of her claim. The employee asserted that she suffered from a serious health condition due to her diagnosis of breast cancer several years prior and that the more recent symptoms indicated that her breast cancer could be returning. The magistrate judge found that this was not sufficient to establish that she suffered from a serious health condition, because she was not, in fact, suffering from breast cancer at the time of her discharge and the thyroid condition did not impact her ability to perform the functions of her job. Moreover, the magistrate judge concluded that the employee did not provide notice of the need for leave. The employee asserted that her rapid weight loss and thinning hair put her employer on notice. However, these observations, even if made, were not verbal notice by the employee of the need for the protections of the FMLA. The magistrate judge noted that the employee only told one co-worker of her condition and told her other co-workers that she was intentionally losing weight. While the magistrate judge concluded that the employee need not mention the FMLA when providing sufficient notice under the Act, the court recognized that the “the employee must verbalize something that signals to the employer that the employee may need FMLA leave.” Further, the magistrate judge noted that, when an employee seeks leave due a medical condition for which he or she previously was provided leave, the employee must specifically reference the medical condition or the need for leave to provide sufficient notice under the Act. Thus, the magistrate judge concluded that the employee failed to provide the employer with sufficient notice that the protections of the FMLA might apply.

Summarized Elsewhere:

Brookshire v. Buncombe County, North Carolina, et al., 2012 WL 136899 (W.D.N.C. Jan. 18, 2012)

Reynolds v. Stovall, 2012 WL 1202026 (W.D. Ark. Apr. 10, 2012)

- B. Inpatient Care
- C. Continuing Treatment

Byron v. St. Mary’s Medical Center, 2012 WL 3966090, 19 WH Cases 2d 1283 (E.D. Mich. 2012)

The employee filed suit against her former employer alleging that she was denied her rights under the FMLA. The employer terminated the employee when she returned to work the day after she sought treatment for acute pancreatitis. In seeking treatment, the employee missed a full day of work. The employer moved for summary judgment, arguing that the employee was not entitled to leave and failed to give proper notice of leave. The court denied the employer’s motion.

While the employee did not require inpatient care and did not suffer a period of incapacity of more than three days, the employee’s condition, pancreatitis, did constitute a serious health condition in that it require multiple treatments. The court noted that “the FMLA requires only that a condition would cause incapacity for three days in the absence of medical intervention or treatment.” In addition, the court determined that a reasonable jury could find that the employee notified her employer of the need for leave when she informed her supervisor

that she was sick and was going to the emergency room and when she furnished her employer with discharge papers from the hospital. In addition, the HR manager testified that she witnessed the employee pick-up FMLA forms after she was terminated.

Summarized Elsewhere:

Johnson v. Dollar General et al., 2012 WL 3072997 (N.D. Iowa Jul 30, 2012)

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

Fries v. TRI Marketing Corp., 139 WH Cases2d 186 (D. Minn. 2012)

The employee worked for a marketing company as a telemarketer and administrative assistant. She suffered from genital herpes and interstitial cystitis, an inflammation of the bladder wall that required numerous visits to the doctor and/or emergency room, caused her to “quite often” arrive late for work, and to call in sick more often than her co-workers. On a Friday, she missed work because of alleged pain and frequent urination. The next day, she claimed to have difficulty urinating and by the evening could not urinate. On Sunday, the employee went to the emergency room, where her doctor attributed her urinary retention issue more to the herpes than to the interstitial cystitis. The emergency room doctor installed a catheter, prescribed medications, and instructed her to take off Monday and return to work on Tuesday.

While at the emergency room, the employee texted her supervisor and informed her that she was in the hospital and had a doctor’s note supporting the need to miss work on Monday. The employee’s supervisor texted her back, informing her that if she missed work on Monday, she would be terminated. Plaintiff was initially suspended for missing work on Monday and later discharged after she threatened to sue. The employer sent her a termination letter, which stated, in part: “Originally was suspended for 30 days, threatened to sue company and management. It was then decided that termination was the best.” The employee’s boss later testified in a deposition that her termination was motivated “a little bit” by her threat to sue the company. Plaintiff filed an FMLA interference and retaliation claim in April 2011 against her former employer.

The company argued that plaintiff’s interstitial cystitis caused her urinary issues on Friday and Saturday and her herpes caused her inability to urinate on Sunday and her Monday absence. Since neither condition resulted in a three day absence, the company reasoned that plaintiff did not have a serious health condition under the FMLA because she was not incapacitated for more than three days. The district court rejected the company’s logic, finding that the two conditions together rose to the level where they were “temporally linked” and affected the “same organ system.”

As for plaintiff’s retaliation claim, the court concluded that because the employer admitted that her threat to sue was at least “a little bit” of the reason for her termination, and because her termination letter stated that the company had planned only to suspend her until she threatened to bring a lawsuit, a jury could conclude that the company violated the FMLA by

retaliating against her for threatening to sue. The court denied the company's motion for summary judgment.

Baggish v. Clear Wireless, LLC, 2012 WL 3538712 (N.D. Fla. Aug. 16, 2012)

Plaintiff missed work for nearly five weeks. She testified that she needed time off from work because she was her son's primary caregiver and she wanted to be there for her child. When her eight-year-old son, who had previously been diagnosed with a prolapsed heart valve, experienced chest pains and had difficulty breathing, plaintiff took him to the emergency room. Test results were inconclusive and the son was discharged the same day with instructions to see the pediatrician. In the following weeks, plaintiff cared for her son "sporadic[ally]" – approximately once a week – by making sure he was comfortable and giving him Tylenol. Plaintiff's son saw two doctors during the five-week period. The first, a heart specialist, found nothing wrong with plaintiff's son's heart and merely ordered annual check-ups. The second determined there was no reason plaintiff needed to stay home and provide extended care for her son. Approximately five weeks following plaintiff's last day of work, the company called plaintiff to request a return-to-work date. Plaintiff responded that she did not have an exact date, and the company fired her shortly thereafter. After the termination, Plaintiff's son was diagnosed with "a little bit of anxiety" and heartburn, which could be treated with chewable Roloids.

Plaintiff brought claims of FMLA interference and retaliation against the company. The court granted the company's motion for summary judgment on both claims, holding that plaintiff's son did not suffer from a "serious health condition." It noted that the son's was not incapacitated for more than three days, as required by the FMLA in cases where overnight hospitalization does not occur. The doctors' diagnoses, and specifically the note stating he did not believe plaintiff needed to stay home from work and provide extended care, were also cited by the court as reasons for dismissal. Furthermore, the court noted, plaintiff herself implied that missing work was unnecessary, by stating that she wanted to care for him "sporadically" and for the sole reasons that she was the son's primary caregiver.

Summarized Elsewhere:

Kirmer v Goodyear Tire & Rubber Co., 2012 WL 1424415 (E.D.La. April 24, 2012)

- a. Incapacity for More Than Three Calendar Days

Dominick v. Baton Rouge Clinic, AMC, 2012 WL 414243 (M.D. La. Feb. 7, 2012)

Plaintiff, who worked as a scheduler for a health clinic and who had been disciplined several times for errors, was seen by a doctor for ear pain. On July 10, 2009, plaintiff was diagnosed with high frequency hearing loss, and her doctor recommended the use of hearing aids or an amplifier. Plaintiff informed her supervisor of the diagnosis, and a double headset was added to the amplifier already in place on her phone. Plaintiff did not feel that this helped her hearing, and she asked the company if she could obtain hearing aids through the clinic and payroll deduction. The request was denied. On August 21, 2009, she then went to her personal physician, described her problem, and said she could not do her job. Her doctor then wrote an

indefinite release from work. Plaintiff requested FMLA leave, which was initially granted. Her doctor subsequently completed the FMLA certification paperwork, stating that she could perform her job with the use of hearing aids or phone amplifier. The company subsequently told plaintiff she would receive no more leave and to return to work. When she did not, she was discharged.

The district court granted the company's motion for summary judgment on plaintiff's interference and retaliation claims. The court noted that plaintiff had continued to work after her initial diagnosis of hearing loss. As such, there was no evidence of consecutive days of incapacity, and plaintiff did not have a serious health condition. The court went on to hold that because plaintiff was not entitled to FMLA, her claim for retaliation failed as a matter of law.

Huberty v. Time Warner Enter. Co., 2012 WL 406983 (N.D. Ohio Feb. 8, 2012)

Plaintiff worked as a warehouse driver. In November 2008, plaintiff approached his supervisor about taking time off because of stress. After being referred to human resources, plaintiff began taking time off and searching for a doctor to certify his medical condition. He was then discharged for a being absent for three consecutive days without calling in. The company's policy required employees to call in for every day of absence.

In granting the employer's motion for summary judgment on plaintiff's claims of interference and retaliation, the court found that there was no evidence that plaintiff could not perform his job duties. Therefore, plaintiff could not establish he had a serious health condition within the meaning of the FMLA. First, the court, held that plaintiff could not establish incapacity using only his own testimony. An employee's subjective assessment was insufficient; a healthcare provider, in the exercise of professional, medical judgment, had to conclude that there was incapacity. Second, plaintiff here could not provide such evidence as he did not consult with a physician prior to taking leave and did not seek treatment until a year later.

The district court went on to hold that even if he had a serious health condition, plaintiff failed to follow the company's reasonable absence notification procedures and adduced no evidence of a causal connection necessary to support a retaliation claim.

Branham v. Gannett Satellite Infor. Network, Inc., 2012 WL 1155928 (M.D. Tenn. Apr. 6, 2012)

The employee receptionist for a community newspaper was discharged in late November 2006 for failing to follow the company attendance policy as to absences that began in early November. The employee sued, claiming that her employer interfered with her use of FMLA leave and fired her in retaliation for her seeking FMLA leave. The case was before the district court on a renewed motion for summary judgment filed by the employer after its first summary judgment was reversed by the Sixth Circuit in 2010. In its 2010 ruling, the Circuit Court held that the employer never triggered the employee's duty to provide a medical certification, and that a jury question existed on whether the employee had a serious health condition. The employer renewed its summary judgment motion after taking the deposition of the employee's health care provider, claiming that there was no longer a question as to whether the employee had a serious health condition. That provider had examined the employee on November 28, which was (i) after the employer sent notice of the termination to employee on November 24, (ii) before the

employee received the written notice on November 29, and (iii) the same day she was advised orally of her discharge.

The district court denied the employer's renewed motion for summary judgment. The court held that the provider's testimony was sufficient to raise a genuine issue of material fact on the incapacity element of the "continuing treatment" requirement. The provider testified that on November 28 she diagnosed the employee with anxiety, depression and insomnia, that she expected the employee to be unable to work a full schedule for six weeks, and that the employee would need at least five physician visits. The court noted that the provider's testimony demonstrated that the provider was not certain whether the period of incapacity was retroactive. Thus, a fact question existed.

Nansamba v. North Shore Medical Center, 2012 WL 1856950 (D. Mass May 21, 2012)

Plaintiff sued defendant, alleging theories of interference and retaliation arising out of her termination on May 10, 2010. On May 5 and 6, the employee saw her general physician for gastrointestinal bleeding. On May 7, she took time off to prepare for a colonoscopy scheduled for May 11. On May 10, the employer ordered the employee to appear at its facilities and fired her for job performance reasons.

The court granted defendant's motion for summary judgment, finding that the employee did not suffer from a "serious health condition" requiring continuous treatment by a health care provider. In particular, it held that she did not require either "treatment two or more times, within 30 days of the first day of incapacity" or "treatment . . . on at least one occasion which results in a regimen of continuing treatment." As to the first definition of "serious health condition," the court determined that the employee first became incapacitated on May 7 and that the incapacity ended when she underwent the colonoscopy on May 11. Because the employee only received one treatment while incapacitated, she did not meet the two treatment requirement. Additionally, the employee did not receive a "regimen of continuing treatment." The court rejected the employee's claim that the drugs she was prescribed before the colonoscopy were such a regimen because they were not intended to treat a health condition, but instead were to prepare her for the colonoscopy. For those reasons, summary judgment was entered against the employee.

Summarized Elsewhere

Cook v. Avon Protection Systems, Inc. 2012 WL 6650638 (W.D. Mich. Dec. 20, 2012)

- b. Continuing Treatment
 - c. Treatment by Health Care Provider
2. Pregnancy or Prenatal Care

Grace v. Adtran, Inc., 470 Fed.Appx. 812 (11th Cir. 2012)

Plaintiff, a former employee who was subjected to a ten-pound weight lifting limitation due to pregnancy, brought an action against her former employer claiming that she was discriminated against due to pregnancy and that the employer interfered with her rights under the FMLA. The Eleventh Circuit Court of Appeals held that the employee failed to establish that the employer interfered with her rights under the FMLA where the employer granted her 12 weeks of FMLA leave as a result of her ten-pound lifting restriction. Moreover, because plaintiff was still restricted from lifting more than ten pounds at the end of her FMLA leave, she remained unable to perform an essential function of her position and, thus, was not entitled to return to her position. Plaintiff also raised an FMLA interference claim based on a theory of involuntary leave, in which she claimed that her employer forced her to take FMLA leave even though she did not have a “serious health condition” that prevented her from working. The Eleventh Circuit, which has not addressed the question of whether an involuntary leave theory is actionable under the FMLA, declined to consider the issue of involuntary leave in this case based on the reasoning that plaintiff’s claim was not ripe for review.

3. Chronic Serious Health Condition

Weidema v State Department of Transportation, 2012 WL 2873942 (Minn. Ct. App. July 16, 2012)

The employee, who recently discovered a lump in her breast, failed to report to work or provide proper notice to the employer on the day following her discovery. When she called in to notify her supervisor that she was late and needed to take the day off, the supervisor told her that her call-in was unacceptable and that she needed to report to work. He also advised to her that she would be required to take a drug and alcohol test under the state’s random drug testing program. Later that day, the employee called the supervisor and told him that she would not be coming in that day or the rest of the week because of personal issues. She came into work the following day to request “comp time” for the week, a request which the supervisor denied. When the supervisor told the employee that she would be taken to the clinic for a drug and alcohol test, she left the premises, called back to tell the supervisor she had been scheduled for a medical examination, and then later returned to work following the exam.

The employee’s medical examination did not result in any work restrictions, nor did the employee’s physician tell her she should not report to work. She was placed on administrative leave by the employer pending its investigation of her refusal to submit to drug testing. During the week she was on leave, she underwent a biopsy. The post-biopsy instructions restricted her from lifting anything heavier than a dinner plate for 24 hours or participating in strenuous activities over the same time frame. The employee reported to work the following week and she was discharged at that point for refusing the drug and alcohol test. She sued, alleging FMLA interference, and FMLA retaliation, and the employer filed a motion for summary judgment.

The court granted the employer’s motion, finding that the employee had not established that she was suffering from a serious health condition under either the “three consecutive days of incapacity” or the “continuing treatment” test. There was no evidence that the employee’s biopsy resulted in anything more than a 24 hour strenuous activity limitation and the court rejected the employee’s own testimony that she was somehow limited from working for three days. Moreover, there was no evidence that the employee actually had cancer (the tumor proved to be

benign) and the court ruled that an employee visit to a doctor for evaluation of symptoms entitles her to FMLA leave only when the symptoms are eventually diagnosed as a serious health condition. Because the employee could not show that her condition would likely lead to three or more days' incapacity if it was left untreated, she could not establish a prima facie case of FMLA interference. The employee's failure to establish entitlement to FMLA leave also meant that she could not show that she had engaged in FMLA-protected activity for purposes of establishing a retaliation claim. Accordingly, the Court of Appeals affirmed the trial court's grant of summary judgment for her retaliation claim, as well.

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

Summarized Elsewhere:

Jones v. C&D Techs, Inc., 684 F.3d 673 (7th Cir. 2012)

- D. Particular Types of Treatment and Conditions
 1. Cosmetic Treatments

Summarized Elsewhere:

Bellanger v. H&E Healthcare, L.L.C., 2012 WL 4325633 (M.D. La. Sept. 20, 2012)

2. Treatment for Substance Abuse
3. "Minor" Illnesses

Wilson v. Sharp Mfg. Co. of America, 2012 WL 489203 (W.D. Tenn. Jan. 27, 2012)

Plaintiff, feeling ill towards the end of her shift, saw a nurse practitioner at a local health care facility after her shift ended at 6:00 a.m. Plaintiff returned to work at 6:00 p.m. that same day and provided a note, indicating that she would be off of work until four days later. The note provided no information as to diagnosis or treatment. When plaintiff returned to work four days later, her supervisor informed her that she needed medical clearance from the company nurse, which she obtained the following day. Plaintiff was then discharged two weeks later pursuant to defendant's attendance policy. At no point prior to or in conjunction with her discharge did plaintiff provide the reason for her absences.

Plaintiff filed claims for FMLA interference and retaliation and defendant filed a motion for summary judgment, arguing that plaintiff was not an eligible employee, did not suffer from a serious health condition, and failed to comply with statutory obligations regarding notice and eligibility. The court evaluated, preliminarily, whether plaintiff was an "eligible employee" under the FMLA and determined a genuine issue of material fact existed as to whether or not plaintiff had worked the requisite 1,250 hours. The court then held that plaintiff did not suffer

from a serious health condition under the criteria of the FMLA, as she was diagnosed with sinus and ear infections. Although the fourteen-days of antibiotics prescribed may have met the statutory definition of a “regimen of continuing treatment” under the regulations, the court cited prior Sixth Circuit holdings that conditions such as sinusitis, bronchitis and ear infections are routine, short-term illnesses not covered by the FMLA, and therefore her illness did not qualify as a serious health condition covered by the FMLA. Despite finding that she did not meet the criteria of a FMLA-covered condition, the court went on to address the sufficiency of notice provided to defendant. The court found that merely providing a medical note with almost no information regarding the need for leave is insufficient to put an employer on notice that an FMLA-qualifying event has occurred.

Linebarger v. Honda of America Mfg., Inc., 2012 WL 1606026 (S.D. Ohio May 8, 2012).

Plaintiff was an automobile assembly line worker who requested FMLA leave for unscheduled restroom breaks as a result of an increased urination frequency condition. After the employer denied this request, plaintiff brought a claim for interference under the FLMA. The district court held that plaintiff did not have a serious medical condition because the need to take frequent breaks to use the restroom would not render him incapacitated, intermittently or otherwise.

Summarized Elsewhere

Cook v. Avon Protection Systems, Inc. 2012 WL 6650638 (W.D. Mich. Dec. 20, 2012)

Giddens v. UPS Supply Chain Solutions, 2012 WL 2524396 (D. Del. June 28, 2012)

4. Mental Illness

Hayes v. Vermeer Manufacturing Co., 817 N.W.2d 495 (Iowa App. 2012)

Plaintiff was discharged for repeated tardiness, allegedly caused by side effects of medication taken for his mental health condition. Plaintiff had sought FMLA leave for arriving at work late, and received a certification from his psychiatrist. The employer asked plaintiff for more information before a determination could be made, including the possibility of time for taking the medication earlier in the evening to keep plaintiff from oversleeping. After plaintiff was absent on several additional occasions, the employer denied his FMLA request and discharged him.

Plaintiff brought a claim for interference with his rights under the FMLA, and the court granted summary judgment in favor of the employer. Because plaintiff sought intermittent leave on a permanent basis for a chronic condition, the court held he did not have a right to FMLA leave.

Summarized Elsewhere:

Hall v. Ohio Bell Telephone Co., 2012 WL 3113157 (N.D. Ohio Jul 31, 2012)

CHAPTER 5. LENGTH AND SCHEDULING OF LEAVE

I. OVERVIEW

II. LENGTH OF LEAVE

Summarized Elsewhere:

Gilliard v. Georgia Department of Corrections, 2012 WL 6115913, 19 WH Cases 1798 (11th Cir. Dec. 7, 2012)

- A. General
- B. Measuring the 12-Month Period

Thom v. Am. Standard, Inc., 666 F.3d 968, 18 WH Cases2d 1132 (6th Cir. 2012)

Plaintiff, who had worked for defendant for 36 years as a molder, requested FMLA leave from April 27, 2005 to June 27, 2005 to repair a non-work-related shoulder injury. Defendant approved the leave in writing, but failed to inform plaintiff which 12-month time period it used to determine FMLA eligibility. Plaintiff's shoulder healed earlier than expected and his doctor cleared him for light duty work beginning on May 31 and set June 13 as the probable date for unrestricted work. When he tried to resume work on May 31, he was sent home because defendant did not permit employees with non-work-related injuries to perform light duty work temporarily after FMLA leave. On June 14, defendant's Human Resources representative called plaintiff because he failed to come to work on June 13. Plaintiff responded that he was experiencing increased pain so would return to work on June 27 and stated that he would provide corresponding medical documentation. Plaintiff was not able to get an appointment with his doctor until June 17 and left a message for HR that day to inform them of the appointment. Plaintiff delivered the note to defendant the same day, but by the time he got there, he was informed that he had been discharged. Defendant had determined that every day from June 13 to 17 was an unexcused absence, which exceeded its permissible absences.

The district court granted partial summary judgment to plaintiff on his FMLA interference claim. On appeal, defendant contended that it used the "rolling" method for calculating FMLA leave, meaning that plaintiff's leave expired on June 13. Defendant also relied on affidavits from officers of plaintiff's union, stating that defendant used the "rolling" method and argued this imputed knowledge of the method to plaintiff. The court upheld the district court, finding, even though defendant had changed to the "rolling" method in March 2005, it had not informed plaintiff of the change or inform him when his FMLA leave would expire. The court discussed that employers should give their employees written notice of the method they will use to calculate the FMLA leave year. The court held that plaintiff was entitled to rely on defendant's prior calendar method of calculating employee leave and the June 27 return-to-work date that defendant approved. The court conceded that providing notice to a union of an employer's calculation method may be imputed to its members. However, that is not the case when an employer approves an employee's leave past their leave expiration date.

The Sixth Circuit reversed the district court's denial of liquidated damages. The court found that defendant did not act in good faith because it had "manufactured" the "rolling" method as the reason for plaintiff's discharge after the fact. The court found the employer's stated reason for plaintiff's discharge to be pretext, given its prior approval of plaintiff's leave through June 27. Also, after plaintiff's discharge, defendant made no effort to investigate further or correct its error when it received a letter from plaintiff's doctor explaining that any confusion as to his leave was not plaintiff's fault.

Cook v. Avon Protection Systems, Inc. 2012 WL 6650638 (W.D. Mich. Dec. 20, 2012)

Plaintiff was a production worker for defendant from 2006 until defendant discharged her in February 2011. Plaintiff had a history of unsatisfactory attendance, having received discipline several times under defendant's no-fault attendance policy. In 2010, plaintiff was pregnant and ultimately gave birth to a daughter. By mid-April 2010, plaintiff had exhausted her FMLA leave as a result of her maternity leave and complications from her pregnancy. On January 25, 2011, plaintiff's child became ill, prompting plaintiff to leave work early and take her child to their pediatrician. Plaintiff's daughter was diagnosed with the flu. The pediatrician told plaintiff to keep her daughter at home for five days and monitor her closely. On February 4, 2011, defendant discharged plaintiff for excessive absenteeism.

Plaintiff sued defendant claiming that her discharge violated the FMLA. The court denied defendant's motion for summary judgment. The court considered: (1) whether plaintiff had any FMLA leave available when she left work to attend to her daughter on January 25, 2011; and (2) assuming plaintiff had FMLA leave available, did her daughter experience a "serious health condition" beginning on January 25, 2011 that would allow plaintiff to take FMLA leave.

As to the first issue, the defendant, in accordance with its written policy, counted FMLA leave using a 12-month rolling period. Plaintiff had first taken FMLA leave due to her pregnancy exactly one year before, on January 25, 2010. If, as of plaintiff's daughter's illness on January 25, 2011, the 12-month counting period included January 25, 2010, then Plaintiff had no FMLA leave available on January 25, 2011. If, however, Plaintiff's FMLA absence of January 25, 2010 was not to be counted on January 25, 2011, then Plaintiff had one day of FMLA leave available for her daughter's illness on January 25, 2011. The court declared this to be a factual dispute for trial.

As to the second issue, the court rejected defendant's argument that plaintiff's 10-month old daughter had not suffered a period of incapacity or continuing care. Plaintiff argued, and the court agreed, that the only activity for a 10-month old child was attending day care, which plaintiff's daughter was unable to do for 5 days. Further, while the DOL's FMLA regulations provide that flu is not ordinarily a serious health condition under the FMLA, according to the court, a 10-month old child with the flu is not the ordinary situation contemplated by the regulations, because of the continuing risk of rapid dehydration.

Murphy v. John Christner Trucking, LLC, 2012 WL 3428072 (N.D. Okla. Aug. 15, 2012)

The employee, a nighttime dispatcher, worked a rotational schedule of seven days on, seven days off. The employee was diagnosed with deep vein thrombosis and took FMLA leave in September 2010 to undergo emergency surgery. On December 25, 2010, the employer terminated him on the grounds that he exhausted his FMLA leave. In calculating the employee's leave, the employer applied leave time to weeks the employee would normally have been scheduled to be off duty. The employee brought a FMLA interference claim, arguing that the employer had incorrectly calculated his leave time by including weeks he would have not worked. The district court granted the employer's motion for summary judgment on the employee's FMLA interference claim, finding that the restrictions on calculating intermittent leave in 29 U.S.C. § 2612(b) and its implementing regulations do not apply to the employer's general calculation of leave pursuant to 29 U.S.C. § 2612(a)(1). In making this finding, the district court noted it could locate only one prior case that had addressed this issue. That prior case, out of the district court of Alaska, held that an employer should only apply FMLA leave to those weeks that would actually be worked by a rotational employee. In declining to follow the prior case, the court emphasized the different language found in 29 U.S.C. § 2612(a)(1) and (b).

Summarized Elsewhere:

Williams v. New York City Health & Hospitals, 2012 WL 5506128 (S.D.N.Y. Nov. 13, 2012)

- 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

Nichols v. City of Mitchell, 2012 WL 5471159 (Bkrtcy. D.S.D. Nov. 9, 2012)

Plaintiff was a transit bus driver for the city of Mitchell, South Dakota. The plaintiff's physician approved his return to work on January 25, 2010 after a January 21, 2010 heart stent surgery. The plaintiff returned to work but was sent home because his employer insisted that a Department of Transportation regulation required him to take 60 days off. The plaintiff did not request the additional 57 days of leave, but his employer required it. In March 2010, the plaintiff experienced chest pain which required that he take leave for additional heart surgery. The plaintiff's physician cleared him to return to work in mid-May 2010 with a lifting restriction of 50 pounds for two-weeks. The employer refused to reinstate the plaintiff with that restriction. During his leave, the plaintiff visited his job site several times, and his supervisors advised him that they were holding his job open and looked forward to his return on June 19, 2010 – the date his employer determined to be his return date. The plaintiff's employer then determined that his FMLA benefits ran out on May 28, 2010 and terminated him on June 1, 2010.

The plaintiff sued his employer for FMLA interference on a theory of involuntary leave. He contended that if he had not been forced to take the 60 days of leave in January 2010, he would have been entitled to leave through June 12, 2010 and would not have been terminated.

The court held that material issues of fact existed with respect to his claim and denied summary judgment to the employer. In so doing, the court noted that other courts in the Circuit have recognized that an employer may interfere with an employee's right to FMLA leave by forcing the employee to take leave the employee did not request or need. Establishing such a claim "requires an employee to have been forced to take FMLA leave even though the employee does not have a serious health condition."

Walker v. Trinity Industries, 2012 WL 1858935 (E.D. Mo. May 22, 2012)

Plaintiff was employed by defendant, who believed that the employee had a serious medical condition and required her to take FMLA leave. Three doctors cleared the employee to return to work, but the employer refused to do so. Later, it advised the employee that her FMLA leave had expired and terminated her. The employee filed suit for interference and retaliation when it did not allow – and refused to accept multiple medical opinions clearing – her to return to work, and later terminated her.

The employer filed a motion to dismiss, which the court granted. The court dismissed the employee's interference claim on grounds that her complaint failed to allege that she had a serious health condition. The court also rejected her theory that she was involuntarily forced to take FMLA leave. It noted that, in one case in its circuit, the district court recognized an FMLA interference claim where an employer forced an employee to take FMLA leave an employee did not request or need, regardless of whether the employee had a serious health condition. While the Eighth Circuit had not endorsed such a theory, the employee's claim would fail even if the circuit were to do so. This is because an interference claim under those facts only arises where an employee seeks FMLA leave at a later date but cannot do so because the employee was wrongfully forced to use FMLA leave in the past. Because the employee did not make such allegations, her interference claim was dismissed.

The court also dismissed the employee's claim for retaliation because plaintiff did not allege she had a serious health condition; therefore, the employee could not show she was engaged in protected activity. The court rejected the employee's arguments that she stated a claim because she was forced to take leave, explaining that analogous district court authority in its circuit required a showing of a serious health condition, regardless of whether FMLA leave was voluntary or involuntary. The court also declined to apply equitable estoppel, finding that an employer misleading an employee might be estopped to plead the defense of ineligibility. Because the employer here was not pleading ineligibility, equitable estoppel did not apply.

F. Measuring Military Caregiver Leave [New Topic]

III. INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES

Summarized Elsewhere:

Powell-Pickett v. AK Steel Corp., --- F. Supp. 2d ---, No. 2010-336, 2012 WL 5248424 (S.D. Ohio Oct. 24, 2012)

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

O'Connor v. Chicago Bd. Of Educ., 19 WH Cases2d 1875 (N.D. Ill. June 19, 2012)

The employee was a high school special education teacher and current employee with 15 years tenure. For approximately the last five years of her employment, she was also a frequent caregiver for her 21-year old son and supervised his morning dosage of medication for bipolar disorder and ADHD. The employee alleged that starting in 2006, she asked her supervisors for “informal intermittent” FMLA leave to be 1 to 15 minutes late to work so she could oversee her son’s morning medication. Beginning in the 2008-2009 school year, the employee was frequently late to school (49+ times in 2008-2009, and often up to 40 minutes). She also had a multi-year history of punching in to work at different locations other than her assigned school. The employee took several lengthy FMLA leaves of absence beginning in 2010 in order to care for her son. The employee’s principal issued multiple verbal and written warnings and suspended the employee at least three times related to these attendance issues over the course of two years. The final suspension was in October 2010. The employee took an approved FMLA leave approximately 3 months later and did not return for the remainder of the school year.

After the final suspension, the employee sued the employer for interfering with her informal intermittent FMLA leave and retaliating against her for exercising her right to intermittent leave by disciplining her for being late to work. The employer defended on the ground the FMLA intermittent leave was not based on a medical necessity, but the employee’s son’s unreasonable demands, drug and alcohol abuse, and his drug and alcohol abuse’s interference with his prescription medications. The district court denied the employer’s motion for summary judgment on both claims, concluding that there was a genuine dispute of material fact whether the son’s erratic behavior was due to his bipolar disorder, and that there was evidence suggesting that alcohol and drug abuse were only a part of the problem. The district court further found that there was sufficient evidence in the record creating a genuine dispute as to material fact that the employee gave her supervisors sufficient notice of her need to care for her son in the morning back in 2006 and that this was the reason for her tardiness. Finally, the district court noted the employer’s evidence that the employee was also disciplined for (i) tardiness during periods her son was not living with her; (ii) arriving at school more than 15 minutes late on multiple occasions; and (iii) punching in at other schools, but held this evidence did not change its conclusion that summary judgment was not appropriate on either claim.

Summarized Elsewhere:

Rush v. E.I. DuPont DeNemours and Co., 2012 WL 5879776 (S.D. Ohio Nov. 20, 2012)

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

Summarized Elsewhere:

Grisby v. Wilberforce University, 2012 WL 4957544 (S.D. Ohio Oct. 16, 2012)

- 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

Summarized Elsewhere:

Grant v. JPMorgan Chase Bank, N.A., 2012 WL 5966644 (S.D. Tex. Nov. 28, 2012)

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

Summarized Elsewhere:

Scott v Grand Prairie Independent School District, 2012 WL 1361621 (N.D. Tex. April 19, 2012)

- 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

Summarized Elsewhere:

Williams v. Crown Liquors of Broward, Inc., 851 F.Supp.2d 1332 (S.D. Fla. 2012)

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

Mena-Valdez v. E.M. T-Shirts Distributors, Inc., et al, 2012 WL 2389668 (D. P.R., June 26, 2012)

Plaintiff claimed interference with his right to take leave under the FMLA, among other state and federal claims. The employer moved for summary judgment, which the court granted in part and denied in part. Plaintiff worked as a full time warehouse employee for defendant. Plaintiff's daughter was diagnosed with an orthopedic condition, which required plaintiff to request leave to attend the medical treatment of his daughter. The employer granted plaintiff a leave of absence without pay, but did not provide plaintiff any information regarding his rights under the FMLA. Plaintiff was unaware of his rights under FMLA because defendant did not outfit its facilities with pamphlets, publications or posters regarding the FMLA. Plaintiff's daughter underwent a very complicated surgery, which required plaintiff to attend to her care, as instructed by the doctor. Plaintiff requested a leave for the term indicated by his daughter's doctor. Defendant again did not inform plaintiff of his rights of intermittent leave under FMLA. Plaintiff submitted his request for unpaid leave, although in the form it stated the "reason for request" as "vacation" and specifically indicated that he requested "the payment of 0 days in cash." The leave was granted and deducted from plaintiff's accrued paid vacation days. Close to his return date, plaintiff's daughter suffered a postoperative complication. Plaintiff did not inform defendant nor did he request additional leave. On his return date, plaintiff resigned from his job with defendant. On the day of his resignation, plaintiff informed defendant that he was leaving because of his daughter's condition and because he thought he was being forced to resign by the company.

In its motion for summary judgment, defendant pointed to the fact that plaintiff asked that the time be designated as vacation time. The court rejected this argument, finding that defendant's failure to comply with the FMLA's notice requirements and defendant's insistence that plaintiff take a paid vacation could have burdened plaintiff's exercise of his FMLA rights. Therefore, the court denied defendant's motion as to plaintiff's FMLA claim.

Summarized Elsewhere:

McArdle v. Town of Dracut / Dracut Public Schools, 2012 WL 6584718 (D. Mass. 2012)

Alexander v. Trilogy Health Services, Inc., 116 Fair Empl.Prac.Cas. (BNA) 904, 19 Wage & Hour Cas.2d (BNA), 2012 WL 5268701 (S.D. Ohio Oct. 23, 2012)

III. NOTICE BY EMPLOYEE OF NEED FOR LEAVE

Summarized Elsewhere:

Corral v. Hersha Hosp. Mgm't, Inc., 2012 WL 4442666 (D.N.J. Sept. 24, 2012)

A. Timing of the Notice and Leave

1. Foreseeable Leave

Summarized Elsewhere:

Pereda v. Brookdale Senior Living Communities, Inc., 666 F.3d 1269 (11th Cir. 2012)

a. Need for Leave Foreseeable for 30 or More Days

Summarized Elsewhere:

Dimitrov v. Quest Diagnostic, Inc., 2012 WL 555767 (Mich. App., Feb. 21, 2012)

b. Need for Leave Foreseeable for Less Than 30 Days

Dean v. Wackenhut Corp., 2012 WL 1577453 (N.D. Ill. May 4, 2012)

Plaintiff sued her former employer, alleging sex discrimination based on pregnancy, interference with FMLA rights, and retaliation for taking FMLA leave. At trial before a magistrate judge, plaintiff moved for judgment as a matter of law on the interference claim, which the court took under consideration. The jury returned a verdict in favor of the employer on all three claims, and plaintiff renewed her motion for judgment as a matter of law and alternatively moved for a new trial.

Plaintiff contended that no reasonable jury could find for defendant on her FMLA interference claim. To prevail on this claim, plaintiff had to prove: 1) she was eligible for FMLA protection; 2) defendant 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) defendant denied FMLA benefits to which she was entitled. The first two elements were undisputed. As for the third element, the court held that plaintiff was entitled to FMLA leave because she sought leave to attend a prenatal care appointment, and "any period of incapacity due to pregnancy, or for prenatal care" meets the "continuing treatment" prong of a serious health condition under the FMLA. Likewise, no rational jury could have concluded that defendant did not have timely and

sufficient notice of the plaintiff's intent to take FMLA leave on December 27 when she requested leave 20 days prior to that. Although the FMLA requires an employee to provide at least 30 days notice of leave when leave is foreseeable, if 30 days is not practicable, notice must be given as soon as practicable. Defendant first claimed that plaintiff did not give at least 30 days notice of her appointment, but there was no evidence that plaintiff was denied leave because of this. Moreover, testimony showed that plaintiff's leave request was denied because she failed to request leave before October 31, per an employer memorandum that required all employees to request Christmastime "vacation/personal days" by October 31. As plaintiff did not learn she was pregnant until November--and was requesting leave not for vacation but under the FMLA--defendant impermissibly required more than 30 days advance notice of plaintiff's appointment.

Defendant also argued that plaintiff failed to comply with its medical certification requirement, which it contended was part of its "usual and customary notice and procedural requirements for requesting leave." Because plaintiff did not provide a doctor's note or other certification as the employer required, defendant argued she was foreclosed from taking FMLA leave. However, the requirement pertained to vacation or personal leave and did not apply to FMLA leave. Further, defendant failed to provide plaintiff with written notice of her need to supply certification after she requested leave. Finally, failure to follow an internal procedure such as providing a doctor's note does not permit an employer to forbid an employee to take FMLA leave if the employee gives timely verbal or other notice, which plaintiff gave by notifying defendant of her appointment on December 7.

Ultimately, although the plaintiff proved the fifth and final prong of her interference claim, she failed to show that she was harmed by the defendant's decision to deny her leave. Although she was terminated, she never argued that her termination constituted interference, and thus her motions for judgment as a matter of law or for a new trial were denied.

2. Unforeseeable Leave

Lee v. U.S. Steel Corp., 450 Fed.Appx. 834 (11th Cir. 2012)

Plaintiff had called his supervisors to inform them that he had injured his back when he was changing a tire and that he would be off work for three days. He called back each of the three days to confirm he would be out that day. Plaintiff also produced three doctor's notes; two indicated that he had been seen by a doctor and the third cleared him to return to work. Defendant discharged plaintiff within a month of him taking these days off for misconduct.

The Eleventh Circuit Court of Appeals affirmed the district court's decision to grant summary judgment in favor of defendant on plaintiff's claims of FMLA interference and retaliation. The court found that plaintiff failed to produce any evidence that his back injury was a serious medical condition under the FMLA. The court noted that plaintiff never applied for FMLA leave and he never gave defendant sufficient notice that his absence was due to a potentially FMLA-qualifying reason. The court also concluded that plaintiff had not established a *prima facie* case of retaliation because he failed to show that he engaged in protected activity or that defendant's discharge decision was causally related to any protected activity.

Clinkscale v. St. Therese of New Hope, 701 F.3d 825 (8th Cir. 2012)

Plaintiff, a nurse at a long-term care facility, experienced a panic attack at work, and her employer's human resources ("HR") director instructed her to leave for the day. Plaintiff's supervisors, however, construed her leaving as quitting, and they discussed her allegedly voluntary termination with the HR staff the next morning. Either before or after their discussion that morning, plaintiff provided the HR department her doctor's note recommending she take off the remainder of the week. Although the HR department provided her FMLA forms, a member of its staff later advised her she had been discharged the previous day for leaving work. Plaintiff sued for FMLA interference.

The district court granted the employer's motion for summary judgment, concluding the employer did not have notice of plaintiff's need for medical leave prior to her discharge. The court alternatively concluded the employer terminated plaintiff for patient abandonment, not for asserting her FMLA rights.

The court of appeals reversed. After determining a reasonable jury could find that plaintiff provided to her employer notice she needed leave for an unforeseeable event, the court held a question of material fact remained as to whether plaintiff put her employer on notice of her potentially FMLA-qualifying condition prior to its determination her employment had ended. This was because plaintiff only left work after the employer instructed her to do so, her supervisors and the HR staff did not discuss her purported resignation until the next morning (when she provided her doctor's note), and her employer responded to the note by providing her FMLA forms, not by informing her she was discharged. The court also concluded a reasonable jury could find the employer discharged plaintiff for taking protected leave, not for performance issues, because the reason she required leave—a panic attack—precipitated her absence from work, her doctor characterized her anxiety disorder as situationally triggered, and she left the work premises at the HR director's direction immediately following her panic attack.

***Hoopingartner v. Corinthian College, Inc.*, 2012 WL 1551274, 19 WH Cases2d 731 (M.D. Fla. Apr. 30, 2012)**

Plaintiff was employed by defendant as a medical assistant instructor from December 2008 to August 2010. After receiving formal, written notice that his attendance issues could lead to termination, plaintiff continued to accrue absences and was eventually discharged for excessive absenteeism. Plaintiff contended he was discharged for taking FMLA leave to care for his ailing mother and his sick wife, and to treat his own "serious health condition." Defendant filed a motion for summary judgment to dismiss the plaintiff's retaliation and interference claims.

Undisputed evidence showed that defendant granted plaintiff FMLA leave to care for his mother, and that using leave was not a factor in plaintiff's termination. As for plaintiff's claim that he was terminated for taking leave to care for his sick wife, the court found that plaintiff failed to provide "needed care" to his wife as a matter of law, so no FMLA violation occurred. The evidence showed that plaintiff's wife was fully capable of providing for her own basic needs, plaintiff rarely cared for his wife, and any "needed care" could have been provided outside of working hours. Thus, summary judgment was proper for plaintiff's interference and retaliation claims regarding his mother and his wife.

Plaintiff's final claim was that the defendant discharged him, in part, because he stayed home sick several times. Defendant maintained that plaintiff failed to provide adequate notice of his leave requests. Plaintiff would call in sick to take leave for his "serious health condition," which was not sufficient notice for employer to determine that plaintiff sought leave to treat such a condition. However, plaintiff did bring a doctor's note to explain a four-day absence when he suffered from gastritis; he also called ahead before he took leave to treat his gastritis. The court held that a jury could find that plaintiff provided timely notice to his employer and sufficiently informed the employer that he suffered from a "serious health condition." Moreover, plaintiff presented evidence that his four-day absence was used against him in his termination. Thus, he raised a genuine issue of material fact with respect to whether his four-day absence could support a claim for FMLA interference and/or retaliation.

Sadeh v. Venetian Casino Resort, LLC, 2012 WL 3065442 (D. Nev. Jul. 27, 2012)

Defendant maintained an attendance policy that required employees to give at least four hours notice before an assigned shift if an employee would be tardy or absent. Plaintiff signed this attendance policy as a condition of his employment. However, throughout his employment with defendant, plaintiff had been habitually tardy or absent. During a suspension and investigation, plaintiff disclosed a condition that qualified for FMLA leave. Specifically, plaintiff was providing care to his mother, who was undergoing treatment for breast cancer. Defendant retroactively applied intermittent FMLA leave to plaintiff's past absences and reinstated him. A short time later, plaintiff was formally approved to take intermittent FMLA for up to 3-4 days per week to care for his mother. However, on multiple occasions, plaintiff failed to give timely notice that he was taking FMLA leave. Defendant's FMLA coordinator met with plaintiff to explain that plaintiff needed to comply with the four-hour notification requirement, even though he was approved for intermittent FMLA leave. A few weeks later, plaintiff again failed to provide timely notice. Defendant once again suspended the plaintiff pending a peer review investigation and ultimately terminated him after he was seen exiting a nightclub on defendant's property and yelling at hotel guests in violation of defendant's employee handbook.

Plaintiff filed suit alleging that defendant had interfered with his FMLA rights and retaliated against him for taking FMLA leave. Defendant moved for summary judgment on plaintiff's claims, arguing that it did not consider plaintiff's FMLA usage when it terminated his employment. Rather, defendant terminated the plaintiff because he failed to comply with the defendant's usual and customary attendance policy, and plaintiff did not provide the defendant with any reasons he could not comply. Plaintiff responded and filed his own countermotion for summary judgment. The district court denied both parties' summary judgment motions. The court found it was undisputed that plaintiff was both qualified and approved for FMLA leave. It was also undisputed that plaintiff failed to properly notify defendant of the need for FMLA leave on at least one occasion, but defendant was on notice that the plaintiff may need to care for his mother several times each week. On these facts, the court concluded that there were questions of material fact surrounding whether unusual circumstances prevented plaintiff from complying with the defendant's absence policy. Similarly, neither party was able to demonstrate an absence of material fact on the plaintiff's retaliation claim.

Summarized Elsewhere:

Verges v. Honda Manufacturing of Alabama, LLC, 2012 WL 3260367, (N.D. Ala. Aug. 8, 2012)

Byron v. St. Mary's Medical Center, 2012 WL 3966090, 19 WH Cases 2d 1283 (E.D. Mich. 2012)

3. Military Family Leave [New Topic]

B. Manner of Providing Notice

Cavaliere v. Advertising Specialty Institute, Inc., 853 F. Supp. 2d 472 (E.D. Penn. 2012)

The employee, who had been employed for six years by the employer, was discharged for failure to perform her duties. There were several complaints about the employee's work performance, and she received a final written warning in which she was instructed to perform certain actions. Prior to the final written warning, the employee alleged that she requested FMLA forms from an employment specialist, but she never received the forms. She further asserted that she discussed her request for FMLA forms with a disbursement accountant two weeks later. The accountant printed out the forms and provided them to the employee. However, the employee did not complete the forms and never applied for FMLA leave. In addition, her supervisor was not aware that she had requested these forms or made any inquiry about FMLA leave. On the other hand, the employee's supervisor was aware that the employee missed two or three business trips due to her medical condition, and her supervisor was otherwise aware of her medical condition. A month after receiving the final written warning, the employer discharged the employee due to her work performance, including her failure to comply with the actions set forth in the final written warning.

The employee sued her employer, alleging that she was discharged in retaliation for exercising her rights under the FMLA. The employer moved for summary judgment on this claim, which the district court denied. The court concluded that there was a disputed issue of fact as to whether the employee provided sufficient notice of the need for FMLA-qualifying leave and whether one of the decisionmakers knew the employee needed leave under the FMLA. The court found that the employee presented sufficient evidence suggesting that she informed her supervisor of the need for FMLA-qualifying leave, even though she never requested FMLA leave, and that her supervisor retaliated against her for taking such leave. Specifically, the court concluded that the employee presented the following evidence, which the court concluded was sufficient to state a claim of retaliation: the employee told the decisionmaker that her back problems caused her to miss business trips; she informed the decisionmaker about her medical condition; she wore a brace and shoulder device to work; the decisionmaker told the employee that she needed to care for her back; and the decisionmaker told coworkers that the employee was absent from work due to her back condition. Thus, the court concluded that the employee could state a claim for retaliation under the FMLA. However, the court concluded that the plaintiff's application for social security disability, which could not be reconciled with her disability claim under the ADA, precluded an award of back pay and front pay under the FMLA.

Wiley v. Richland Community College, 2012 WL 6681214 (C.D. Ill., Dec. 21, 2012)

Plaintiff worked in admissions for the employer college and refused to work on Saturdays because of her chronic fatigue syndrome. The employer terminated plaintiff's employment, citing several unrelated performance issues. Plaintiff brought claims against the employer alleging FMLA interference and retaliation.

The district court granted summary judgment in favor of the employer on both theories because plaintiff failed to notify the employer at any point that she sought to take medical leave. Although plaintiff told her employer that she had chronic fatigue syndrome and that it would qualify as a serious medical condition under the FMLA, in deposition she stated that she never actually took time off work because of the condition. Because she neither took time off on account of the condition, nor notified the employer that she would do so, as a threshold matter the court held that the employer was entitled to summary judgment.

Additionally, plaintiff could not state a claim for interference because the employer required her to work some Saturdays, where she was absent from these shifts before she informed her employer that she had chronic fatigue syndrome. As for the retaliation action, the court found that two months and fourteen days between the protected activity and termination of employment was not sufficiently close, without more, for her claim to survive summary judgment. Finally, plaintiff could not show that she performed her job satisfactorily but was treated differently from similarly situated employees who did not request FMLA leave, because she did not perform her job satisfactorily and did not proffer any similarly situated employees that were treated differently.

Smith v. Construction Datafax, Inc., 871 F.Supp.2d 1226 (N.D. Ala. 2012)

On May 28, 2010, plaintiff called into work and informed his supervisor that his wife had been admitted to the hospital. The supervisor responded by telling plaintiff to "do what you need to do." By June 1, plaintiff's wife's condition worsened and plaintiff informed his supervisor that he would be out until June 14. The supervisor did not inform plaintiff that his time off could qualify for leave under the FMLA. Plaintiff did not return until June 21 and at that time defendant met with plaintiff and told him to go home; that they would be investigating the situation. Defendant later discharged plaintiff for job abandonment for "no-call/no-show the week of June 14." Plaintiff filed suit, alleging FMLA interference and retaliation.

In its motion for summary judgment, defendant did not dispute the adequacy of notice for the period before the week of June 14, but it argued that plaintiff gave no notice whatsoever regarding his need for leave the week of June 14. However, the court found that the questions of fact regarding whether notice was given, and if so, what the notice consisted of and when it was given, are questions of fact. Because that material issue of fact remained disputed, summary judgment was denied on the claim of interference. With regard to the claim of retaliation, the court found that job abandonment is a legitimate, non-retaliatory reason to terminate an employee and that plaintiff was unable to show pretext. The court therefore granted defendant's motion for summary judgment on the retaliation claim.

King v. Blanchard Machinery Co., 2012 WL 4586177 (D. S.C. Sept. 28, 2012)

Plaintiff, a nine-year employee with a previously strong performance record, filed suit under the FMLA and ADA based on his employer's refusal to grant him medical leave after he packed his belongings, announced that he was leaving, and walked off the job. During the previous year, due to layoffs and a restructuring, he had been required to assume additional duties and relocate his office. Several days before plaintiff walked off the job, his employer had become aware that he had seen a doctor and been prescribed sleeping pills. Although the employer was not aware, plaintiff had also been prescribed anti-anxiety medication.

Plaintiff alleged interference with his right to FMLA leave and termination in retaliation for invoking his rights under the FMLA. The employer moved for summary judgment on the interference claim, arguing that plaintiff was not an employee entitled to FMLA rights because (1) he voluntarily resigned from his position prior to requesting leave; (2) he did not have a "serious health condition" as defined by the FMLA; and (3) he had failed to provide notice of intent to take a medical leave of absence. Plaintiff countered that he lacked the mental capacity to resign and his employer's awareness that he was "overworked, experiencing high levels of stress, and behaving unusually" had put the employer on notice of his intent to take medical leave. The court disagreed, finding that plaintiff had voluntarily resigned, that there was no evidence of misrepresentation or deception on the part of the employer or that the employer took advantage of the plaintiff's "frail mental state," and that the employer lacked notice of plaintiff's intent to take a medical leave before he walked away from his job. The court also dismissed the retaliation claim, stating that plaintiff's voluntary resignation precluded a finding of retaliation based on his post-resignation efforts to take medical leave.

Spurling v. C&M Fine Pack, Inc., 2012 WL 2931206 (N.D. Ind. July 18, 2012)

The employee worked as a packer/inspector on the company's factory line, and repeatedly fell asleep on the job. After several instances of discipline, the company warned the employee that if she fell asleep again she could be fired. Nevertheless, she fell asleep once again and was suspended pending termination, with her supervisors recommending that she be terminated. Before her termination was formally approved by the company management, the employee indicated that she could be suffering from a medical condition causing her to fall asleep at work. She produced paperwork from her physician indicating that she was suffering "drowsiness" that required set rest periods to accommodate her sleepiness. Notwithstanding the doctor's notes, the company terminated her and she sued under the ADA and the FMLA. The employee's FMLA claim was that the company interfered with her right to take FMLA leave to complete medical testing.

The district court granted summary judgment to the employer on the ADA claim, noting that the employee was not even aware that she had a sleeping disorder until several months after she was terminated. With respect to the FMLA claim, the court determined that the company had already decided to terminate the employee before she made any requests for time off for medical reasons. In addition, the court found that the company would have terminated the employee because of the ongoing sleeping problem. The court also found that the employer was not put on notice that the employee had a medical problem because the sleeping problem had been going on for over a year. Accordingly, the employee's condition was not the dramatic change in

circumstances indicating a serious medical condition, sufficient to put the employer on notice of a problem.

Alexander v. Trilogy Health Services, Inc., 19 Wage & Hour Cas.2d (BNA), 1711, 2012 WL 5268701 (S.D. Ohio Oct. 23, 2012)

The plaintiff nurse worked the night shift at a residential care facility. In May 2010, she notified the employer that she was pregnant and planned to take maternity leave. Thereafter, the plaintiff received three disciplinary actions in July and August and, as a result, was placed on a final written warning. On August 23, she left work early and reported to her supervisor that she was ill and unable to work her shift that evening. On August 24, she notified her employer that she had had been diagnosed with dangerously high blood pressure that day and was instructed by her physician not to work that evening. Because the employee called off with fewer than four hours' notice, the employer treated the call-off as an attendance violation per its written policy.

On August 25, in accordance with the employer's written policy, the employee contacted the employer's business office to request FMLA paperwork. The employer had, however, changed its FMLA policy when it retained a third-party administrator to handle FMLA requests, and required employees to contact the administrator. The company had not, however, updated its handbook or provided other written notice to its employees of this process. A representative from the employer's business office wrongly instructed the employee to obtain FMLA paperwork from the administrator's website. The employee was unable to do so because the proper method was via telephone.

On August 26, the employer informed the employee that her failure to provide at least four hours' notice before her August 24 absence constituted a voluntary resignation. Following complaints that her absence was legally protected, the plaintiff was suspended pending an investigation and ultimately terminated after the employer concluded she had abandoned her job because it never received FMLA paperwork.

The court granted the employee's motion for summary judgment on her FMLA interference claim. The court rejected the employer's argument that the employee "never applied for" FMLA leave because formal application is not required and the employee's August 24 report to her supervisor provided sufficient information for the employer to reasonably determine the FMLA might apply. The court further found that, while an employee may be required to follow more onerous procedures for requesting leave in some cases, the employee was not required to because the employer failed to inform her in writing of its new FMLA leave procedures. The court concluded that the employer violated the FMLA by failing to reinstate the employee on August 27.

Furry v. Lehigh Valley Health System, 2012 WL 4510760 (E.D. Pa. Sept. 28, 2012)

The employee requested and was approved for medical leave from March 18 through March 26, 2008 for health complications related to her miscarriage. The employee did not request FMLA leave for this absence. After being absent for nearly two weeks after her return to work date of March 26, the employee contacted the employer on April 7, 2008, to request the following day off for her doctor appointment; this request was granted.

At a subsequent meeting with defendant's employee health department, the employee was very upset about her miscarriage, her uncle's recent death, and from missing work. Due to her emotional state, the employee was informed that she must submit a release from her mental health provider before she could return to work. The employer conditionally approved her leave under the FMLA retroactively and forwarded the employee a medical certification form for her mental health provider to complete. However, the employee's mental health provider refused to complete the medical certification, and refused to release her to return to work. Ultimately, the employee was terminated from employment on June 20, 2008 because she could not provide a medical release to return to work or the necessary documentation to support her absence.

The employee sued her employer for interference with her FMLA rights. She alleged that she requested FMLA leave in April 2008 and was denied same. The parties filed cross-motions for summary judgment with defendant arguing that the FMLA claim was untimely, but withdrew this argument on reply; its motion was, therefore denied. As to the plaintiff's motion, the court found that there was a genuine issue of material fact as to whether the employee provided the employer with sufficient notice of her intent to take FMLA leave in April 2008. Notwithstanding the allegation in her complaint that she requested FMLA leave, the court noted that the employee testified this allegation was erroneous, she did not request FMLA leave, and she knew how to obtain FMLA leave documents. However, the court also noted that the employee's March 2008 request for medical leave without mentioning the FMLA may have constituted adequate notice. The court thus concluded that the issue of adequate notice was properly left to the jury, and denied plaintiff's motion for summary judgment.

Grosso v. UPMC, 857 F. Supp. 2d 517 (W.D. Pa. 2012)

Plaintiff, a cardiopulmonary bypass machine operator, suffered from diabetes and hypoglycemic unawareness syndrome (HUS) which could cause her to pass out without any warning signs. On July 31, 2008, plaintiff was in the operating room appearing to sleep. The attending surgeons told her to go outside and walk around. Plaintiff later asserted that she was taking FMLA leave during the July 31 incident, and that her termination based on the day's events amount to interference and retaliation in violation of the FMLA. The court was not receptive to this argument. It found that plaintiff could not show a key element of an FMLA claim, namely that she provided notice to the employer. Plaintiff gave no written or verbal notice to defendant that she wished to take FMLA leave. She argued, however, that her actions that day should have sufficiently put defendant on notice that she needed FMLA leave. The court flatly rejected this argument. Plaintiff's retaliation claim also failed due to the lack of notice to the employer.

Summarized Elsewhere:

Wilson v. Sharp Mfg. Co. of America, 2012 WL 489203 (W.D. Tenn. Jan. 27, 2012)

Santiago v. Butler Company, 2012 WL 527699 (D. Conn. Feb. 17, 2012)

Pagan v. Select Specialty Hospital – Youngstown, Inc., 2012 WL 2296242 (N.D. Ohio June 18, 2012)

Delp v. Rolling Fields, Inc., 2012 WL 3144050 (W.D. Pa. Aug. 1, 2012)

Golez v. Potter, 2012 WL 3134256 (S.D. Cal. July 31, 2012)

C. Content of Notice

Abdulbaki v. Regent Care Center of San Antonio II Limited Partnership, 2012 WL 1076206 (W.D. Tex. March 29, 2012)

When the employee's diverticulosis flared up, causing severe pain, the employee called his supervisor to tell her that he would be absent from work. During that conversation, the employee asked about his need to take FMLA leave. The employee was directed to speak to human resources, who told the employee to provide a note from his doctor. Human resources also told the employee that he did not need to take FMLA leave because he would only be out for a few days. The doctor's note stated that the employee would return on April 23, 2010, but the employee was under the impression that the note stated he would be absent through that date. Thus, when the employee failed to come to work on April 23, 2010, the employer discharged the employee for committing gross misconduct pursuant to its No Call, No Show Policy.

The court granted the employer's motion for summary judgment on the employee's FMLA interference and retaliation claims because the employee failed to establish a *prima facie* case. The court found that the employee did not notify the employer of his intention to take FMLA leave nor did he provide a qualifying reason for the leave prior to his termination. The FMLA does not require the employer to affirmatively grant leave without such a request or notice by the employee. Therefore, the employee did not provide adequate notice to trigger the protection of the FMLA for his interference claim. For the same reasons, the court granted the employer's summary judgment motion on the employee's retaliation claim as well. The employee could only establish that he was discharged, but he was unable to prove that he had engaged in a protected activity. Nor could the employee establish a causal link between his FMLA leave and his discharge because the employee had never actually applied for FMLA leave. Moreover, the court stated that even if the employee had established a *prima facie* case for retaliation, the employee did not show that the employer's legitimate non-discriminatory reason, violation of the No Call, No Show Policy, was pretextual.

Santiago v. Butler Company, 2012 WL 527699 (D. Conn. Feb. 17, 2012)

The employee's wife was diagnosed with terminal cancer, and the employee sought a leave of absence from work. According to the employee, the employer denied the leave of absence, but agreed to lay off the employee so he could collect unemployment. The employee contended that the employer did not inform the employee of his rights under the FMLA, but indicated that it would reinstate the employee after his need for leave ended. The employer contended that it informed the employee regarding his rights under the FMLA, but that the employee did not want to take leave because it would be unpaid. According to the employer, the employee requested that the employer lay him off so he could collect unemployment. The employer ultimately laid off the employee, and subsequently, it eliminated the employee's position pursuant to a reduction in force. After the employee's wife passed away, the employee sought reinstatement, which was denied.

The employee sued the employer, claiming that he was denied leave under the FMLA and that the employer retaliated against him when it laid him off. The employer filed a motion for summary judgment, which the court denied. In its motion for summary judgment, the employer asserted that the employee's interference and retaliation claims failed because the employee did not provide notice of the need for leave under the FMLA. The court concluded that there was a disputed issue of fact regarding whether the employee provided notice of the need for leave. While the employee admitted that he did not reference the FMLA in his request, he asserted that he told the employer that he needed leave to care for his wife who had been diagnosed with a terminal illness. The court recognized that an employee who seeks leave for the first time for an FMLA-qualifying reason is not required to reference the FMLA in his or her request. It noted that an employee is only required to give verbal notice sufficient to make the employer aware of the employee's need for FMLA leave and the anticipated timing and duration of leave. It explained that, once the employee provides sufficient notice, the employer has a duty to inquire to determine if FMLA leave is at issue. As there was a disputed issue of fact whether the employee gave sufficient notice, the court denied the employer's motion for summary judgment.

***Brea v. Heartland Express, Inc.*, 2012 WL 2898993 (D. Ariz. Aug. 8, 2012)**

The court denied defendant's motion for summary judgment and found defendant's proposed work arrangement of a reduced schedule did not comply with the FMLA. Defendant moved for reconsideration on the grounds plaintiff never sought FMLA leave and defendant's offer of a reduced schedule was not an attempt by the employer to comply with the FMLA.

As an initial matter, the court noted defendant, not plaintiff, was responsible for determining whether a leave request is likely to be covered by the Act. Plaintiff's failure to characterize the leave request as FMLA and the fact plaintiff's doctor had not mentioned the FMLA, was unavailing and did not absolve defendant of its obligation to determine if plaintiff was seeking leave under the FMLA. After finding plaintiff properly sought FMLA leave, the Court held inaction by the employer would have clearly constituted interference or restraint with employee's exercise of his rights. As such, the court considered whether the reduced schedule offered by the employer satisfied its obligation. While the offer of a reduced schedule ultimately was not in compliance with the FMLA, the court considered the reduced schedule for the benefit of defendant and doing so clearly did not "disadvantage" the employer. The court ultimately held there was a question of fact as to whether defendant's failure to respond to plaintiff's request for leave interfered with or restrained plaintiff from exercising his right to take that leave and denied defendant's motion for reconsideration.

***Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. Ill. 2012)**

In 2007, plaintiff was placed on a performance improvement plan for failing to meet her monthly sales goals. In December 2008, plaintiff told her supervisor she might need time off in early 2009 due to her father's possible need for chemotherapy to treat his leukemia. Plaintiff later asked for and was given a day off on April 25 to attend a doctor's appointment with her father. In addition, plaintiff told a supervisor in March or April of 2009 that she was driving her

mother (who was ultimately diagnosed with kidney disease) to medical appointments on her days off, and in February 2009 plaintiff had a “casual conversation” with another supervisor about the challenges of dealing with aging parents and alluded to her father’s illness. Plaintiff’s performance issues continued into 2008 and 2009 and the company decided to terminate her employment on June 22, 2009, although plaintiff was not notified until June 24. On June 23, plaintiff sought and was given leave to take her mother to the hospital. The next day, plaintiff was given notice of her termination. Plaintiff subsequently sued, alleging the company interfered with her rights under the FMLA and retaliated against her in violation of the Act.

The Seventh Circuit affirmed the district court’s dismissal of plaintiff’s FMLA interference claim on two grounds. As an initial matter, the Court held plaintiff did not put the employer on notice of the need for FMLA leave. The Court analyzed three situations. First, plaintiff’s “casual conversation” with her supervisor about the challenges of dealing with aging parents was insufficient as a matter of law to put the supervisor on notice that FMLA qualifying need was needed. Second, plaintiff’s conversations with her other supervisor about driving her mother to medical appointments was insufficient to put the employer on notice because it dealt only with plaintiff’s days off and plaintiff never articulated that she needed time off to care for her mother. Lastly, plaintiff’s notice that she “may” need time off to care for her father with leukemia and subsequent day off of work was a “closer question” but, ultimately, plaintiff did not put the employer on notice that plaintiff needed medical leave to care for her father. Additionally, summary judgment on the interference claim was proper because the employer did not deny or interfere with plaintiff’s leave. While termination can constitute interference because it is a denial of benefits, there was no evidence that the termination decision was motivated by plaintiff’s FMLA leave.

Similarly, the Seventh Circuit affirmed dismissal of plaintiff’s FMLA retaliation claim. First, as discussed above, plaintiff did not provide her employer sufficient notice of the need for FMLA leave and, therefore, did not engage in an FMLA protected activity and could not maintain a retaliation claim. Second, it was undisputed plaintiff was not performing her job satisfactorily and plaintiff did not proffer sufficient circumstantial evidence to create an inference that employer was motivated by retaliatory animus.

Mondonedo v. Frito-Lay, Inc. 2012 WL 1632834 (D. Md. May 8, 2012)

Plaintiff brought a claim against his employer alleging interference with his rights under the FMLA. The district court held that plaintiff did not give proper notice to his employer, where he did not show up to work but faxed in two doctor’s notes saying that he needed to be absent during certain dates. Although plaintiff did more than simply call in sick, the notes did not say anything about his condition or treatment plan, so the employer could not be expected to determine whether he might have a serious medical condition.

Wright v. Stark Truss Co., 2012 WL 3039092 (D. S.C. July 24, 2012)

While at home, the employee suffered a nervous breakdown and threatened to kill himself in front of his wife and child. The next day, the employee’s wife (who was also employed by defendant) reported the incident to their employer and stated that her husband was

sick in the hospital and would be out of work. The employer represented that the employee would be covered by FMLA, but advised the wife not to tell the employee's supervisor about the incident because the employee would be terminated. When the employee returned to work after being released from the hospital without restrictions, he and his wife were both terminated. The employer claimed that during the employee's absence, it realized that the employee's position was unnecessary and that the terminations were to save costs.

The district court denied the employer's motion for summary judgment on the employee's ADA claims and FMLA retaliation claim. Viewing the facts in the light most favorable to the employee, the court rejected the employer's argument that the FMLA claim was invalid because the employer lacked sufficient knowledge of the need for FMLA leave. In reaching this conclusion, the court noted that, under the circumstances, appropriate notice could be given by a family member, and that the employer subsequently failed to request and medical records or other information from the employee regarding his condition.

The court also found that the employee met his burden of introducing sufficient evidence for a reasonable trier of fact to find that the employer's stated reasons for termination were pretextual. Although the court held that cost savings was a legitimate non-discriminatory reason for termination, it denied summary judgment because of the suspicious timing of the terminations, the lack of other layoffs during the entire month, the statement that the employee's supervisor would fire employee if he became aware of the situation, the employer's failure to realize that the employee was not necessary during previous time off, and the employer's testimony regarding a belief that the employee was unstable and posed a possible threat. Finally, the court also observed that that a decision not to replace a terminated employee does insulate an employer from liability under the FMLA.

Thomas v. Bala Nursing & Retirement Cent., 2012 WL 2581057 (E.D. Pa. July 3, 2012)

Plaintiff worked for defendant from 2007 to 2011 as a nurse practitioner and charge nurse. Plaintiff suffered from anemia or iron deficiency, which limited her ability to work long hours and caused fatigue. Defendant discharged plaintiff for excessive tardiness and plaintiff then brought a number of claims against defendant, including retaliation and interference claims under the FMLA. Plaintiff alleged that she requested FMLA leave, her benefits were denied, and defendant retaliated against her. Defendant moved for summary judgment, but the court denied defendant's motion because a reasonable jury could find for plaintiff.

Plaintiff and defendant disagreed about many of the facts. Plaintiff argued that she submitted paperwork for FMLA leave, whereas defendant argued that there was no notice of plaintiff's anemia or her request for FMLA leave. Defendant argued that plaintiff never explained that her tardiness was due to anemia or should fall under FMLA even after she was reprimanded for her tardiness. Plaintiff claimed that she repeatedly notified her supervisors that she would be running late to work because of her anemia, and specifically requested permission to arrive late. In light of the disputed facts, the court found genuine issues of material fact and that a jury could find for the plaintiff on her FMLA claims.

Poper v. SCA Americas, Inc., 2012 WL 3288111 (E.D. Penn. Aug. 13, 2012)

The employee initially began working as a consultant for the employer, a global consumer goods company. The employee was hired full-time on August 18, 2008 as a Technical Analyst. In this role, the employee was responsible for addressing and fixing IT issues that arose. The employee had a long history of back problems, and during his tenure with the employer, the employee injured his elbow in a non-work accident. The employee also had a long history of prescription drug abuse, and this led to numerous incidents of erratic behavior on the employee's part. In addition, the employee received several complaints about his performance and behavior. The employee became eligible for FMLA leave on May 21, 2009. The employee was absent on May 21, 2009 for pain related to his elbow injury. Other than this absence, the employee did not take any other FMLA-eligible leave prior to his termination. The employee was terminated on June 1, 2009, based on an extensive history of performance problems and erratic behavior over the course of his relatively short employment.

The employee brought interference and retaliation claims under the FMLA, alleging that his employer terminated him shortly after he requested intermittent FMLA leave. The employer moved for summary judgment, which the court granted. The employer argued, and the court agreed, that the employee failed to give the employer adequate notice of his intention to take FMLA leave. The employee told his employer that he "had appointments he needed to make and keep" and that he would need some time off after his injury. The employer asked if he had any concerns about working following the injury, and the employee said no. The court held that these general statements were insufficient to reasonably apprise the employer of his request to take time off for a serious health condition. The court also held that the employee had failed to demonstrate that the employer's legitimate, nondiscriminatory reason for the employee's termination – his erratic behavior and poor performance – was pretext for discrimination or retaliation.

Brushwood v. Wachovia Bank, N.A., 2012 WL 642216 (W.D. Va. Feb. 28, 2012)

Plaintiff, who worked for defendant as a personal service representative, injured her foot and sought medical treatment. Her treating physician provided a note stating that she needed to miss one day of work. Despite plaintiff's request for additional days off, the physician refused to provide her with an excuse for more than one day. Plaintiff then informed her supervisor that she would be absent for more than one day, but could only obtain a doctor's note for the first day. The supervisor responded to plaintiff, who previously had received a warning for unrelated absences, that if she did not return to work on the second day, the bank would terminate her employment. When plaintiff did not report to work on the second day, the bank discharged her. Subsequently, plaintiff's foot condition worsened and she had to use crutches and have surgery. While plaintiff was using crutches, she returned to her office to collect her personal belongings.

Plaintiff sued under the FMLA, and the parties cross-moved for summary judgment. In its motion, defendant argued that plaintiff did not give it sufficient notice that she was taking protected leave. The court agreed and granted summary judgment in favor of defendant. The court concluded that plaintiff's "statement [that she would be absent more than a day without a medical excuse], which essentially conveyed the message that her treating physician did not believe her condition to be serious enough to justify her absence from work for more than a

single day ... was not sufficient notice that she was taking protected leave.” Further, the court rejected plaintiff’s contention that defendant should have known she needed FMLA leave when she arrived at her former office on crutches. The court reasoned that notice that comes after an alleged interference with FMLA rights is “ineffective.”

Summarized Elsewhere:

Wilson v. Sharp Mfg. Co. of America, 2012 WL 489203 (W.D. Tenn. Jan. 27, 2012)

Erdman v. Wachovia, 2012 WL 728917 (D.S.C. Feb. 16, 2012), adopting report and recommendation, 2012 WL 716595 (D.S.C. Mar. 6, 2012)

Cavaliere v. Advertising Specialty Institute, Inc., 853 F. Supp. 2d 472 (E.D. Penn. 2012)

Wai v. Federal Express Corp., 18 WH Cases2d 1451 (11th Cir. 2012)

O’Connor v. Chicago Bd. Of Educ., 19 WH Cases2d 1875 (N.D. Ill. June 19, 2012)

White v. Telcom Credit Union, 874 F. Supp.2d 690 (E.D. Mich. 2012)

Spurling v. C&M Fine Pack, Inc., 2012 WL 2931206 (N.D. Ind. July 18, 2012)

Furry v. Lehigh Valley Health System, 2012 WL 4510760 (E.D. Pa. Sept. 28, 2012)

D. Change of Circumstances

Towns v. Northeast Mississippi Electric Power Assn., 2012 WL 2138255 (5th Cir. June 13, 2012)

The employee, a cashier, suffered from pain that was so severe her supervisor directed her to see a doctor. The doctor diagnosed the employee with carpal tunnel syndrome and referred her to a specialist. The employee pursued a workers’ compensation claim, which was denied because the specialist determined that she did not have carpal tunnel, but rather had a preexisting bone disease. She consulted another doctor who approved thirteen weeks of short term disability (STD) leave. The employer received the employee’s disability leave forms, but did not inform the employee of her rights under the FMLA. Shortly before her STD was to end, she received a letter from the employer saying that work was no longer available for her. The employee filed suit, arguing that the employer failed to inform her of her rights under the FMLA. The employer filed a motion for summary judgment, arguing that the employee failed to give adequate notice of her need for FMLA leave because the employee was not in contact with the correct person when she was on leave. The Fifth Circuit reversed the district court’s grant of summary judgment in favor of the employer, finding factual issues regarding whether the employee provided the employer with adequate notice of her need for FMLA leave.

Summarized Elsewhere:

Smith v. City of Niles, 2012 WL 5862088 (6th Cir. Nov. 19, 2012)

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

Brookshire v. Buncombe County, North Carolina, et al., 2012 WL 136899 (W.D.N.C. Jan. 18, 2012)

Plaintiff worked for defendant as a soil erosion officer, spending most of his work days out of the office. Over time, defendant began to suspect that plaintiff was not working a full day and was falsifying his timesheets. Following a lengthy investigation, defendant discharged plaintiff for falsification of time records. Plaintiff filed, alleging FMLA interference and retaliation. Plaintiff claimed that approximately three months before his discharge, he requested to work only three days per week because of his stress levels and overall health. Plaintiff did not submit supporting medical certification and admitted that he made the decision to reduce his schedule on his own. The court granted defendant's motion for summary judgment on plaintiff's interference claim, finding that plaintiff could not demonstrate that he had a serious health condition or that he had provided appropriate notice to his employer,

In considering defendant's motion for summary judgment on plaintiff's retaliation claim, the court noted that plaintiff had not demonstrated that he had even taken FMLA leave. Assuming that plaintiff had engaged in protected conduct by discussing intermittent leave with his supervisor, the court held that plaintiff failed to demonstrate a causal connection between such conversations and his discharge. Moreover, plaintiff did not provide evidence of pretext. Accordingly, the court granted defendant's motion for summary judgment on the retaliation claim as well.

Gates v. United States Postal Service, 2012 WL 4902851 (6th Cir. Oct. 16, 2012)

Plaintiff brought this action against defendant alleging that defendant discharged him for excessive unscheduled absences in violation of the FMLA. Plaintiff argued that absences for which FMLA leave was denied for failure to follow the employer's procedures were the sole basis for termination, thus interfering with his FMLA rights. Plaintiff also alleged retaliation for exercising his FMLA rights.

Evidence at trial showed that the employee had a history of attendance issues involving unscheduled absences predating his application for intermittent FMLA leave. Following his application for FMLA leave, he continued to have unscheduled absences, some of which were related to his FMLA-certified condition, but many of which were not. In many situations the employee's FMLA requests were disapproved by the defendant's FMLA coordinators because he failed to follow the defendant's procedures for reporting and documenting unscheduled absences, even after meeting with the coordinators to review requirements.

On appeal, the Sixth Circuit determined that the district court properly adopted the advisory jury's finding that plaintiff would have been discharged due to excessive unscheduled absences unrelated to his FMLA leave, regardless of the exercise of his FMLA rights or his compliance with internal FMLA leave procedures. Thus, the court distinguished this case from earlier Sixth Circuit precedent holding that employers cannot deny FMLA relief for failure to comply with internal notice requirements that are more strict than those contemplated by the

FMLA. The Sixth Circuit applied the *McDonnell Douglas* Title VII burden-shifting framework to both the FMLA interference and retaliation claims. The employee did not point to any evidence or make any argument that his discharge was not justified based on his excessive unscheduled absences or that this reason was pretextual. Accordingly, the district courts' findings were upheld.

Goldsmith v. Greater Dayton Reg'l Transit Auth., 2012 WL 2576645 (S.D. Ohio July, 3, 2012)

Defendant employed plaintiff as a bus driver from 1997 to late 2008. Defendant terminated plaintiff's employment based on her non-FMLA related absences. Plaintiff claimed that her absences should have been FMLA leave, therefore her termination was improper. The court found that plaintiff's last two absences, which resulted in her termination, were not FMLA-related and termination was proper.

During plaintiff's employment, her mother became ill and plaintiff took FMLA leave to care for her. Plaintiff took a number of FMLA-related absences between 2003 and 2008. Plaintiff also had many non-FMLA related absences – in her last year of employment she reached thirteen absences and defendant consistently reprimanded plaintiff for her absenteeism. Plaintiff received notice that she was only two absences away from termination based on company policy stating that fifteen absences in a twelve month period lead to automatic termination. After this notification, plaintiff missed another day of work and was promptly terminated.

Plaintiff claimed her last two absences were FMLA-related. On the day of the first absence, plaintiff informed defendant that she needed to leave work early to visit her husband in the hospital. Plaintiff did not mention FMLA, the need to care after her husband, or her husband's precise medical condition. Plaintiff never requested FMLA leave to care for her husband and never submitted an application for FMLA leave related to her husband's care. In fact, plaintiff did not speak to her supervisor about the absence until after she was facing termination months later. Defendant granted plaintiff a leave of absence when her husband was discharged and encouraged her to seek FMLA leave if need be. Plaintiff did not do so. Plaintiff took another absence when her mother had a cold, but the leave was not FMLA-related. The dispatcher on-call specifically asked whether the leave was FMLA related, and plaintiff said no.

Plaintiff argued that an employee does not have to expressly state that leave is for a FMLA purpose, but rather must state information for the employer to reasonably conclude that FMLA leave is applicable. While that is true, in this case, plaintiff knew of her FMLA options and affirmatively denied them. Further, plaintiff did not seek FMLA leave until months after the absences. Plaintiff also claimed that defendant retaliated against her FMLA activity by firing her, however, defendant fired plaintiff before she requested FMLA leave for her last two absences. Defendant fired plaintiff for her non-FMLA related absences, not for her FMLA related activity. The court granted defendant's motion for summary judgment, finding that plaintiff could not prove that defendant violated the FMLA or retaliated against her.

Golez v. Potter, 2012 WL 3134256 (S.D. Cal. July 31, 2012)

Plaintiff was a custodian with the United States Postal Service (“USPS”). The USPS had an attendance system that required employees who were going to be absent or late to work to contact the Interactive Voice Response System (“IVR”) in advance, unless an emergency prevented him from doing so. An employee calling the IVR system must state the duration and reason for his tardiness. Additionally, employees are required to notify a supervisor prior to leaving the premises before the end of their shift.

In 2007, plaintiff received approval for unscheduled FMLA leave for December 1-22 to take care of his mother. In the spring of 2008 plaintiff wished to take more unscheduled leave to care for his mother. Because the circumstances surrounding this leave were similar to the December 2007 request, defendant’s FMLA Coordinator merely asked for an updated medical certification form supporting the unforeseeable leave he sought. However, plaintiff did not submit this updated certification until June 6, 2008. Based on the certification, plaintiff was authorized to take unscheduled FMLA leave five to twelve times a month to care for his mother commencing retroactively on May 5, 2008. Thus, plaintiff was not protected from unscheduled leave from December 22, 2007 to May 4, 2008. The record indicated that plaintiff was late for work eleven times in April and May of 2008, and failed to notify a manager or call the IVR system. Plaintiff’s direct supervisor informed him multiple times that he was required to call the IVR system if he was going to be late. Additionally, on May 11, 2008, plaintiff learned that his mother was having difficulty breathing. He immediately clocked out from work, though did not tell his supervisor or even another employee that he was leaving; plaintiff did not contact his supervisor until late that evening. The supervisor testified that this was the only call he received from plaintiff during the spring of 2008. The record also showed that plaintiff did not fill out a Request for or Notification of Absence Form 3971 that day. As a result, plaintiff was terminated on July 4, 2008 for failure to follow the instructions of his supervisor, failure to contact IVR in advance to report eleven instances of tardiness, and failure to follow the instructions of his supervisor to report in advance on May 11, 2008 that he was leaving prior to the end of his shift.

The court held that for plaintiff’s leave to be protected under the FMLA, it required him to give proper notice (absent extenuating circumstances). The court held that no such extenuating circumstances existed here, and that plaintiff’s absences were thus unprotected. As such defendant did not interfere with plaintiff’s FMLA rights.

Martinez v. Harley-Davidson, Inc., 2012 WL 3881615 (E.D. Wis. Sept. 6, 2012)

The employer maintained an absence point-system policy for hourly employees that counted the number of absences an employee accumulated and required employees to call in at least 30 minutes prior to shift start if the employee would be missing work. Plaintiff routinely violated this policy by calling in late when he missed a shift due to FMLA leave. The employer would count plaintiff .25 “points” per late call-in under the policy, but would not penalize plaintiff for the actual leave. Eventually, plaintiff accumulated a number of points under the policy due to his late call-ins, and the employer disciplined and ultimately discharged plaintiff for repeatedly violating the policy.

Approximately six months after the last late call-in, plaintiff approached a physician to receive a “backdated” note stating he was medically unable to call in on time due to depression.

Plaintiff had not previously informed the employer that he was medically unable to comply with the employer's policy. Plaintiff filed suit, alleging FMLA interference and the employer filed a motion for summary judgment. The court ruled that no reasonable jury could conclude that the policy interfered with plaintiff's FMLA rights. Additionally, the court denied plaintiff's interference claims based on being assessed "points," holding that the claims were untimely because he had been assessed the points more than two years from when he filed suit.

Summarized Elsewhere:

Erdman v. Wachovia, 2012 WL 728917 (D.S.C. Feb. 16, 2012), adopting report and recommendation, 2012 WL 716595 (D.S.C. Mar. 6, 2012)

Towns v. Northeast Mississippi Electric Power Assn., 2012 WL 2138255 (5th Cir. June 13, 2012)

Grosso v. UPMC, 857 F. Supp. 2d 517 (W.D. Pa. 2012)

Stone v. St. Vincent Hosp. and Health Care Ctr., 2012 WL 5844748 (S.D. Ind. Nov. 19, 2012)

IV. EMPLOYER RESPONSE TO EMPLOYEE NOTICE

Summarized Elsewhere:

Santiago v. Butler Company, 2012 WL 527699 (D. Conn. Feb. 17, 2012)

Holfelder v. Inservco, Inc., 2012 WL 3960449, 19 WH Cases 2d 1159 (N.D. Ohio 2012)

- A. Notice of Eligibility for FMLA Leave [Renumbered and Amended Heading Title (Formerly IV.C, "Notice of Ineligibility for Leave")]

Lichtenstein v. Univ. of Pittsburgh, 691 F.3d 294, 19 WH Cases2d 776 (3d Cir. 2012)

Plaintiff was employed as a psychiatric technician. She had repeated attendance problems. In a three month period she was absent twice, tardy six times and switched shifts constantly. According to the employer, the last straw occurred on December 30, when she arrived to work several hours late and left work several hours early. Her supervisor did not inform the plaintiff of the termination, however. Instead, the next day, the supervisor left for a one week vacation. Plaintiff was scheduled to work on January 3, but failed to appear. Instead, she called the nursing supervisor and told her that she was "currently in the emergency room . . . my mother [was] brought into the hospital via ambulance, and I [am] unable to work [to]day." The supervisor taking the call simply noted in the attendance log, "sick mom." Four days later, the employer discharged plaintiff, who then filed claims for retaliation and interference under the FMLA.

The district court dismissed plaintiff's FMLA retaliation and interference claims on a motion for summary judgment because it concluded that she failed to show that she had notified

her employer of her need for leave in order to care for her mother's serious health condition, and that she had failed to cast a reasonable doubt on her employer's proffered justification for her termination. The Third Circuit disagreed, however, and reversed the decision. The appellate court noted that, under the FMLA, the question is not whether the employee gave every necessary detail to determine if the FMLA applies, or whether the employee gave enough information to rule out non-FMLA scenarios. Rather, the question is whether the information provided allows an employer to "*reasonably* determine whether the FMLA *may* apply." Given the factual circumstances, the court found a question of fact as to whether the employer had sufficient information to be put on notice that the FMLA might have applied. The court also held that, based on the temporal proximity between the plaintiff's call and her discharge, and other inconsistencies in the record, there was sufficient evidence to cast a reasonable doubt on the employer's proffered justification for her termination.

Jordan v. Southeastern Pennsylvania Transit Authority, 2012 WL 912723 (E.D. Pa. Mar. 19, 2012)

Plaintiff was taken to the hospital while on duty. She subsequently filled out an accident report and injury report and missed work on account of the injury. The employer sent her two separate letters directing her to report to a physician provided by the employer. On both occasions plaintiff failed to appear. Based on her failure to appear, plaintiff's employment was terminated. Before her discharge, however, plaintiff submitted a Sick Benefit Application Form, which triggered her request for FMLA leave. The employer determined that plaintiff had not worked the minimum number of hours required to qualify for leave under the FMLA and was therefore ineligible.

In her lawsuit, plaintiff alleged, among other things, that her discharge violated the FMLA because the employer failed to advise her that she was ineligible for FMLA leave before terminating her employment. The district court rejected this argument, relying on the reasoning of the Third Circuit that a failure to advise an employee of ineligibility did not expand an employee's eligibility under the FMLA, and granted summary judgment to the employer on that claim.

Summarized Elsewhere:

Cullison v. Dauphin County, 2012 WL 3026784 (M.D. Pa. July 24, 2012)

- B. Notice of Rights and Responsibilities [Amended Heading Title (Formerly "Individual Notice to Employee Concerning FMLA Leave")]

New-Howard v. Shinsekis, 2012 WL 2362546 (E.D. Pa., June 21, 2012)

Plaintiff was a secretary for defendant, a federal agency. After pursuing civil litigation for about 18 years against her employer for wrongful termination, plaintiff was reinstated to her federal employment. On the day she was restored to her position, plaintiff requested leave in order to take care of her husband the very next day. Plaintiff was granted a leave without pay. After returning to work, plaintiff requested ongoing medical leave to take care of her husband.

Plaintiff left work without signing any document and leaving the unapproved leave request in her cubicle. Afterwards, a long thread of communications ensued between plaintiff and representatives of defendant where defendant requested plaintiff to provide proper documentation for her leave requests. Plaintiff continued providing inadequate documentation. During the cycle of communications, plaintiff changed her request for leave from family-care to self-care due to her own mental health condition. Defendant did not approve plaintiff's leave request because she failed to provide sufficient documentation. Finally, after more than six months, defendant informed plaintiff that she would be removed from employment because of excessive, unapproved absences.

Plaintiff filed suit, alleging that defendant wrongfully denied her FMLA leave request. In granting defendant's motion for summary judgment, the court determined that plaintiff failed to comply with the FMLA's notice and certification requirements. The documentation plaintiff provided only indicated that plaintiff's husband had undergone surgery, but failed to explain how and why plaintiff was required to care for him. The documentation she submitted for her own health condition failed to specify the date her condition began, the duration of leave, or facts regarding her condition.

Ridgeway v. Royal Bank of Scotland Group, 2012 WL 1033532 (D.Conn. March 27, 2012)

In October 2009, while employed by defendant, plaintiff fell at work exacerbating his preexisting back and spinal problems. He took leave under the FMLA during October and November to complete a course of physical therapy. At this time, defendant informed plaintiff that it used a calendar year method for calculating successive FMLA leave intervals. In November 2009, after physical therapy, plaintiff's doctor informed him that he would need further surgery that would require six to ten additional weeks of recovery. Plaintiff scheduled his surgery for December, believing he could use the rest of his 2009 FMLA entitlement that month, and then take leave until April 2010 because his FMLA leave time would start over on January 1, 2010. However, though he was reassured that he could take leave until April 2010, defendant changed its policy from a calendar year method of calculating FMLA entitlement, to a 12 month rolling back method. Unaware of this, and assured that his leave was approved through April 2010, plaintiff took the time off as he planned. On April 22, plaintiff was discharged.

Plaintiff filed suit, alleging defendant interfered with his rights under the FMLA and retaliated against him for taking FMLA leave. Defendant moved to dismiss both claims, arguing that because plaintiff was not terminated until April, he took all the leave he requested, and thus had failed to state an interference claim. The court held that plaintiff had alleged a sufficient claim of interference, reasoning that plaintiff's allegations of lack of notice and misleading information regarding defendant's FMLA leave calculation policy rendered him unable to conform his leave so as to maintain his reinstatement rights. The court also held that plaintiff sufficiently pleaded a retaliation claim, because defendant's policy change without adequate notice could create a plausible inference of retaliatory intent, as it effectively induced plaintiff to take leave beyond the protected period, causing him to forfeit his right to reinstatement.

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

Cashman v. CNA Financial Corp., et al., 2012 WL 113667 (E.D. Pa. Jan. 13, 2012)

Over the course of two and a half years, plaintiff had taken leave for bladder cancer and its recurrence. Defendant had classified some of these absences as FMLA leave and some as paid time-off. During this time period, defendants reorganized plaintiff's division and assigned plaintiff a new supervisor. The new supervisor quickly began to identify deficiencies in plaintiff's performance, ultimately leading to imposition of a performance improvement plan ("PIP"). In response to the PIP, plaintiff announced his retirement. Plaintiff later tried to rescind his retirement announcement, but defendants declined to permit him to withdraw it.

Plaintiff filed suit, alleging FMLA interference by defendants' failure to designate all of his FMLA-qualifying leave as FMLA time. The court granted defendants' motion for summary judgment as to this claim, finding that plaintiff did not establish that he had lost wages or suffered any economic harm as a result of defendants not notifying him that some of his leave was covered by the FMLA. Plaintiff also alleged FMLA retaliation, claiming that the PIP constituted an adverse employment action. Considering the Supreme Court's *Burlington Northern* standard, the court acknowledged that a negative performance evaluation could constitute an adverse employment action. The court held that the PIP was not an adverse employment action because defendants established that plaintiff's performance needed improvement. In the alternative, the court also held that even if the PIP constituted an adverse employment action, plaintiff could not demonstrate a causal relationship to his FMLA leave. The court noted: "There is no evidence [defendants] considered [plaintiff's] leave when making [the] determination to place his on a [PIP]." As a result, the court granted defendants' motion for summary judgment as to the retaliation claim as well.

Gilliard v. Georgia Department of Corrections, 2012 WL 6115913, 19 WH Cases 1798 (11th Cir. Dec. 7, 2012)

The court summarized Eleventh Circuit FMLA caselaw, but provided only a brief explanation supporting its affirmance of the district court's grant of summary judgment to the employer. With regard to plaintiff's claim of FMLA interference, the court held that she failed to present more than a scintilla of evidence that she received less than 12 weeks of FMLA leave. Plaintiff's retaliation claim failed because she did not establish that the legitimate, nondiscriminatory reasons proffered by defendants for the proposed five-percent salary reduction and her termination were pretexts for retaliation. Finally, there was no improper retroactive designation of FMLA leave under 29 C.F.R. § 825.300(d)(1) since she received notice that her leave was designated as FMLA leave within five business days of defendants' receipt of the necessary information.

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

Summarized Elsewhere:

Washburn v. Gymboree Retail Stores, Inc., et al., 2012 WL 3818540 (W.D. Wash., Sept. 4, 2012)

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

McLaughlin v. Autozoners, LLC, 2012 WL 1560157 (S.D. Ind. May 2, 2012)

Plaintiff was discharged after allegedly accruing excessive absences. Plaintiff filed a retaliation claim under the FMLA, claiming that certain absences should have counted toward FMLA leave but were counted as unexcused absences. Both parties moved for summary judgment. The parties did not dispute that plaintiff was qualified to take FMLA leave from August 2-15, 2010, so the case turned on whether the plaintiff's absences on July 29 and 30, 2010 qualified for FMLA leave.

First, the court determined whether plaintiff's absences from July 29 to August 15 counted as one, continuous, "serious health condition" under the FMLA. Plaintiff argued that his July 29 and 30 absences counted toward his condition because he was already experiencing symptoms relating to the "serious health condition" that caused him to take leave in August. The court found that a reasonable jury could view the entire time as a single serious health condition, though there was some evidence to the contrary. Next, the court decided whether plaintiff became totally disabled on August 2, when his doctor's note stated he was diagnosed with cellulitis (the qualifying "serious health condition"). Although defendant relied on this date to show that plaintiff was not disabled on July 29 or 30, the court rejected the idea that the doctor's note was a "negative certification" that the plaintiff was *not* disabled before August 2. Also, the doctor's note was made in the context of short-term disability benefits, not FMLA leave. Because of the differences between the two designations, the court felt the jury was in a better position to decide how much weight should be given to the doctor's form.

Finally, the court considered whether defendant gave proper notice to plaintiff after he requested leave. The record showed plaintiff did enough to apprise defendant of his condition. Defendant was then required to give plaintiff notice of his eligibility to take FMLA leave within a certain time period. The evidence showed that it was possible defendant did not comply completely with the proper notice requirements. But, even if defendant committed a technical violation, plaintiff was not harmed by any failure to receive notice. Accordingly, the issue was better left to the jury as well. Thus, the court denied both parties' motions for summary judgment.

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

Sechler v. Modular Space Corp., 2012 WL 1355586 (Apr. 18, 2012)

As the District General Manager, the employee had a history of alcoholism. Despite many years of sobriety, the employee had several relapses and estimated that he drank a pint and a half of vodka up to four days a week. The employee sought help from the employer and emailed the employer requesting leave. In response, the employer immediately assisted the employee with a treatment process. During the treatment process, all of the employee's duties were placed on hold. The employee completed his treatment and upon returning to work, the employee agreed to submit to random drug and alcohol testing. The employee was informed that

failure to do so may result in his discharge. The employee submitted to at least two drug/alcohol tests and the results of both were negative. The employee also received poor performance evaluations. Over the course of several days, the employer received complaints that the employee was acting unusual – as if he was under the influence of alcohol. The employer asked the employee to submit to a drug/alcohol test and that the employer would drive him, but he refused unless he could drive himself. The employer offered to obtain a taxi for the employee, but the employee still refused. After the employer made multiple attempts to have the employee tested, the employee refused. Accordingly, the employer discharged the employee for refusing to take a drug/alcohol test.

The Southern District Court in Texas granted the employer’s motion for summary judgment, in part, finding that the employer failed to comply with the FMLA’s notice requirements. The court found that once an employee requests FMLA leave, as the employee had in his email requesting leave, the employer “must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances.” 29 C.F.R. § 825.300(b)(1). The court found that the employee’s simple statement that he sought help and requested leave was sufficient to trigger the employer to provide the employee with FMLA notice. The court found that a genuine issue of material fact still remained as to the employer’s compliance with the FMLA’s notice requirements where the employer does not contend that it gave him notice. Further, the court found that the employer’s failure to provide the employee with proper notice of his FMLA rights impaired his rights and resulted in prejudice. Here, the employee demonstrated to the court how he would have done things differently had he known about his FMLA leave rights. The court also stated that if the employee is found to be an “eligible employee,” then the employer’s motion for summary judgment will be denied as to his FMLA entitlement claim. Such decision, however, was not decided in this case. Finally, as to the employee’s FMLA discrimination/retaliation claim, the court granted the employer’s motion for summary judgment on the grounds that employee could not establish causation between his FMLA leave and his discharge and/or his poor performance evaluations. Additionally, the employer had a legitimate, non-discriminatory reason for discharging the employee – failing to take a drug and alcohol test.

Summarized Elsewhere:

Thom v. Am. Standard, Inc., 666 F.3d 968, 18 WH Cases2d 1132 (6th Cir. 2012)

Kelsh v. WCI Steel, Inc., 2012 WL 366947 (Ohio Ct. App. Feb. 6, 2012)

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

Holland v. Shinseki, 2012 WL 162333 (N.D. Tex. Jan. 18, 2012)

Plaintiff claimed that “excessive and unwarranted scrutiny” of her work performance caused her to suffer from a number of medical ailments. These medical ailments led plaintiff to request FMLA leave as well as several accommodations, including transfer to a different facility. Plaintiff’s transfer request was eventually granted and following her transfer, plaintiff filed suit, alleging that defendant violated the FMLA by denying her leave, denying her written designation

of leave, and breaching confidentiality. Defendant moved for summary judgment, contending that plaintiff was not denied any FMLA rights.

The court found that defendant did not deny or interfere with plaintiff's right to take leave. After plaintiff had requested leave, defendant responded to the request by inquiring into whether the leave was for an FMLA-qualifying reason. Defendant then approved the request for leave once it received sufficient information from plaintiff to determine it did qualify under the FMLA. The court concluded that plaintiff was, therefore, not denied any rights under the FMLA. The court further found that defendant did commit a technical violation of FMLA regulations by failing to provide written notice of its designation of her FMLA leave within five days. The court noted, though, that defendant had provided verbal notice within the five days and that plaintiff had the burden to demonstrate "real impairment of [her] rights and resulting prejudice." Because plaintiff could not demonstrate prejudice stemming from the delay in written designation, the court found in favor of defendant. Moreover, defendant prevailed on plaintiff's claims regarding improper disclosure of her medical records because defendant established that only members of management discussed her FMLA leave.

Turning to plaintiff's FMLA retaliation claim, the court considered whether plaintiff had suffered an adverse employment action. Plaintiff contended that she suffered such an action when defendant stopped engaging in email communication with plaintiff and when she failed to receive promotions or transfers after her return from leave. Applying the Supreme Court's analysis from *Burlington Northern*, the court determined that a reasonable employee could find such actions to be materially adverse. Plaintiff also demonstrated that other employees may have been treated more favorably in that AWOL designations had been removed from records of employees who had not requested leave but hers had not been. As a result of these factual disputes, the court denied defendant's motion for summary judgment on plaintiff's retaliation claim.

***Antone v. Nobel Learning Communities, Inc., et al.*, 2012 WL 174960 (D.N.J. Jan. 19, 2012)**

Plaintiff informed defendant that she needed a leave of absence to undergo treatment in a hospital. Defendant provided plaintiff with an FMLA certification form approximately one month later, which plaintiff and her physician promptly completed and returned. The physician specified a return date eight days beyond twelve weeks, but defendant never informed plaintiff when her leave would expire and never notified plaintiff that she was eligible for FMLA leave. In fact, the first notification defendant sent to plaintiff was a notice that she would be discharged for failing to return within twelve weeks of her initial leave date. Plaintiff filed suit, contending that she would have returned within twelve weeks had she been informed about when her FMLA time expired and produced a note from her physician indicating she could have returned within twelve weeks.

Defendant moved to dismiss plaintiff's FMLA interference and retaliation claims, arguing that because it provided twelve weeks of FMLA leave to plaintiff, it could not be liable for interference. The court noted that an employee can maintain a claim for interference in situations where the employer's failure to provide timely designation did not permit the employee "to make an informed decision about structuring [her] leave . . . in such a way to

preserve the job protection afforded by the Act.” Because defendant failed to provide the designation notice, the court denied its motion to dismiss the interference claim. The court also found that plaintiff had alleged sufficient facts to survive a motion to dismiss her retaliation claim, rejecting defendant’s contention that plaintiff failed to allege that it had discharged plaintiff.

Myers v. Kettering Med. Ctr., 2012 WL 174807 (S.D. Ohio Jan. 20, 2012)

Plaintiff worked as a dialysis nurse and claimed defendant violated the FMLA notice requirement in 29 C.F.R. § 825.300(d)(5)-(6) by failing to notify her that it designated twelve weeks of her fifteen-month leave as FMLA leave. Plaintiff was injured on August 15, 2009 in the course of her employment and began a leave of absence on that date. Plaintiff was unable to work because of her injury and subsequent related health conditions from August 15, 2009 until some point in the spring of 2011. On November 23, 2010, plaintiff was terminated due to the length of her absence from work. Defendant did not give the plaintiff notice that her leave was designated as FMLA leave until she was terminated.

The Southern District Court of Ohio granted defendant’s motion for summary judgment, finding that, even though it failed to give plaintiff notice that her leave had been designated FMLA leave, plaintiff failed to establish prejudice from the delayed FMLA notification. The court found that regardless of whether she had received notice of defendant designating her leave as FMLA, she still would have taken medical leave beginning August 15, 2009 and ending no sooner than the spring of 2011. Therefore, plaintiff could not show that she suffered any harm as a result of defendant’s failure to notify her that it designated twelve weeks of her fifteen-month leave as FMLA leave.

Summarized Elsewhere

Cook v. Avon Protection Systems, Inc. 2012 WL 6650638 (W.D. Mich. Dec. 20, 2012)

Dean v. Wackenhut Corp., 2012 WL 1577453 (N.D. Ill. May 4, 2012)

V. MEDICAL CERTIFICATION AND OTHER VERIFICATION

Summarized Elsewhere

Sullivan-Robinson v. Arkansas Parole Board, 2012 WL 5354797 (E.D. Ark. Oct. 29, 2012)

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

Allen v. U.S. Postal Service, 2012 WL 3763618 (W.D. Wash. Aug. 29, 2012)

Plaintiff, a postal worker, called in sick on June 28, 2007 via defendant’s automated phone-in system. Defendant sent plaintiff an email and left a voicemail requesting that he provide medical documentation supporting his absence. Plaintiff initially responded by stating that he was not required to bring “a G-D thing,” but subsequently submitted a note from the VA

stating that he would be off of work until July 7. Plaintiff, however, did not return to work on July 7. On August 7, defendant sent plaintiff a letter advising him that it was designating his absence as unscheduled sick leave, asking that he provide medical documentation to management, and providing plaintiff with forms for requesting leave under the FMLA. Rather than returning the forms, plaintiff submitted a note stating that he would be able to return to work on August 14, but he failed to return on that date. Plaintiff ignored defendant's subsequent requests that he provide medical documentation in support of his leave, only responding to defendant after receiving a notice of proposed removal from defendant on October 3, 2007. In his November 2, 2007 response, plaintiff claimed to be seeking medical help for unexplained headaches, which had been traced to sleep apnea, and stated that he did not know whether his condition qualified him for FMLA leave. On November 5, plaintiff also sent a letter to the VA expressing concern that the VA had not completed his FMLA forms, but did not provide this information to defendant. Plaintiff ultimately met with defendant on December 4, 2007. During the meeting, he referenced his medical problems, but did not provide any documentation to support his condition and did not reference FMLA leave. On December 13, plaintiff submitted a request for leave to defendant's FMLA office. The FMLA office notified plaintiff that his documentation supported intermittent leave to attend medical appointments, but did not establish that he was incapacitated and unable to work.

Plaintiff never returned to work and, on January 8, 2008, defendant discharged him for failure to document medical reasons for, or otherwise explain, his failure to return to work. Plaintiff sued, asserting claims for hostile work environment, violation of the FMLA and wrongful termination. Defendant moved for summary judgment on plaintiff's FMLA claim, arguing that there was no evidence to support either an interference or retaliation claim under the FMLA. The district court agreed, finding that plaintiff refused to provide any documentation explaining his alleged medical condition or when he might return to work. Because there was no evidence supporting plaintiff's claim that he ever sought FMLA leave from defendant, that he ever told the defendant why he was not at work, that defendant in any way interfered with his rights under the FMLA, or that defendant discharged him for attempting to exercise his rights under the FMLA, the court granted defendant's motion.

Miedema v. Facility Concession Services, Inc., 487 F. App'x 214 (5th Cir. 2012)

The employee sought FMLA leave to be treated for post-traumatic stress disorder after having claimed she was sexually harassed at work. Shortly thereafter, her physician sent the employer a note indicating that she was being treated for this condition and "would be unable to return to work yet." The physician did not, however, indicate the beginning date of the employee's condition or its probable duration. The employer responded by issuing a Notice of Eligibility and medical certification form, which was to be completed by her health care provider. When the employee did not return the certification within 15 calendar days, the employer sent the employee a follow-up letter to remind her of the need to submit the certification. However, the employee still did not return the certification. The employer therefore considered the employee's absences unexcused and accordingly terminated her employment.

The Fifth Circuit affirmed summary judgment for the employer on the employee's FMLA interference and retaliation claims. Because she did not return the medical certification, the employee's employment was properly terminated, despite clear evidence that she otherwise suffered from a serious health condition. The court also found that the employer's request for

certification was proper where the employee's physician's note did not provide all the information required of a statutory certification. The court rejected the employee's argument that the employer's follow-up letter was insufficient because it did not advise her that her employment would be subject to termination for failing to return the certification. The court found no such obligation in "follow-up communications" since the employer already had informed her of the consequences when it initially provided the blank certification. As a result, her FMLA interference and retaliation claims were dismissed.

Smith v. Wynne, 2012 WL 3553722 (10th Cir., Aug. 20, 2012)

The employee worked as a computer engineer for the United States Air Force. After suffering an on-the-job injury, the employee used the full extent of her sick leave and applied for leave without pay ("LWOP"). The employee submitted the documentation necessary for a LWOP, but was discharged because the documentation she submitted did not demonstrate that the employee suffered an ongoing serious health condition. The employee then sued the employer, alleging that the employer had wrongfully denied her requested leave under the FMLA. The Merit Systems Protection Board ("MSPB") reviewed the employee's discharge and concluded that the employer did not violate the FMLA.

The district court upheld the MSPB's determination, finding that the MSPB was correct in determining that the employee had not demonstrated that she suffered a serious health condition. Significantly, the employee's physician recommended that the employee be returned to work without restrictions during the time the employee was seeking LWOP. The employee did not return to work despite this certification from her health provider. Likewise, the court found that the employee had not been retaliated against for asserting her FMLA rights because the employee did not suffer a serious health condition entitling her to leave.

Porter v. Donahoe, 484 F. Appx 589 (2d Cir. 2012)

Plaintiff, a postal worker, alleged that defendant interfered with his rights under the FMLA. Plaintiff failed to sufficiently complete his leave request, and defendant denied plaintiff's request for leave. The district court granted defendant's motion for summary judgment, and plaintiff appealed.

The Second Circuit affirmed. When an employee is eligible and requests leave under the FMLA, "[a]n employer may require that [the] request ... be supported by a certification issued by the health care provider" of the family member for whom the employee is caring. 29 U.S.C. § 2613(a). A certification is "incomplete" if "one or more of the applicable entries have not been completed." 29 C.F.R. § 825.305(c). A certification is "insufficient" if the entries are completed, but "the information provided is vague, ambiguous, or non-responsive." *Id.* The court held that plaintiff submitted an insufficient leave request. Specifically, the court found that plaintiff failed to answer several questions on the form, was given opportunities to cure the deficiencies, and failed to correctly cure the deficiencies in his certification.

Drake v. Walmart Stores, East L.P., Inc., 2012 WL 2996488 (M.D. Fla. July 23, 2012)

The employee informed the employer that he was having panic attacks and was given the employer's standard leave of absence packet. Plaintiff did not see his doctor until nine days later, the doctor did not complete the FMLA certification until nine additional days had passed, and the doctor's office did not transmit the completed form back to the employer for an additional 12 days—some 30 days after the employer requested the certification. Plaintiff was discharged the day after the doctor's office faxed the certification form, which the employer denied receiving.

The language of the employer's leave paperwork stated the certification must "generally" be returned within 15 days, and also contained an express statement that the certification could be returned "as soon as possible" if there were circumstances outside the employee's control that prevented it from being returned within 15 days. The court found that issues of fact remained on whether plaintiff met the flexible requirements regarding submission of timely certification that were stated on the employer's forms.

Hyl Dahl v. Michigan Bell Telephone Co., 2012 WL 5359257 (Oct. 31, 2012)

The employee informed her employer that she was unable to perform her job duties because she suffered from depression and post traumatic stress disorder. The employer granted her intermittent FMLA leave. After several years, the employer suspected fraud and placed the employee under surveillance one day when she took leave. Based on its observations, the employer opened an investigation to determine her need for leave. The employee's health care providers sent the employer a "supplemental certification" supporting her need for FMLA leave on the day of the employer surveillance. Ultimately, the employer terminated her for fraudulent use of FMLA leave.

The employee brought claims alleging interference with her rights under the FMLA and retaliation. The district court granted summary judgment on her retaliation claim, but a jury awarded damages based on her interference claim. On appeal, the employer argued that no reasonable jury could believe the supplemental medical certification was reliable because the employee's medical provider gave the certification without seeing or speaking to her on the day she took leave. The court rejected this position, holding a contemporaneous medical examination was not required. The court pointed out that the employee had been treated by the health care providers for several years, and their supplemental certification was not solely based on the employee's "self diagnoses," but rather their familiarity with her condition and her later reports about how she felt on that day. The court also determined that there was sufficient evidence that the employee was unable to perform her job on the day the employer's investigators observed her, and that she used the leave for its intended purpose. Additionally, it was not erroneous for the trial court to refuse to grant a new trial after counsel for the employee argued in closing that, if the employer thought the medical certification was insufficient, under the FMLA it could have asked for a second certification.

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

Graham v. Bluecross Blueshield of Tennessee, Inc., 2012 WL 529551 (E.D. Tenn. Feb. 17, 2012)

Three years before her discharge, the employee had requested and was granted intermittent leave under the FMLA. Her physician certified that the frequency of her need for leave was unknown. The employer notified the employee that it was the company's policy to require medical recertification after seven absences in a month when the certification provided that the frequency was unknown. Three years later, the employee again requested intermittent FMLA leave. She indicated that she expected to experience four episodes per month with each episode lasting three to four days. In response, the employer's administrator noted that the employee was eligible for leave and requested that the employee provide medical certification of the need for leave. The employee provided medical certifications, but they were inadequate as they provided that the employee was expected to experience fewer than four episodes per month. The employer's administrator informed the employee that the medical certification was inadequate and invited the employee to submit additional information from her doctor. Thereafter, the employee submitted medical certification indicating that the frequency and duration of the episodes was unknown. As a result, the employer granted the employee's request for leave; however, the employee understood that she would need to obtain recertification if she used more than seven days of intermittent leave per month.

Shortly thereafter, the employee took 28 days of leave. The employer's administrator notified the employee that she would need to provide medical recertification to justify her leave. The employee contended that she did not receive this letter. The employer's administrator sent a second letter requesting medical recertification and indicated that her recent leave had not been approved due to the lack of medical certification. The employee contended that she did not receive this letter either. According to the employer, the employee and the employer met to discuss her leave several times over the next month. The employee admitted that she met with the employer once during this time period and it requested information from her doctor. The employee knew that she had not submitted sufficient information from her doctor. Nonetheless, the employee did not submit any additional information from her doctor, and the employer discharged her for excessive absenteeism.

The employee sued the employer asserting interference with her FMLA rights. The employer sought summary judgment on the employee's claim, which the court granted. The court indicated that the dispositive issue was whether the employee's notice, including her medical certification, entitled her to the amount and frequency of leave she actually took. There was no dispute that the employee was entitled to *some* leave, but the question was whether she was entitled to all of the leave that she took. The court concluded that the employee was not entitled to a continuous leave of absence by a medical certification that provided the frequency and duration of the need for leave was unknown. The healthcare provider's statement that the frequency and duration were unknown did not entitle the employee to take as much leave as often as she desired up to the twelve weeks of leave provided in the Act. Additionally, the court found that the employer reasonably requested medical recertification. The court held that, when the employee failed to provide medical recertification after given sufficient time to do so, the employer lawfully discharged her.

Roundtree v. Securitas Security Services, Inc., 2012 WL 631848 (D. Conn., Feb. 27, 2012)

Plaintiff, a security guard, had complained that his female coworkers had sexually harassed him. On August 6, 2008, plaintiff wrote to a supervisor that he was “stressed out because of a hostile environment” and was going to seek medical help. The next day, he saw a doctor and then sent defendant a fax saying, “I will not be returning to work until doctor determine it. [sic]” Plaintiff’s fax also included a doctor’s note stating that he suffered from “anxiety, hypertension and sleep dysfunction” and that his return date was “to be determined.” On the following day, August 8, defendant sent plaintiff, who had not reported to work, a letter asking him to clarify whether he was seeking FMLA leave and to return a certification form within fifteen days or risk discharge. A month later, defendant sent him a similar letter. Plaintiff, who claimed that he never received the first letter, never responded and was discharged. He sued alleging retaliation under the FMLA.

The district court granted the defendant’s motion for summary judgment. It concluded that plaintiff failed to properly invoke his rights under the FMLA and, thus, could not establish a *prima facie* case of retaliation under the Act. More specifically, the court explained that the doctor’s note provided by plaintiff in his initial fax did not constitute sufficient certification because it failed to include the requisite information under the FMLA regulations, such as the date when the plaintiff’s anxiety commenced, the probable duration of his condition, and whether he was unable to perform the functions of his position. Furthermore, according to the court, defendant provided plaintiff with adequate notice (within two days of the start of his leave) of his obligation to provide certification and adequate opportunity to provide the certification and advised him that failure to provide the requested documentation could result in his discharge.

Ahmed v. Salvation Army, 2012 WL 6761596 (D. Md. Dec. 12, 2012)

Plaintiff requested FMLA leave before she was scheduled to undergo open heart surgery. The employer asked her to submit a Certification of Health Care Provider form. Plaintiff did so, but Section III of the form, which had questions to be completed by her health care provider, was left largely blank. The employer informed plaintiff that her form was incomplete and did not have sufficient information for an FMLA determination to be made, and instructed her to submit a completed form. Plaintiff submitted a second form, but this one also did not contain answers to the Section III questions or indicate the expected period of incapacity and leave she would need following her surgery. The employer informed plaintiff that this form also was insufficient and asked her to submit another with this information, but plaintiff did not do so before beginning her absence for the surgery. The employer sent her a letter to notify her that she was absent from work “without proper documentation,” and after 23-days of unapproved absence, the company terminated her employment.

The district court granted summary judgment for the employer on plaintiff’s FMLA interference claim because plaintiff never submitted a completed Certification form, so the duty to provide FMLA leave was not triggered. The court found that the Certification form was incomplete because it did not contain answers to the Section III questions or information regarding the date the employee’s heart condition commenced, the condition’s expected duration, or a statement that the employee was unable to perform the functions of her job.

Plaintiff argued that the employer did not comply with regulations related to the procedures for deficient FMLA forms, but the court disagreed. Although the employer may not have specifically stated why the employee's first-submitted form was incomplete, it did so in response to the second form with sufficient detail to comply with 29 C.F.R. § 825.305(c). The court also found that the employer provided plaintiff with more than the required seven days to cure the deficiencies in the incomplete forms. Finally, plaintiff could not show that seven days to cure the deficiencies in the forms was not practical under the circumstances because she did not present evidence of any good faith efforts to cure those deficiencies.

Blair v. Wilson Trailer Company, 2012 WL 2989661 (N.D.Iowa. July 20, 2012)

Plaintiff sought FMLA for his own serious health condition and the employer provided a certification form to him. Plaintiff's health care provider attempted to complete the form, but his first attempt was extremely vague and incomplete. The employer contacted the health care provider for clarification and a new certification form was prepared and sent the same day. Again, the employer found it incomplete and denied plaintiff's request for FMLA. Plaintiff then sought a third version from his health care provider and submitted it to the employer, who did not alter its decision to deny plaintiff FMLA leave and issue discipline to him for the absences he sought to have protected under the FMLA.

The court denied both parties' motions for summary judgment. It found that reasonable minds could differ as to whether the employer had an obligation to notify the plaintiff in writing what was insufficient about the certification forms, and whether the forms were so deficient that the employer properly determined that plaintiff was not entitled to FMLA leave on the face of the certification without further obligation to provide notice of the insufficiencies to plaintiff.

Greer v. Cleveland Clinic Health System-East Region, 2012 WL 5359255 (6th Cir. Oct. 31, 2012)

In late 2007, the employee requested full-time FMLA leave for surgery on his hand, and then intermittent leave for follow up appointments. The employer approved the request, and the employee took ten days off for the condition. The employee returned to work, however, and argued that he did not receive notice of the approval. In 2008, the employee requested and was granted six weeks of full-time leave for a foot condition, but the employer denied his request for intermediate leave. Soon after returning to work, the employee was terminated for not reporting to work without giving notice on several occasions, a violation of the employer's attendance policy. The employee brought claims for FMLA interference and retaliation.

The court of appeals upheld the district court decision, granting summary judgment for the employer. With regard to the December 2007 leave request, the court held that the employee had no interference claim because he took 10 days off for his hand. The employee argued that the 2007 request indicated his intention to take further leave for his foot condition, but the court rejected this argument because the medical certification only addressed his hand condition. The employee also contended that the employer interfered with his 2008 request by denying him intermittent leave, but the court concluded that the medical certification requested full-time

leave, not intermittent, because it only indicated that the employee would be unable to work for a period of time.

On his retaliation claim, the employee established a *prima facie* case because of the close temporal proximity between the leave and the termination, and because the employee was terminated, in part, for absences that occurred during the time he was approved for leave, but did not know it. However, the employee would have accrued excessive attendance and tardiness points under the employer's policy even not counting those taken during the time approved for leave, and the employee failed to provide notice for some of his absences. As a result, the employee could not show that the proffered reason for his termination was pretext.

Summarized Elsewhere:

Willis v. Legal Aid Defender Ass'n, Inc. and Deierdre Weir, 2012 WL 246293 (E.D. Mich. Jan. 26, 2012)

Porter v. Donahoe, 484 F. Appx 589 (2d Cir. 2012)

McLaughlin v. Autozoners, LLC, 2012 WL 1560157 (S.D. Ind. May 2, 2012)

- C. Second and Third Opinions
- D. Recertification

Mills v. Temple University, 18 WH Cases2d 311 (E.D. Pa. April 3, 2012)

The employee filed an interference claim against the employer based on the employer's request for a new healthcare provider certification in July prior to the November expiration of her then-current certification dated in May. The employer sought summary judgment on the claim, arguing that it had requested the new certification as permitted by 29 C.F.R. § 825.308(c) because circumstances had changed significantly. In the employer's view, the employee was suddenly unable to file heavy medical charts in July. In fact, however, she had not been doing filing for months, but a summer intern, who had been helping the employee do her filing, left in July. The court held that whether the circumstances had changed or not so as to allow for a new request was a question of material fact, and denied the employer's motion.

Grisby v. Wilberforce University, 2012 WL 4957544 (S.D. Ohio Oct. 16, 2012)

Plaintiff taught psychology at the defendant university and also had a part-time position at another nearby school of medicine. This latter position required plaintiff to act as the subject of physical examinations each Friday afternoon. In 2004, plaintiff requested intermittent FMLA leave from defendant for treatment of chronic allergenic rhinitis and asthma, for which plaintiff received an allergy injection every two (2) to three (3) weeks. The medical certification provided that employee would need FMLA leave during conflicting office hours, and made no mention of need for a special, reduced work schedule. The plaintiff received his injections at a local walk-in clinic for the next five (5) years and at no time requested any FMLA leave pursuant to his doctor's certification.

In November 2009, plaintiff received his spring 2010 teaching schedule, which was prepared in accordance with defendant's university-wide scheduling protocol. The schedule conflicted with plaintiff's other part-time employment. At least in part to avoid that conflict, plaintiff requested a special schedule and represented that the medical examinations plaintiff received at his part-time position were part of his certified medical treatment, so that the FMLA entitled plaintiff to the special schedule. Defendant denied plaintiff's request because his 2004 FMLA certification did not indicate any need for a special schedule and did not indicate any need for the type of examinations plaintiff received at his part-time position. At defendant's request, plaintiff also provided an updated certification, which was similar to the original. Accordingly, defendant again granted intermittent leave for treatment every two to four weeks, but denied the request for a special schedule.

Plaintiff sued claiming that defendant interfered with plaintiff's FMLA rights by (1) requiring recertification five years after plaintiff's original certification, and (2) denying plaintiff's request for the special schedule. The district court granted defendant's motion for summary judgment on both theories. First, plaintiff's request for the special schedule, in light of the five-year lapse since plaintiff's original certification and the apparent inconsistency between plaintiff's request and plaintiff's medical certification constituted a change of circumstances that reasonably warranted defendant's request for certification. Second, defendant did not interfere with plaintiff's rights by denying plaintiff's request for a special schedule since the medical examinations plaintiff received as in the course of plaintiff's part time employment were not part of plaintiff's certified medical treatment, and defendant accommodated plaintiff by permitting plaintiff to take leave related to plaintiff's certified treatment, paying plaintiff for such leave and not deducting from plaintiff's accrued sick leave.

Moore v. Sprint Communication Co., L.P., 2012 WL 4480696 (D. Md. Sept. 27, 2012)

After acceptable job performance for twelve years and being promoted several times, plaintiff was assigned a new supervisor who changed her office location and found her performance problematic. Plaintiff was given improvement plans and written warnings, including a final written warning. Two weeks after the final warning, she took leave based on asthma, migraines and stress. Her employer directed her to apply for FMLA leave and short-term disability. She was approved for both, with a return date of April 4. She also received, but did not read, a letter stating that an extension of the leave would require (1) completion of a form by her health care provider, and (2) a new return to work date. Plaintiff did not return to work on April 4. She faxed an extension request two days later, but failed to include a new date of return. She also filed an EEOC charge. Although her employer made several requests for a date of return, plaintiff failed to provide one. Eventually, the employer sent a letter retroactively terminating her leave of absence. Plaintiff contacted her employer and was again told that her health care provider needed to indicate a return date before the extension request form could be processed. The following day, plaintiff received a letter from her supervisor stating that she would be terminated unless she returned to work in four days.

Plaintiff neither provided the information required to process her extension request nor returned to work. She was discharged and filed suit alleging several causes of action, including

FMLA retaliation based on being terminated while on medical leave. The employer moved for summary judgment, arguing that plaintiff was not on FMLA leave when discharged. Without expressly holding that an employee does not have to be on FMLA leave *at the time of discharge* to maintain a retaliation claim, the court ruled for the employer on a different ground. After applying the *McDonnell Douglas* analysis, the court found that plaintiff was discharged because she failed to provide support for her continued absence, not because she took FMLA leave.

Wallace v. Rite Aid Corp., 2012 WL 366896, 18 WH Cases2d 1518 (D. Md. Feb. 1, 2012)

Plaintiff had worked for the company as a store manager. In the spring of 2008, plaintiff began receiving treatment for depression and anxiety, including taking medication prescribed by a physician's assistant. Plaintiff subsequently started FMLA leave for his condition. The physician's assistant originally provided the company with a return to work form saying plaintiff could return on June 26, but later provided a second return to work form extending his return date until July 7. After extending his leave to July 7, the physician's assistant told plaintiff that she would not give him any more notes. Plaintiff never returned to work and defendant terminated his employment.

Plaintiff sued, alleging that defendant discharged him in violation of the FMLA. Defendant moved for summary judgment, which the court granted. The court noted that plaintiff's FMLA leave ended on July 7 and once that leave expired, defendant "was entitled to treat him as they would any other employee and hold him responsible for coming to work." The court rejected plaintiff's claim that he thought the physician's assistant had faxed the defendant a form again extending his leave, because there was no evidence to support that contention.

Summarized Elsewhere:

Graham v. Bluecross Blueshield of Tennessee, Inc., 2012 WL 529551 (E.D. Tenn. Feb. 17, 2012)

Smith v. City of Niles, 2012 WL 5862088 (6th Cir. Nov. 19, 2012)

Roundtree v. Securitas Security Services, Inc., 2012 WL 631848 (D. Conn., Feb. 27, 2012)

E. Fitness-for-Duty Certification

Whitaker v. Nash County, 2012 WL 3840375 (E.D. N.C. Sep 5, 2012) aff'd, Whitaker v. Nash County, --- Fed.Appx. ---, 2013 WL 136009 (4th Cir. Jan. 11, 2013)

The employer required plaintiff to submit a fitness-for-duty certification at the conclusion of her twelve weeks of FMLA leave. When plaintiff instead submitted a request for extended leave, the employer wrote a letter noting that plaintiff's job was critical and suggesting that her employment would be terminated unless she proposed some accommodation by a given deadline. When plaintiff failed to respond to the employer's letter, she was discharged.

Plaintiff filed suit, alleging FMLA retaliation. The court granted the employer's motion for summary judgment, finding that the employer had presented a legitimate, non-discriminatory

reason for the discharge. The court noted that the FMLA regulations expressly permit an employer to demand a fitness-for-duty certification at the expiration of an employee's FMLA leave, and concluded that the employer was justified in discharging the plaintiff when she did not respond to the employer's letter offering to confer.

Summarized Elsewhere:

Steinker v. Enovapremier., 2012 WL 3597392 (S.D. Ind., Aug. 20, 2012)

Keeler v. Aramark, 483 Fed. Appx. 421 (10th Cir. 2012)

F. Certification of Continuation of Serious Health Condition

Guethlein v. Donahoe, 2012 WL 3028509 (S.D. Ohio July 25, 2012)

Plaintiff sued the US Postal Service, alleging it retaliated against her for bringing an EEOC complaint and by requesting documentation of her need for continued FMLA leave at the end of her first approved FMLA leave period. The court granted summary judgment for the employer, finding legitimate, nondiscriminatory reasons for the employer's request for documentation, noting that an employer may require that a request for leave may be supported by certification issued by the health care provider and provided in a timely manner by the employee to the employer. Plaintiff argued the request was a pretext for discrimination because she had already submitted documentation of her incapacitation to a medical department, and postal regulations provide that employees are not required to submit evidence to support their claim of medical incapacity more than once every 30 days. The court rejected such claim because there was no evidence that the manager requesting the documentation had received the documentation plaintiff had submitted elsewhere within the postal service, and plaintiff never responded to his letters to inform him that she had provided the documentation to another department.

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”)]

Poling v. Core Molding Technologies, 2012 WL 423762 (S.D. Ohio Feb. 9, 2012).

Plaintiff requested FMLA leave for a medical condition beginning in May 2008. Although approved, he did not use any leave because he was able to attend doctor appointments outside of his work hours. On September 20, 2008, the day before he was to work mandatory overtime, plaintiff called defendant and left a voicemail, leaving his name and stating "FMLA." He did not specify the reason for FMLA leave and he made the call from his vacation home. On September 22, defendant's human resources manager requested medical certification for plaintiff's absence and noted that if the leave did not qualify for FMLA, it would be subject to the company's attendance policy. Under the policy, because plaintiff had exhausted all of his available paid and unpaid days, the absence would result in discharge. When plaintiff did not return the medical certification by October 8, the company informed him that he was being discharged, but he was given an additional opportunity to provide the certification. When plaintiff returned a completed certification that day, the doctor did not state that plaintiff had been unable to work on September 21. The company explained that the certification was not sufficient and, after telling plaintiff what would be required, was given another chance to submit the required certification. When two more weeks passed without plaintiff providing additional certification paperwork, the company sent another letter stating that the paperwork was not sufficient and that he was discharged. Following a grievance hearing, an arbitrator reinstated plaintiff with back pay. Plaintiff later filed a civil action alleging violation of the FMLA after he was laid off in 2010.

In granting the employer's motion for summary judgment, which plaintiff did not oppose, the district court noted that the FMLA permits an employer to require medical certification of an employee's need for leave for his own serious health condition. When an employee fails to provide certification for leave that has already been taken, then the leave is not FMLA. It was undisputed that the employer had provided notice to plaintiff as to what he needed to submit. Thus, plaintiff's discharge did not violate the FMLA.

Summarized Elsewhere:

Moore v. Sprint Communication Co., L.P., 2012 WL 4480696 (D. Md. Sept. 27, 2012)

Blair v. Wilson Trailer Company, 2012 WL 2989661 (N.D.Iowa. July 20, 2012)

1. Employee [Renumbered Heading (Formerly V.H.1)]

Willis v. Legal Aid Defender Ass'n, Inc. and Deirdre Weir, 2012 WL 246293 (E.D. Mich. Jan. 26, 2012)

Plaintiff, V.P. of Human Resources for defendant, left a voicemail for her supervisor, the CEO, stating that she was not coming in to work and would be absent for approximately one week. The following week she left another voicemail stating she would be out for four to six weeks. Defendant then sent plaintiff FMLA paperwork and an application for short-term

disability benefits. When defendant later followed up on the status of the FMLA certification form, plaintiff's psychologist faxed over the certification. The certification indicated when treatment began and that visits were twice weekly, but failed to include a condition and duration as well as a signature and date. Follow-up questions to the doctor revealed no facts as to duration or diagnosis, only that plaintiff was unable to perform all job functions. defendant sent plaintiff a letter and a new set of FMLA documents, stating that the certification was incomplete and insufficient, citing the specific deficiencies in the certification, and requiring resubmission. The letter required resubmission within seven days. After approximately two weeks with no resubmission of documents, defendant sent a discharge letter to plaintiff, citing unauthorized leave without FMLA certification or designation.

Plaintiff filed claims for FMLA interference and retaliation and defendant filed a motion for summary judgment, which the court granted. The court found that plaintiff failed to comply with statutory obligations regarding sufficient medical certification. In order for an employee to prevail on either an interference or a retaliation claim under the FMLA, the employee must show that she is entitled to leave under the FMLA. The court held that because plaintiff failed to submit adequate medical certification, she could not show that she was entitled to FMLA leave, and, therefore, was not exercising FMLA rights. The court further found that defendant acted in accordance with law in denying FMLA leave and that plaintiff's discharge was due to her unexcused absences. Employer policy-based grounds for discharge are beyond the purview of the FMLA and at the discretion of the employer. The court found that defendant followed proper procedure in attempting to obtain clarification and in notifying plaintiff that failure to provide proper medical certification within the seven day statutorily prescribed period could result in denial of FMLA leave. The court rejected plaintiff's argument that defendant was required to warn her that violation of defendant's policies could result in discharge.

Kinds v. Ohio Bell Tel. Co., 2012 WL 3075304 (N.D. Ohio, Jul. 30, 2012)

Plaintiff worked for defendant as a maintenance operator. Nine years into her employment, plaintiff took a nine-week absence for medical reasons. Pursuant to company policy, defendant treated all leaves qualifying for short-term disability ("STD") as FMLA-qualifying. Accordingly, a short time after plaintiff began her nine-week leave, she received a letter from defendant explaining her obligations under the company's attendance policy and notifying her that no FMLA paperwork would be required if her entire absence qualified for STD. Defendant's STD carrier informed defendant that a 20-day portion of the plaintiff's time off did not qualify for STD. Accordingly, when plaintiff returned to work, defendant gave her an FMLA certification form and asked her to complete it for the time-off not covered by STD, giving her fifteen days to return the form. When she failed to do so, defendant sent plaintiff a reminder and gave her an additional seven days to return the certification. At the end of the seven day period, plaintiff asked for an extension, and defendant extended her deadline by fourteen days. However, plaintiff failed to comply with the extended deadline. Shortly after plaintiff missed the third certification deadline, defendant informed her that it had denied her request for FMLA leave to cover the leave time at issue because she failed to submit medical certification. Plaintiff was given the opportunity to have the FMLA denial overturned if she provided adequate medical certification within another fifteen day period but she again failed to

do so. Accordingly, the leave at issue was considered a chargeable absence, and plaintiff was suspended pending termination. Defendant ultimately terminated plaintiff's employment.

Plaintiff filed suit alleging FMLA interference. Specifically, she alleged that defendant improperly concluded that the 20-day leave period was not FMLA qualified, failed to request certification in a timely manner, and terminated her for leave that was FMLA protected. The defendant moved for summary judgment. The district court granted defendant's summary judgment motion. After reviewing the regulations governing certification, the court noted that the Sixth Circuit. Even though defendant did not give plaintiff the paperwork when she initially requested leave, the court found that defendant had reason to question the appropriateness of plaintiff's leave after it learned that some leave did not qualify for STD. In sum, the court found defendant's decision to deny plaintiff's FMLA leave due to untimely certification was justified. Because the plaintiff was not entitled to FMLA leave, she could not establish a *prima facie* claim for FMLA interference.

Summarized Elsewhere:

Roundtree v. Securitas Security Services, Inc., 2012 WL 631848 (D. Conn., Feb. 27, 2012)

Graham v. Bluecross Blueshield of Tennessee, Inc., 2012 WL 529551 (E.D. Tenn. Feb. 17, 2012)

Srouder v. Dana Light Axle Manufacturing, LLC, 2012 WL 1080411 (E.D. Ky. March 30, 2012)

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

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

Cox-Frietch v. Ohio Bureau of Workers' Compensation, 2012 WL 6051972 (6th Cir. Dec. 6, 2012)

Plaintiff appealed an order granting summary judgment on her claims for interference and retaliation. The primary issue was whether the employer's sick leave policy requirements interfered with employees' rights under the FMLA. The employer's FMLA policy required employees to substitute sick leave for unpaid FMLA leave. When the employee's sick leave balance fell below twenty hours, the employee was required to submit a physician's verification for future absences due to illness or injury within three working days after the employee's return to work. The policy provided that the failure to submit the verification may result in disciplinary action.

The appellate court noted that the FMLA specifically allows an employer to require an employee to substitute accrued paid sick leave for unpaid FMLA leave. Further, in doing so, an employer may require the employee to adhere to neutral policies governing the use of paid sick leave. The appellate court found that the requirement of physician verification did not conflict with the FMLA. The plaintiff argued that because the employer acknowledged that her use of FMLA leave caused her to be placed on the physician verification status requirement, this constituted direct evidence that the employer used her FMLA leave as a negative factor in disciplining her. The court rejected that argument. The court found that the plaintiff was not disciplined for an absence but rather for failing to submit a verification form in accordance with a sick leave policy. Accordingly, summary judgment was affirmed.

c. Paid Family Leave

Summarized Elsewhere:

Hill v Walker, 2012 WL 1439628 (E.D.Ark. April 26, 2012)

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

Rodriguez v. Atria Sr. Living Group, Inc., 2012 WL 3457718 (S.D.N.Y. Aug. 13, 2012)

The employee worked as a maintenance technician for the employer, a senior living home. He was hired on April 8, 2008. In early 2009, he suffered a shoulder injury that was not work related. The employee asked for FMLA leave in February or March 2009. The employer rejected his request because he had not been employed for one year. Nevertheless, the employer allowed the employee to take a general leave of absence to undergo surgery in March 2009. In April 2009, while still on a general leave of absence, the employee became eligible for FMLA leave. The employee returned to work to sign a statement acknowledging that his general leave would be converted to FMLA leave. The employee remained on leave until June 2009, when his doctor cleared him to work with no restrictions. During his leave, the employee became eligible for two employee referral bonuses, but did not receive payment for those bonuses until he returned to work in June. In October 2009, the employee was injured while lifting something at work. His physician recommended a second surgery, and he again went on FMLA leave in late October. This second leave ran concurrent with the employee's worker's compensation leave. The employee exhausted the FMLA leave on November 6, 2009. The employee alleged that the employer refused to allow coworkers to donate paid leave to the employee, but the employer granted the employee an additional one-month leave of absence through December 7, 2009. The employer sent letter to the employee notifying him that he would be responsible for paying the premium on his medical benefits. The employee did not receive the letter and his insurance lapsed. The employer terminated the employee in December 2009.

The employee brought six FMLA interference claims against his employer, and the parties filed cross motions for summary judgment on the FMLA claims. The employee alleged interference based on the employer's failure to pay the employee referral bonuses until he returned from his first FMLA leave, the employer's failure to send "formal notice" of FMLA leave, the employer's failure to pay the employee's portion of health insurance benefits during his second leave, the employer's failure to notify the employee about concurrent worker's compensation leave, the employer's failure to allow donated paid time off, and the employer's "interruption" of the employee's first FMLA leave. The court granted the employer's motion for summary judgment on all claims except the employee's claim regarding concurrent worker's

compensation leave and the employee's claim regarding health insurance benefits. With regard to the remaining claims, the court held that the employer did not interfere with the employee's FMLA rights because he received all benefits he was entitled to and the employer was not obligated to provide additional benefits beyond those the employee was typically entitled to.

- a. Methods of Payment
 - i. During Paid Leave
 - ii. During Unpaid Leave
 - b. Consequences of Failure to Pay
5. When the Obligation to Maintain Benefits Ceases
- a. Layoff or Termination of Employment
 - b. Employee Notice of Intent Not to Return to Work
 - c. Employee's Failure to Pay Premiums
 - d. "Key Employees"
 - e. Other Circumstances
6. Rules Applicable to 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**

Summarized Elsewhere:

Rodriguez v. Atria Sr. Living Group, Inc., 2012 WL 3457718 (S.D.N.Y. Aug. 13, 2012)

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

Keeler v. Aramark, 483 Fed. Appx. 421 (10th Cir. 2012)

The employee sued his employer and his supervisor alleging FMLA violations. The employee alleged that the employer violated the FMLA because it did not pay him for the Labor Day holiday. However, the employer presented undisputed evidence that it did not provide holiday pay for any employee on unpaid leave during the holiday, or for any employee who did not work the last regularly scheduled work day before the holiday unless the absence was previously approved. In this case, it was undisputed that the employee was absent on the last work day before Labor Day without prior approval. Because the evidence showed that the employer treated other employees who were absent for non-FMLA reasons in the same manner as it treated plaintiff, the Tenth Circuit Court of Appeals upheld the district court's grant of summary judgment in favor of the employer.

Plaintiff also raised an FMLA retaliation claim that was based on the employer's refusal to allow the employee to return to work based on a doctor's note. However, that note was countermanded by a subsequent note stating that the employee could not, in fact, return to work until later due to a condition that prevented the employee from working in the hospital until he no longer had that condition. The court therefore found the retaliation claim "factually without merit."

- d. Paid Leave [New Topic]

Franks v. Indian Rivers Mental Health Center, 2012 WL 4736444 (N.D. Ala. Sept. 30, 2012)

The employee told her supervisor that she needed to take FMLA leave to undergo neck surgery. In response, the supervisor asked the employee to postpone the surgery as long as possible. The supervisor had a history of making such requests and referring to employees who needed FMLA leave as "problem employees." Following the employee's request, the supervisor started steadily increasing the employee's workload and drafted a memorandum outlining problems with the employee's job performance. Prior to the request, the supervisor had always praised the employee's job performance. Shortly after receiving and responding to the aforementioned memorandum, the employee took FMLA leave to undergo the surgery. While plaintiff was on leave, she received calls from several different employees regarding work-related questions. However, the employee was not given "on-call pay" for taking these calls. While she was on leave, a different supervisor requested a meeting with the employee immediately upon her return to work. Moreover, plaintiff's supervisors audited her work, but did not audit the work of her coworkers. During this time period, the employer also locked plaintiff out of her computer and changed the lock on her office door. In response, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. Upon returning to work, plaintiff was immediately terminated for performance issues. Plaintiff did not benefit from the company's progressive disciplinary procedures. The employer had knowledge of plaintiff's charge at the time of her termination.

The district court partially granted and partially denied the employer's motion for summary judgment. With respect to plaintiff's FMLA interference claims, the court did not find that the employer interfered with plaintiff's rights by asking her to postpone the surgery as long as possible. The court further held that an employer may deny an employee "on-call pay" during FMLA leave, where that pay is based on performance (i.e. taking calls) and where the employee is unable to so perform due to FMLA leave. However, the court found a genuine issue of material fact as to whether the employer interfered with plaintiff's right to FMLA leave by asking or requiring her to perform work-related tasks during her leave period. The court also found a genuine issue of material fact as to whether plaintiff was actually reinstated in compliance with the FMLA, considering that her computer and office were inaccessible upon her return from leave. With respect to plaintiff's FMLA retaliation claim, the court did not find that plaintiff's increased workload constituted an "adverse employment action," but ultimately found that plaintiff produced sufficient evidence to constitute a genuine issue of material fact as to whether her termination was pretextual. Specifically, the court held that (1) the employee presented ample evidence disputing her alleged performance issues; (2) the deviation from the company's disciplinary procedures was evidence of pretext; (3) the lone audit of the employee's files was evidence of pretext; (4) the employee presented evidence that her supervisor treated adversely other employees who had exercised their rights under the FMLA; and (4) the close temporal proximity between the employee's charge of discrimination, return from leave and termination was also evidence of pretext.

Summarized Elsewhere:

Williams v. Crown Liquors of Broward, Inc., 851 F.Supp.2d 1332 (S.D. Fla. 2012)

CHAPTER 8. RESTORATION RIGHTS

I. OVERVIEW

Washburn v. Gymboree Retail Stores, Inc., et al., 2012 WL 3818540 (W.D. Wash., Sept. 4, 2012)

The employee, who had been diagnosed with multiple sclerosis, requested periodic leave over a nine-month period which was approved, despite the employer's contention that FMLA paperwork was unnecessary. One year later, the employer contacted the employee while she was again on periodic leave to discuss, for the first time, her FMLA rights. Again, additional requests for leave were granted but the employee was told she needed a doctor's note to return to work. In the weeks that followed, the employee submitted several requests for extensions of her FMLA leave as well as a complaint that she had experienced "mistreatment" due to her leave requests, but failed to provide all requested documentation from her healthcare provider. The company eventually notified the employee that her leave term had expired and she was given three days to contact her manager or the company would consider her job abandoned. The employee then told the company that her doctor would only approve her return if she were placed at a different location. The company denied that a comparable position was available at a different location and the employee was deemed to have resigned for failure to return to work and/or provide additional certifying documentation. The employee filed suit claiming that employer violated the FMLA's notice and collaboration requirements, interfered with her FMLA rights by denying leave requests, retaliated against her for requesting leave and failed to reinstate her upon her return from leave. The employer filed a motion for summary judgment as to all counts.

The court rejected the employer's argument that an employee who receives all leave requested suffers no actionable harm, following the Ninth Circuit's definition of "harm" which includes a deprivation of substantive statutory rights under the FMLA. The court also denied summary judgment as to the violations of the FMLA's notice and collaboration provisions, expressly recognizing a company's duties under FMLA regulations. As to the employee's retaliation claims, the court found that her coworkers' conduct was not "severe and pervasive," but that the employer's repeated requests that she resign from her position raised a triable issue of fact as to whether the employer had "discouraged" the taking of FMLA leave. The court dismissed the employee's reinstatement claims as the evidence established that the employer offered reinstatement to the employee's original position and the employee admittedly refused the same, holding that there is no affirmative duty to restoration to another position. The court also found that the employee failed to supply sufficient medical documentation for additional leave, such that the company's acceptance of her "resignation" did not violate the FMLA's reinstatement provisions. The Court dismissed employee's ADA claims, in part, on similar grounds, but noted that reassignment, while not required by the FMLA, could be a reasonable accommodation under the ADA.

Juarez v. Verizon Services Corp., --- F.Supp.2d ----, 2012 WL 3764878 (M.D. Fla. 2012)

The employee, a regional salesperson with a history of exceptional performance, was accused of resistance to changes in the company's business model. The company claimed it engaged in formal "counseling," threatening the employee with a Performance Improvement

Plan; however, the employee disputed that the counseling session actually occurred. The next day, the employee took a three-day leave of absence attributable to accrued sick time. When she returned to work, she requested additional time off due to a migraine and bereavement of her recently deceased grandmother. Thereafter, the employee timely submitted an FMLA Certification Form and was approved for additional leave. While the employee was on approved leave, she was investigated for alleged violations of the company's Code of Business Conduct including allegations of mishandling expense reports and inappropriate social relationships with subordinates. After requesting another extension of her leave period, the company hired an investigator to determine whether the employee's request for FMLA leave was fraudulent. Before her return to work, the company demoted the employee and capped her compensation package at a range that was 46% less than her previous annual income. The employee remained employed with the company, but brought claims for FMLA interference and FMLA retaliation.

The company moved for summary judgment on both counts arguing that: (1) there was no adverse employment action; (2) the employee could not establish the causation element of her discrimination claim because the company had already planned to demote her notwithstanding her request for leave; and (3) the employee was granted all leave requested. The court found that a significant reduction in the employee's salary, as well as the employee's testimony that her new job was entirely different, was evidence sufficient to show an adverse employment action. The court also quoted the Eleventh Circuit's rule that "close temporal proximity between the employee's protected conduct and the adverse employment action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection." In other words, the timing of the internal investigations and the fact that the demotion occurred on the date the employee returned from leave created an issue of fact for the jury as to causation. As for the interference claim, the court found that a reasonable juror could find that the employer's actions were designed to "discourage" the employee from taking FMLA leave.

II. RESTORATION TO THE SAME OR AN EQUIVALENT POSITION

***Wanamaker v. Westport Bd. of Educ., et al.*, 19 WH Cases 2d 1242 (D. Conn. 2012)**

Plaintiff was a computer teacher who went on maternity leave. She gave birth to her daughter, but also had complications during labor resulting in a spinal cord injury. In addition, her daughter was born with a heart defect, necessitating a lengthy period of FMLA leave. Plaintiff was allegedly told by the employer's human resources personnel, prior to the start of the school year, that her position would be held for her during the leave and that the employer hired a substitute teacher to temporarily fill her position. A few weeks later, however, the school's principal informed plaintiff that she was being replaced permanently and that when she was ready to return, she could work as a substitute teacher. Upon hearing this, plaintiff offered to return to work if the employer would accommodate her by letting her teach from a chair instead of standing. The principal rejected the offer and placed plaintiff on leave. At the end of the school year, the plaintiff renewed her request for reinstatement to the computer teacher position. Her request was denied, but the employer offered her a full-time position as a classroom teacher. Plaintiff rejected the offer and sued for interference and retaliation under the FMLA.

The employer moved to dismiss the case for failure to state a claim upon which relief could be granted. The district court denied the motion. Noting that the law requires employers

to reinstate employees to the same job, or its “virtually identical” equivalent, the court noted that plaintiff had sufficiently pled that the substitute teacher position and the full-time classroom position were not equivalent replacements to her position as a computer teacher. Thus, at least on a motion to dismiss, she had adequately pled a claim for interference and retaliation under the FMLA.

Summarized Elsewhere:

Washburn v. Gymboree Retail Stores, Inc., 19 WH Cases2d 1634 (W.D. Wash. 2012)

A. General

Boggs v. Automotive Operations, L.P., 2012 WL 12926 (E.D. Tex., Jan. 4, 2012)

Plaintiff was employed by defendant as a used car title clerk, which required her to input data, type checks, fill out paperwork, and to file. Following a workers’ compensation claim in March 2008, plaintiff’s physician issued work restrictions for plaintiff not to use her right arm or lift heavy objects. Around the same time, defendant hired an additional used title clerk. Then, in August 2008, plaintiff took FMLA leave for an unrelated condition and she returned to work in October 2008. During plaintiff’s FMLA leave, the second used title clerk performed plaintiff’s job duties and an additional clerk was hired as well. When plaintiff returned from leave, defendant told her that her position was being eliminated and she was offered the position of cashier instead, with the same pay and benefits as her previous position. Plaintiff declined the cashier position and resigned because she did not believe she could perform the job due to her physical restrictions and because the cashier position required her to work Saturdays while the used car title clerk position did not. Plaintiff also asserted the duties of the two positions were substantially different. Plaintiff brought suit against defendant, alleging retaliation in violation of the FMLA. Defendant filed a motion for summary judgment asserting that plaintiff had not suffered an adverse employment action under the FMLA because she resigned and because she was offered an equivalent position upon her return.

In denying the motion for summary judgment, the court found that there was a genuine issue of material fact as to whether plaintiff had been offered an equivalent position after her FMLA leave. The court further determined that there was a factual issue regarding whether plaintiff had been constructively discharged because the cashier position may have constituted a demotion. The court found that defendant had articulated a legitimate, non-discriminatory reason for failing to return plaintiff to her former position by stating that it was downsizing and that plaintiff did not perform as well as the other two clerks. However, the court found that plaintiff had presented a factual issue as to pretext because plaintiff had performed title work for over twenty years and had worked for defendant longer than the other two clerks.

Summarized Elsewhere:

Hurnevich v. ArvinMeritor, Inc., 2012 WL 4475603 (E.D. Mich. Sept. 27, 2012)

Juarez v. Verizon Services Corp., --- F.Supp.2d ----, 2012 WL 3764878 (M.D. Fla. 2012)

Gerdin v. CEVA Freight, LLC, --- F. Supp.2d ---, 116 FEP Cases 883, 2012 WL 5464966 (S.D. Tex. Nov. 8, 2012)

B. Components of an Equivalent Position

Summarized Elsewhere:

Barlow v. Dan's Payroll Services, Inc., 2012 WL 5522652 (D.R.I. Aug. 20, 2012), adopted by 2012 WL 5525494 (Nov. 12, 2012)

Ghawanmeh v Islamic Saudi Academy, 857 F.Supp.2d 22 (D. D.C. 2012)

1. Equivalent Pay

Turner v. McKesson Corp., 2012 WL 3542240 (M.D. Ala. Aug. 10, 2012)

As part of plaintiff's employment with defendant as a customer service manager, she received an annual merit increase for meeting defendant's standards. In November 2009, plaintiff took two weeks of FMLA leave for surgery. The next increase plaintiff received after her leave was prorated to a lower rate than her previous increases. Plaintiff filed suit, alleging the reduction was because of her FMLA leave. The employer filed a motion to dismiss, which the court denied. The court found that plaintiff's allegation that defendant reduced or prorated her bonus as a result of plaintiff taking FMLA leave was sufficient to state an interference claim under the FMLA. The court noted that whether or not a bonus is included in "equivalent pay" under the FMLA depends on the nature of the bonus. It was unclear on the face of the complaint whether the bonus at issue was the type that may properly be denied or prorated in the event of FMLA leave. Because the complaint did not explain how plaintiff typically earned her bonus, it was not clear whether or not the bonus was considered a pay increase that Plaintiff would have been entitled to or whether it was a production bonus which may be denied or pro-rated. As such, construing as true the allegation in the complaint – that plaintiff's bonus was improperly prorated as a result of her taking FMLA leave - the Court denied defendant's motion to dismiss.

As to plaintiff's retaliation claim, the court found that plaintiff's allegation that her merit adjustment had been prorated directly as a result of her taking FMLA leave was sufficient to withstand a motion to dismiss. The allegation that the bonus reduction occurred directly as a result of plaintiff's taking FMLA leave satisfied the causal relation between the adverse action and protected activity for purposes of deciding a motion to dismiss.

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

Levings v. Mountain Country Foods, Inc. 2012 WL 1023342 (W.D. Okla. March 27, 2012)

The employee held a supervisory position within the company when she was suspended due to behavioral issues. Following her suspension, the employee's supervisor gave her two

options: (1) to resign from her employment; or (2) to take FMLA leave to receive mental health treatment, after which she would be guaranteed a job but would no longer be employed in the supervisory position. The employee elected to take the FMLA leave. Upon her return, she was assigned to a different position but her rate of pay and benefits remained the same as her former position. Several months later, the company discharged the employee for another incident involving her behavior towards co-workers.

The court denied the employee's motion for summary judgment on her FMLA claim. The employee's motion contended that the company interfered with her statutory rights under the FMLA by failing to allow her reinstatement to her former position following her leave. Although the employee did not dispute that she received the same salary and benefits that she had prior to her FMLA leave, the employee argued that her subsequent assignment to a non-supervisory position was a demotion and, therefore, violated the FMLA requirement that the employee be restored to "an equivalent position." However, the company disputed this on the premise that the employee's supervisory duties were removed prior to her taking the FMLA leave. The court found that the dispute regarding the timing of the removal of the employee's supervisory duties is one of credibility, which cannot properly be resolved in a motion for summary judgment.

Crawford v. JP Morgan Chase & Co., 2012 WL 1185983 (S.D. Ohio Apr. 9, 2012)

The employee sued her employer, alleging interference and retaliation in violation of the FMLA. The employer sought summary judgment, which the court granted. The employee claimed interference because she was not restored to an equivalent position upon her return to work. The employee was restored to a position with similar duties, salary, salary grade, potential for bonus, hours and location, but which, she claimed, took her off of her career path. The court held that this argument was speculative and inconsistent with her promotion by the time of suit to a high level position. The employee further claimed that the positions were not equivalent because she was demoted in the management hierarchy, as evidenced by the fact that she and another person, her comparator, both directly reported to a manager before her leave, but she only indirectly reported to that person after she came back. The court was not persuaded because her argument compared her to someone who was not her peer; rather, her comparator was always above her in the management hierarchy. Finally, her original position was eliminated for business reasons that the employee did not rebut. The employee's retaliation claim failed because it was tied to her claim that she was demoted. The court held that she was not demoted and was transferred to an equivalent position so she could not establish a prima facie case. Moreover, she could not establish a causal connection between her transfer and her leave and also could not establish that the reason for the transfer was pretextual.

Callaway v. Academy of Flint Charter School, 2012 WL 5265728 (E.D. Mich. Oct. 23, 2012)

From October 2009 through June 2010, the employee school teacher missed a significant amount of work, including a month following hand surgery for which she alleged she was never provided FMLA paperwork, and two weeks following surgery to remove uterine fibroids, which was certified as FMLA leave. Prior to her first surgery, the plaintiff was a sixth grade teacher. However, upon her return from the first surgery, the plaintiff alleged she was reinstated to a lesser teaching position, and following the second surgery she was again placed in a lesser

teaching position, which required her to perform non-teaching duties outside the classroom and for less pay.

After the 2009-2010 school year, the employer terminated all of its teachers and delegated rehiring to a third-party human resources company. The employee alleged the employer told her that all former teachers would be rehired after reapplying and interviewing. The employee was interviewed, but not rehired. She alleged the interviewer told her she would not be rehired because of “questionable attendance.”

The employee filed suit, alleging the employer interfered with her FMLA rights by failing to certify absences as FMLA-protected and failing to reinstate her to an equivalent position, and that the employer retaliated against her for exercising FMLA rights by not rehiring her. The court denied the employer’s motion for summary judgment. It found evidence of interference based on the employee’s allegation that, although she requested leave at least thirteen times, only one leave was certified. The court also found evidence of interference based on the employee’s reinstatements to lesser positions with non-teaching duties, which included “answering phones,” “signing kids in,” “hanging stuff up in the hall,” “running memos,” serving ice cream and sweeping floors – none of which were pre-leave duties.

The court found the employer’s alleged statement that the employee was not rehired due to “questionable absences” to constitute direct evidence of FMLA retaliation. As a result, the court applied a mixed motive analysis requiring the employer to demonstrate it would not have rehired the employee in the absence of a discriminatory motive. The court found the employer was unable to overcome the inference of retaliation because some of the “questionable attendance” could have been FMLA-related.

Summarized Elsewhere:

Rodriguez v. University of Miami Hosp., 19 Wage & Hour Cas.2d (BNA) 1806, 2012 WL 6013170 (11th Cir. Dec. 3, 2012)

III. CIRCUMSTANCES AFFECTING RESTORATION RIGHTS

A. Events Unrelated to the Leave

Summarized Elsewhere:

Boggs v. Automotive Operations, L.P., 2012 WL 12926 (E.D. Tex., Jan. 4, 2012)

1. Burden of Proof
2. Layoff

Summarized Elsewhere:

Hurnevich v. ArvinMeritor, Inc., 2012 WL 4475603 (E.D. Mich. Sept. 27, 2012)

3. Discharge Due to Performance Issues

Simonetti v. Broadridge Financial Solutions, Inc., 2012 WL 32931 (D.N.J., Jan. 5, 2012)

Defendant discharged plaintiff the day he returned to work after an approved medical leave of absence. At the discharge meeting, plaintiff was told that he was being discharged because of a customer complaint. Moreover, plaintiff had been on a performance improvement plan at the time he went out on leave and defendant contended plaintiff had not complied with the requirements of the plan. After his discharge, plaintiff filed suit, alleging that defendant interfered with his FMLA rights by refusing to reinstate the plaintiff following his approved FMLA leave. Defendants moved for summary judgment, arguing that they had approved plaintiff's FMLA leave request and did nothing to discourage or prevent him from taking leave.

In denying defendant's motion for summary judgment, the court found that there was a genuine issue of material fact as to FMLA interference. The court found that, although plaintiff had been placed on a performance improvement plan, defendant could not rely on the deficiencies noted in the plan because plaintiff had been given a favorable progress report in the plan itself. The court determined that a jury could conclude that the performance issues had been resolved and plaintiff would not have been terminated had he not taken leave. In addition, the court reasoned that, to the extent plaintiff's poor performance reviews related to his absences, a jury could find that defendant penalized plaintiff for taking FMLA-protected time off, although plaintiff had not actually applied for leave in the previous years.

The court also denied summary judgment on the plaintiff's FMLA retaliation claim. The court found that plaintiff had presented a *prima facie* case of retaliation and also presented evidence of pretext. To rebut defendants' claim that plaintiff was discharged due to unsatisfactory performance, plaintiff pointed to the fact that he had been warned about absences and his performance improvement plan explicitly mentioned his absences, even though defendants were aware of plaintiff's medical conditions. Plaintiff also noted that there had been documented improvements in his job performance and that inconsistent reasons had been given for his discharge.

Reynolds v. Stovall, 2012 WL 1202026 (W.D. Ark. Apr. 10, 2012)

Miller County employed plaintiff in the Circuit Judge's office for approximately 6 months from December 2008 - June 2009, and again in the Sheriff's Department from September 2009 - May 2010. She was hired as a detention deputy by the Sheriff's Department but ultimately performed the role of an office clerk. During her employment in the Sheriff's Department, plaintiff altered her start date to falsely qualify for sick leave; took a paid holiday for her birthday despite not accruing the requisite year of service; and, as determined by an investigation conducted by the employer, likely filed a false police report against her boyfriend. She was placed on disciplinary probation and then on inactive employee status as a result of these violations. A couple days after going inactive, plaintiff obtained a doctor's note releasing her from work for two weeks as a result of alleged depression symptoms, for which he prescribed her medication. Plaintiff faxed the note to the employer and referenced FMLA leave on the fax. Several days before her FMLA leave was to end, she was discharged due to excessive leave, alteration of time sheets, and insubordinate behavior. She filed suit against

defendant, alleging a wide range of claims, including retaliation and interference under the FMLA.

Defendant moved for summary judgment, arguing that plaintiff's claims failed because she was not an "eligible" employee under the FMLA; she failed to demonstrate a serious health condition; she failed to give appropriate notice of the need to be absent from work; and she failed to show that her absence was the only reason for her termination. The court granted the motion on all FMLA claims. The court found that plaintiff was eligible for FMLA because she was employed by Miller County - albeit in two different departments - for more than 12 months. Even though they were not consecutive periods of employment, that is not required under the FMLA. The court also found that plaintiff could survive summary judgment on the serious health condition issue, finding that she had a period of incapacity requiring absence from work; the incapacity exceeded three consecutive days, and the doctor provided continuing treatment during her period of incapacity in the form of prescribed depression medication. It also found that plaintiff provided sufficient notice of her need for FMLA leave by referencing it in the faxed doctor's note.

However, plaintiff could not show that her FMLA leave was a motivating factor in her dismissal. Rather, all of her other performance deficiencies and policy violations caused her discharge. Thus, her retaliation claim failed. Plaintiff's interference claim was based on defendant's failure to provide her notice of FMLA rights within five days of taking leave and by failing to reinstate her to the same position upon return from FMLA leave. However, the court found that, although she was discharged while on leave, she could not recover on this claim because the employer's reason for dismissal was insufficiently related to her leave.

Baker v. Enterprise Leasing Co. of Indianapolis, Inc., 2012 WL 4358740 (S.D. Ind. Sept. 21, 2012)

Plaintiff was employed as a Branch Manager in Indiana. Plaintiff informed her supervisor that she was pregnant in April 2008 and that she was due to give birth in mid-December. Plaintiff did not request FMLA leave for her pregnancy; instead, she requested vacation time to commence on December 15, 2008.

Prior to her pregnancy, plaintiff's customer service scores were below the corporate average. After she became pregnant, the plaintiff's customer service scores fell further below the corporate average. Plaintiff received a written warning on July 7, 2008. On August 9, 2008, plaintiff prepared a written memorandum addressing concerns that her supervisors were using her low scores to get rid of her and that her direct supervisor was a bully. Plaintiff could not recall whether she actually submitted this complaint, however. Plaintiff's job performance continued to deteriorate and, on December 3, 2008, her supervisors decided to terminate her employment. On December 4, 2008, plaintiff informed her direct supervisor that she was scheduled to give birth on December 17, 2008. The following day, on December 5, 2008, defendant terminated plaintiff's employment.

Plaintiff alleged that the company terminated her employment because of her pregnancy and/or in retaliation for having complained about unfair treatment. Plaintiff also brought a claim against the employer for FMLA interference. The court granted the employer's motion for

summary judgment in its entirety. As to plaintiff's FMLA interference claims, the court ruled that plaintiff could not show that the employer denied her any FMLA benefits to which she was entitled. The court did recognize that a discharge that is meant to prevent an employee from taking FMLA leave does constitute interference. However, here the court ruled that the plaintiff's discharge was for performance-based reasons and, therefore, did not violate the FMLA. As to plaintiff's FMLA retaliation claim, the court found that the suspicious timing of plaintiff's discharge was not enough to establish her prima facie case. The court noted that there was no evidence of plaintiff's supervisors making negative comments regarding her need for FMLA leave and no evidence that they were upset by the news of her impending delivery in December 2008. In fact, plaintiff's retaliation claim was undermined by the fact that she informed her supervisors of her pregnancy back in April 2008 but was not terminated until December 2008.

Pagel v. TIN, Inc., 695 F.3d 622 (7th Cir. 2012)

The employee was a salesperson for a company that manufactured corrugated packaging products. The employee began experiencing heart problems, and as a result, took several absences that were arguably covered by the FMLA. Five days before a scheduled heart surgery, the employee met with his manager to discuss his year-to-date performance. The manager observed that the employee's sales revenue and volume had declined over the past two years, and that his year-to-date numbers were even worse. The employer warned that the employee risked termination if his performance did not improve. The employer did not adjust its sales expectations to account for the employee's FMLA-related absences.

Several weeks later, while the employee was out of the state for medical tests, the manager contacted him and informed him that he would be traveling to the employee's sales territory the following day to "ride along" on some sales calls. Sales calls were typically scheduled one week in advance to give the client enough notice and the employee enough time to prepare, but in this instance, the employee had no time to set up a full day of calls or to prepare for them. By all accounts, the sales calls went badly. The employer discharged the employee shortly thereafter for continued poor performance.

The Seventh Circuit reversed the district court's grant of summary judgment in favor of the employer, holding that issues of fact remained as to both the employee's interference and his retaliation claim. In so holding, the court noted that "[T]he FMLA does not require an employer to adjust its performance standards for the time an employee is actually on the job, but it can require that performance standards be adjusted to avoid penalizing an employee for being absent during FMLA leave." The court also observed that a reasonable jury could interpret the circumstances surrounding the ride along as setting the employee up to fail, which supported the employee's argument that the employer's purported reason for terminating his employment (poor performance) was pretextual.

Barlow v. Dan's Payroll Services, Inc., 2012 WL 5522652 (D.R.I. Aug. 20, 2012), adopted by 2012 WL 5525494 (Nov. 12, 2012)

Plaintiff, a manager at defendants' Dunkin' Donuts store, was demoted to floating manager upon returning to work from a week-long FMLA leave for pneumonia. The day after learning of his demotion, plaintiff resigned. Defendants asserted that the decision to demote plaintiff occurred shortly before plaintiff took leave in a series of communications among management regarding plaintiff's job performance. None of the alleged performance problems and few of the management communications were documented. Plaintiff sued defendants for FMLA interference on the grounds that they failed to reinstate him into his position or an equivalent one. Defendants moved for summary judgment, arguing that (1) the decision to remove plaintiff as manager was made prior to plaintiff's medical leave, (2) the decision was based solely on job performance, and (3) plaintiff was offered an equivalent position – "floating assistant manager" upon returning from leave.

The magistrate judge recommended that defendants' summary judgment motion be denied. The court noted several timing problems and conflicting testimony among defendants' managers, and a lack of contemporaneous documentation to support defendants' assertions, and held that triable fact issues remained on the question of whether defendants' decision would have made regardless of plaintiff's FMLA leave. The court also held that the floating assistant manager position was not an "equivalent" position to the manager position as a matter of law because it likely was accompanied by a salary decrease, offered less job security, and involved more travel than the manager position, which was a permanent store assignment.

Moore v. Novo Nordisk, Inc., 2012 WL 4472627 (D. S.C. July 26, 2012)

Plaintiff was a pharmaceutical representative and the employer was subject to federal prohibitions on offering kickbacks or bribes to induce a person to arrange for or recommend purchasing a product or service. The employer also had policies that prohibited employees from providing items to health care providers for their personal benefit. While at a health care fair, plaintiff's immediate supervisor told her she was going to have Dominique Wilkins autograph a basketball for a physician in their territory, and plaintiff claimed the supervisor instructed her to also have basketballs autographed and distributed to increase sales in her territory. Plaintiff asked Wilkins to sign eight to 10 basketballs. The employer later received an anonymous tip that plaintiff had distributed basketballs to doctors in exchange for their business and investigated the tip. Plaintiff's supervisor instructed her to lie during the investigation, and she did so, but later confessed. Plaintiff then broke her ankle and required surgery, and she was granted FMLA leave. While on FMLA leave, the company concluded the investigation and decided to terminate her employment. She complained that she was being fired for following her supervisor's instructions.

Plaintiff sued the employer on several bases, including FMLA interference and retaliation. The court granted summary judgment in favor of the employer, holding the fact that she was on FMLA leave does not insulate her from termination that would have occurred had she not taken leave. It was undisputed that the employer's discovery of and investigation into her misconduct took place before she requested FMLA leave, and the decision maker was unaware that she had applied for and was granted FMLA leave at the time he recommended her termination. The fact that her FMLA was discussed during her termination meeting was not

sufficient evidence that her leave was a motivating factor in her termination, particularly because plaintiff herself raised the topic.

Hair v. Federal Express Corp., 2012 WL 4846999 (E.D. Wash. Oct. 11, 2012)

The plaintiff, a long term employee of defendant, filed suit against her employer for FMLA interference based upon her termination of employment, after using intermittent FMLA leave. Pursuant to the employer's policy, employees qualified for termination of employment upon reaching "three strikes" within a 12 month period. The employer argued that plaintiff violated the "three strike" policy by receiving two written warnings for not following company policy when calling-in two of her absences and by receiving an unsatisfactory performance review. However, plaintiff alleged that the employer failed to recognize and designate several absences as FMLA leave and that the employer considered her FMLA leave as a negative factor in its termination decision. She also alleged that she complied with the call-in policy, but to the extent that she may not have fully complied, her condition prevented her from doing so.

Defendant admitted that it inadvertently counted three FMLA protected absences when assessing the plaintiff's performance, but that these three absences were inconsequential to plaintiff's performance review. Defendant also failed to challenge plaintiff's claim regarding the mischaracterization of other absences in its briefs to the court. Plaintiff alleged that the so-called inadvertent inclusion of FMLA absences was done to manipulate her performance review and in response to other employees who were upset about the plaintiff taking leave.

In denying the defendant's motion for summary judgment, the district court concluded that there was a triable issue of fact as to whether plaintiff's substantive FMLA rights were violated by the misidentification of her leave. The district court also stated it was not required to consider whether defendant acted with improper motive, when it mischaracterized the leave, because there was no good faith exception to FMLA violation, citing to 9th Circuit case law. Finally, the district court held that defendant had failed to establish the absence of issues of material fact. More specifically, the court concluded that there was a triable issue of whether plaintiff's use of FMLA leave constituted a negative factor in the termination decision. In reaching its conclusion, the district court relied upon the following facts: 1) plaintiff's performance problems referenced by defendant occurred after she began taking FMLA leave; 2) defendant offered no additional evidence of ongoing disciplinary problems over plaintiff's 17 year work history with the company; 3) regardless of whether the inclusion of FMLA protected leave affected plaintiff's performance review, a factual dispute existed between the parties regarding the inclusion of FMLA protected absences in the plaintiff's disciplinary process; and 4) plaintiff's supervisor had sent plaintiff an e-mail expressing dissatisfaction with plaintiff's use of FMLA leave.

Butler v. Champion, 2012 WL 78200 (S.D. Ohio 2012)

Plaintiff was employed in defendant's tool room for more than three years. Plaintiff took sick leave from October 22, 2009 through November 4, 2009, and returned to work without a doctor's excuse. On November 17, plaintiff contacted the Director of Human Resources, who told him to pick up a form to have his doctor fill out to request FMLA leave. When plaintiff failed to pick up the paperwork, HR mailed it to him. Plaintiff's doctor signed the certification,

and he returned it to HR. Plaintiff then failed to either show up for work or provide medical documentation to justify his FMLA leave, and he was discharged for job abandonment.

The Court granted summary judgment in favor of defendant, reasoning that defendant did not interfere with plaintiff's right to FMLA leave because it was plaintiff who failed to provide proper documentation for his absences. Plaintiff's FMLA retaliation claim also failed because he did not properly avail himself of FMLA leave, and there was no causal connection between his discharge and his previous FMLA leave. Moreover, discharge for job abandonment is a legitimate, nondiscriminatory reason for an employer's adverse action.

***Delaney v. Simplexgrinnell L.P.*, 2012 WL 465177 (N.D.Cal. Feb. 13, 2012)**

Plaintiff worked as a technician for defendant, a fire and security system installation company. Plaintiff was hired in January 2006 and initially received positive performance reviews and merit-based pay increases. In 2009, plaintiff's performance suffered. Plaintiff's manager sent him numerous emails criticizing his untimely and inaccurate daily reports and informing him he was expected to improve or there would be "big issues." On January 25, 2010, plaintiff received his performance review for 2009, where he earned the lowest performance score of any technician. Two days after this review, plaintiff requested medical leave due to stress and anxiety, which was granted. On April 12, 2010 plaintiff returned from his leave of absence. Within days, the supervisor expressed via email renewed disapproval of plaintiff's revived habit of submitting incomplete daily reports. On May 18, 2010 the supervisor met with plaintiff and issued him a formal written warning that identified this problem, as well as others. The warning also placed plaintiff on a 90-day probationary period. Over the next three months, the supervisor continued to see the same problems with plaintiff's work, and eventually decided to discharge plaintiff.

Plaintiff filed suit, alleging violations of the FMLA as well as state laws. Defendant moved for summary judgment on the FMLA claims, which the court granted finding that the overwhelming balance of evidence failed to show that plaintiff's termination was caused by anything other than his poor performance.

Summarized Elsewhere:

***Sickels v. Cent. Nine Career Ctr.*, 2012 WL 266945 (S.D. Ind. Jan. 30, 2012)**

***Clinkscale v. St. Therese of New Hope*, 701 F.3d 825 (8th Cir. 2012)**

***Turner v. Florida Prepaid College Board*, 2012 WL 4208923 (N.D. Fla. Sept. 20, 2012)**

***Cordero v. AFI Food Service, LLC*, 2012 WL 5989424 (D. N.J. Nov. 29, 2012)**

***Avent v. Kraft Foods Global, Inc.*, 2012 WL 3555378 (E.D. Va. Aug. 16, 2012)**

4. Other

***Wilson v. Virgin Islands Water & Power Auth.*, 2012 WL 745613 (3d Cir. March 8, 2012)**

Plaintiff, a clerk for defendant, was required to maintain her full-time student status at a local college to keep her job. In March 2005, plaintiff informed defendant that she was pregnant. Thereafter, defendant posted an opening for her replacement, even though she had not informed the defendant that she planned to quit her job. Within the next few months, plaintiff received letters from the employer's human resources department demanding proof of her current and past college enrollment, even though she had already provided such information to the employer.

In July 2005, plaintiff was placed on bed rest, but she was not informed of her right to seek FMLA leave. Moreover, while out on leave, the employer informed her that her supervisor was searching for her replacement given that she would not be continuing with her classes until January 2006. Plaintiff proceeded to bring suit under a host of laws, including the FMLA. On appeal from a grant of summary judgment to the employer, the court ruled that the employer's failure to inform the plaintiff of her FMLA rights did not prejudice her, as she was and remained ineligible to keep her job given her inability to remain a full-time student. For that reason, summary judgment was affirmed.

Rodriguez v. University of Miami Hosp., 19 Wage & Hour Cas.2d (BNA) 1806, 2012 WL 6013170 (11th Cir. Dec. 3, 2012)

Plaintiff filed a lawsuit for FMLA interference and retaliation, alleging her employer interfered with her rights under the FMLA by not returning her to her original position after returning from FMLA leave. She claimed that the employer retaliated against her by terminating her employment about one month after she returned from FMLA leave. The district court granted summary judgment for the employer on claims and the plaintiff appealed. The appellate court affirmed summary judgment on the retaliation claim, but reversed summary judgment on the interference claim.

In regard to the interference claim, the employer claimed that plaintiff was transferred to a different position on returning from FMLA leave because she was unable to perform the essential functions of her prior position. The employer argued that the plaintiff and her supervisor expressed "discord" toward each other and that both agreed they could not work with each other, and that plaintiff's mental state resulted in her being unable to perform the essential functions of her position. Plaintiff presented evidence dispute she ever expressed discord or an inability to work with her supervisor, resulting in a factual dispute. Also, the employer relied on information contained in the FMLA paperwork in which it was noted that plaintiff was still suffering from anxiety, panic attacks, and depressed mood that would interfere with her ability to do her job with the supervisor. The appellate court found that the employer could not use this information, filed before plaintiff returned from leave, to show that she was unable to perform her job because the plaintiff actually returned. Further, the same doctor who signed the paperwork included a statement that plaintiff was able to perform her job functions without restrictions.

McClelland v. Communitycare HMO, Inc., 19 Wage & Hour Cas.2d (BNA) 1672, 2012 WL 5951622 (10th Cir. Nov. 29, 2012)

Plaintiff suffered a knee injury and sought FMLA leave for knee replacement surgery. The employer granted the leave, but notified plaintiff that she previously used some FMLA leave

and thus her leave would expire on December 16, 2009. As the end of the leave was approaching, plaintiff was again reminded about the expiration of her leave. The employer denied plaintiff's request for extended leave extended leave, but offered to accommodate the medical needs of the plaintiff by, among other things, reducing hours or permitting work restrictions. When plaintiff's FMLA leave expired, she did not return to work. The employer's policy stated that a failure to return to work after the expiration of the leave would result in employment termination. Accordingly, the plaintiff's employment was terminated.

The court of appeals affirmed the district court's order granting summary judgment to the employer. The appellate court noted that it was undisputed that prior to plaintiff's leave, she was given written notice of the amount of her available FMLA leave. Plaintiff was given the full amount of the FMLA leave and the employer's policy providing that an employee who did not return to work after FMLA leave may be discharged. The court stated that the FMLA permits an employer to discharge an employee who does not return after the expiration of FMLA leave. Plaintiff's arguments that she should have received more leave or should have had her post-FMLA leave absences covered by other types of leave offered by the employer were rejected. The court stated that the employer had no obligation to provide anything more than the statutorily-required amount of FMLA leave.

Ryan v. Pace Suburban Bus Division of the Regional Transportation Authority, 27 A.D. Cases 349, 2012 WL 5077725 (N.D. Ill. Oct. 18, 2012)

After the employee was released to return to work following FMLA leave, the employer required him to undergo a Functional Capacity Evaluation ("FCE") to test his ability to perform certain functions of his Inspection Technician job. The results of the FCE indicated the employee was able to perform the physical demands of his job only at a "sedentary" level, whereas the position description for the job categorized the physical demands as "light." After the employee's light duty assignment ended, the employer required another FCE, but provided the FCE physician a position description that increased the physical demand rating of the job from "light" to "medium." The results of the second FCE indicated the employee was unfit to perform the job, and the employer terminated his employment. Almost three years later, the employee applied for and was granted disability benefits from the Social Security Administration ("SSA") based on his physical limitations.

The employee asserted the employer interfered with his FMLA rights by failing to reinstate him to his original or equivalent position. The district court denied the employer's motion for summary judgment. First, it rejected the argument that the employee's Social Security application established his inability to perform essential functions of the job. Consistent with its prior analysis of the employee's ADA claim, the court found that the employee's representations to the SSA about his physical abilities three years after his employment ended did not preclude a finding that he was physically able to perform the job at the time of his termination.

Second, the court rejected the employer's argument that the employee was not entitled to FMLA benefits because he could not perform the essential functions of the job. While an employer may refuse to restore an employee to his past position when restoration would give a

“right, benefit, or position of employment” that the employee would not have received if the employee had never left work (29 U.S.C. 2614(a)(3)(B)), the court concluded the unexplained increase in workload requirements submitted as part of the employee’s second FCE would allow a trier of fact to conclude the employer artificially raised the exertion level to prevent the employee from returning to his position.

Summarized Elsewhere:

Varise v. H & E Healthcare, L.L.C., 2012 WL 5997202 (M.D. La. Nov. 30, 2012)

B. No-Fault Attendance Policies

Summarized Elsewhere:

Avent v. Kraft Foods Global, Inc., 2012 WL 3555378 (E.D. Va. Aug. 16, 2012)

C. Employee Actions Related to the Leave

1. Other Employment

Murphy v. The Ohio State Univ., 2012 WL 4499027 (S.D. Ohio Sept. 28, 2012)

On September 24, 2011, plaintiff, employed by defendant as a dispatcher, received a traffic citation from the Columbus Police Department for disobeying the commands of a public safety officer while on her way to work. A copy of a report detailing the citation was forwarded to defendant’s department of public safety on September 27, 2011. Plaintiff thereafter requested and obtained leave under the FMLA from September 30, 2011, through December 21, 2011. While she was on leave, defendant learned that plaintiff was working for the City of Grandview Heights part-time during her FMLA leave. After plaintiff returned to work, defendant instituted an investigation of the plaintiff’s traffic citation and her work during her FMLA leave. As a result of the investigation, plaintiff was suspended for three days. She subsequently filed suit, claiming FMLA interference and retaliation. The defendant thereafter filed a motion for summary judgment.

The district court granted defendant’s motion for summary judgment. As to plaintiff’s interference claim, the court found that plaintiff failed to address this claim in her memorandum opposing the defendant’s motion. With respect to plaintiff’s retaliation claim, the court concluded this claim was based solely on the fact that defendant conducted its investigation after she returned from FMLA leave. Defendant waited to investigate plaintiff’s traffic citation until she returned from leave because “it didn’t seem appropriate to launch an internal affairs investigation until she was back and could be made aware of the situation,” which the court found to be a legitimate, non-retaliatory reason for the timing of the investigation. The court also found defendant’s reason for the investigation to be a legitimate and permissible. Finally, the court determined that plaintiff’s conduct while on FMLA leave was a legitimate and proper reason for her suspension, both alone and coupled with her citation.

Warwas v. City of Plainfield, 2012 WL 3024423 (3rd Cir. July 25, 2012)

The employee, a former city health officer, developed peptic ulcers and clinical depression and was “restricted to home and could not work/attend school.” The city granted the FMLA leave, but she continued to work at home on a part-time job she had with another city. When the employer discovered this, it terminated her employment because she had violated its policy on outside employment. She appealed to the Merit System Board, which found her guilty of conduct unbecoming an employee because she used paid sick time while engaged in secondary employment, but reinstated her employment. When she was to return to work, she was informed her office was unavailable and she should return in two days. The parties dispute whether she ever returned to work. She was then cautioned that she was on unauthorized leave without pay and that any further absences would result in her termination. She did not report to work, and her employment was terminated. She sued the city alleging interference with her FMLA rights.

The district court granted summary judgment without reaching the merits, finding the doctrine of issue preclusion barred her from seeking relief under the FMLA because her interference claim merely sought to re-litigate the Merit System Board’s finding regarding the propriety of her termination. The court of appeals affirmed without deciding whether the district court erred in its finding of issue preclusion, finding summary judgment was appropriate because the employee was discharged for reasons entirely unrelated to the exercise of her rights under the FMLA. She was discharged not for her use of FMLA leave, but rather for the perceived misuse of the leave and her failure to return to work.

2. Other Activities During the Leave

Turner v. Parker-Hannifin Corp. 2012 WL 1229125 (W.D. Pa. Apr. 12, 2012)

The employee injured his back while working as a Class A Operator at the employer’s facility. The employee went on FMLA leave for nine days to recover. A year later, the employee used intermittent FMLA leave for medical appointments or problems related to his diabetes. The employer, however, noticed that the employee’s intermittent FMLA leave requests tended to straddle weekends and holidays. The employer monitored the employee’s pattern of taking FMLA leave, and decided to hire a private investigator to follow the employee while he was on leave. One day, the employee reported to work and mid-way through his shift, indicated that his back was bothering him and that he needed to go home. The employee also indicated that he needed several days to recover. The employer’s investigator followed the employee, and saw that less than one hour after the employee left the facility, the employee entered a wood line to go hunting. As soon as the employer received the report from the investigator, the employer made the decision to terminate the employee for fraudulently claiming FMLA leave. When the employee returned to work following his leave, the employer informed the employee of the company’s decision.

The Western District Court in Pennsylvania denied the employer’s motion for summary judgment on the employee’s FMLA retaliation claim, on the grounds that it was not reasonable for the employer to decide to discharge the employee’s job based solely upon the investigator’s report. The district court found that the employer failed to consider whether hunting was inconsistent with his medical restrictions, and failed to give the employee an opportunity to

explain his activities. The district court determined that equating hunting with the ability to work, without taking into consideration what is involved in both activities is for a jury to decide. The employee stated that he did not hunt the day in question, and presented emails that demonstrated the employer's annoyance with the employee taking FMLA leave. The district court also found that the temporal proximity between the employee's FMLA leave and his discharge supported a causal connection between the protected activity and the adverse action. Although the employer attempted to articulate that it discharged the employee because it reasonably believed that he was falsifying the reasons for his leave, the district court again referred to the employer's unreasonable reliance on the investigator's report.

Sledge v. Comcast ABB Management, LLC, 2012 WL 2368319 (N.D. Ill. June 20, 2012)

The employee sued her former employer alleging FMLA interference and retaliation claims. The employee worked as a supervisor for the employer. She requested and was granted an intermittent FMLA leave to take two days off each week to care for her daughter who had asthma. The employer received complaints from the employee's co-workers about the frequent absences and began to investigate the employee's possible misuse of FMLA leave. After learning that the employee also used some FMLA leave on dates she initially requested vacation, the employer held a fact-finding meeting with the employee. At the meeting, the employee admitted that she went to the library to study in addition to running personal errands on FMLA leave days. There was also evidence she attended classes on these days. Based on these admissions and the fact the employee had been dishonest about the purpose of her FMLA leave, she was discharged.

The district court granted the employer's motion for summary judgment on both claims, concluding that the undisputed facts established that the employee was not entitled to continued employment. The district court reasoned that an employee was not entitled to continued employment after returning from leave unless she had used that leave "for the intended purpose." Citing Seventh Circuit precedent, the district court applied an "honest suspicion" standard. The district court held that the employer had more than an "honest suspicion" that the employee was misusing her FMLA leave; indeed, it had the employee's actual admission. Accordingly, the district court granted summary judgment on the FMLA interference claim. In reaching this holding, the court rejected the employee's testimony that she was unaware of any limitations on her FMLA leave. Also unpersuasive was the employee's claim that so long as she spent some of the "FMLA day" taking care of her daughter, she was entitled to the entire day off. Finally, the court disposed of the employee's evidence that she took FMLA leave for the intended purpose of taking care of her daughter, stating the issue was not the employee's intended purpose in requesting FMLA leave or in exercising it on a particular day—rather, the question was what she was actually doing while on leave. The court rejected the employee's retaliation claim on the same evidence, reasoning that she did not establish that she engaged in FMLA-protected activity.

Summarized Elsewhere:

Ramey v. Vacumet Corp., 2012 WL 252403 (E.D. Tenn. Jan. 26, 2012)

3. Reports by Employee

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

Kelsh v. WCI Steel, Inc., 2012 WL 366947 (Ohio Ct. App. Feb. 6, 2012)

The employee injured his knee on May 29, 2007. After being examined by the employer's on-site doctor, the employee was allowed to return to work. Later that day, the employee was examined by his own doctor and released to work without restriction. Regardless, the employer offered the employee a comprehensive light duty program on May 30. However, the employer did not inform the employee of his FMLA rights. The employee never responded to the offer and did not show up for work. The employer hired a private investigator to tail the employee from May 31 through June 7. The private investigator saw the employee working at the bar the employee owned, lifting heavy objects, and doing other activities that indicated he could have performed his job. On June 5, the employee told his family doctor that he could not stand for long periods and that it hurt to walk, and as a result his doctor gave him an off-work slip from May 30 to June 15. On June 8, the employee filled out a workers' compensation form requesting temporary total compensation, indicating that he had not performed any work since the injury and that the employer had not given him a light duty option. The employer discharged the employee for falsifying the workers' compensation form.

The employee filed a claim asserting that the employer had interfered with his FMLA rights because it failed to inform him of those rights. A jury returned a verdict for the employer and the employee moved for judgment notwithstanding the verdict or a new trial. The Ohio Court of Appeals affirmed, concluding that the employer's failure to inform the employee of his rights did not cause him any injury. According to the court, the question of whether the employee was discharged as a result of the employer's failure to inform him of his FMLA rights was a proper question for the jury, and the jury reasonably concluded that the employee was terminated for falsifying the workers' compensation form. Because the FMLA does not create strict liability for employer interference and there was "no evidence in the record establishing that if [the employee] had been informed of the FMLA protections, he would have completed his application honestly and not in violation of [the employer's] policies," the employee was not prejudiced by the violation and therefore not entitled to JNV or a new trial.

Scruggs v. Carrier Corp., 666 F.3d 1269 (7th Cir. 2012)

The employee worked as a brazier (one who torches parts into fan coils) for a company that manufactured refrigeration, air conditioning, and heating equipment. Starting in 2004, the employee requested (and was permitted) intermittent FMLA leave to visit his mother at her nursing home and to drive her to doctor's appointments. In 2006, the employer implemented a plan to remedy its excessive employee absenteeism problem. In addition to instituting new procedures for handling employee leave requests, the employer hired a private investigator to follow approximately 35 employees who were suspected of abusing the company's leave policies.

The investigator followed plaintiff on three occasions. On the first two, there was no evidence that plaintiff was misusing his FMLA leave. On the third day, however, the investigator

observed (and videotaped) that plaintiff never left his house. After being confronted with the results of the video surveillance, the employee said that he did not abuse his FMLA leave. During the employer's subsequent investigation, the employee provided documentation from the nursing home indicating that he was at the nursing home that day. He also claimed to have left and reentered his home unobserved through the back door. However, the documents provided were inconsistent with each other, and the employer did not find his story credible. The employer terminated the plaintiff for misusing his FMLA leave, and denied his subsequent grievance.

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the employer. The court explained that, in order to defeat an interference claim, an employer need only show that its refusal to reinstate the employee was based on an "honest suspicion" that he was abusing his FMLA leave. Based on the facts above, the court held that the defendant had an "honest suspicion" that the plaintiff was abusing his leave, and that it had no duty to conduct a more thorough investigation than it had already done. The court further held that the employer's honest suspicion also defeated the plaintiff's retaliation claim, because its reason for terminating plaintiff "was not the same as his protected activity." The court emphasized that "an employee has no greater right to reinstatement or to other benefits than if the employee had been continuously employed," and likened plaintiff's actions to that of an employee committing fraud while on duty.

Jaszczyszyn v. Advantage Health Physician Network, 19 WH Cases2d 1549 (6th Cir. Nov. 7, 2012)

The employee, a customer service representative who spent most of her day talking with customers by telephone, began to experience back pain as a result of a car accident several years earlier. She first missed work for the condition on August 31, 2009, and returned to work for one day on September 8 after her first period of FMLA leave ended. She was then absent from work and did not return. To support her need for additional FMLA leave, she provided her employer with several medical certification forms, one indicating that she required intermittent FMLA leave and others stating that she was "completely incapacitated" until October 26.

On October 3, while the employee was on FMLA leave, she attended "Pulaski Days," a Polish heritage festival, where she spent eight hours socializing with friends. After the festival, she posted several pictures on Facebook in which she was shown at the festival. That weekend, she left her employer several voicemails indicating that she was in pain and would not be at work the following Monday. One of the employee's co-workers, who was covering her workload, complained to their supervisor, who then viewed the Facebook pictures. Following an investigation, during which the employee was unable to reasonably explain the inconsistency between the photos and her claim that she was "completed incapacitated" at the time, the employer discharged the employee.

The Sixth Circuit affirmed summary judgment in favor of the employer on the employee's FMLA interference and retaliation claims. As to the interference claim, which the employee premised on the fact that her employer failed to reinstate her, the court held that the employer did not interfere with the employee's FMLA leave because it allowed her to take the requested time off even before it processed all her paperwork. She was thus deemed to have been given "all the leave to which she was entitled." In addressing the employee's retaliation claim,

the court held as a matter of first impression in that Circuit that the “honest belief” rule – i.e., that an employer’s honest belief in its stated reason for taking an adverse employment action precludes a finding of pretext, even if the employer is later proven to be mistaken in its belief – applies to FMLA retaliation claims. Applying this rule, the court found that the employer honestly believed that the employee’s behavior in the Facebook photos was inconsistent with her claims of total disability. That the employer conducted an investigation and gave the employee an opportunity to explain the photos contributed to the court’s finding that the employee could not demonstrate the requisite nexus between her protected FMLA activity and the adverse employment action.

Ryan v. Pace Suburban Bus Division of the Regional Transportation Authority, 27 A.D. Cases 349, 2012 WL 5077725 (N.D. Ill. Oct. 18, 2012)

After the employee was released to return to work following FMLA leave, the employer required him to undergo a Functional Capacity Evaluation (“FCE”) to test his ability to perform certain functions of his Inspection Technician job. The results of the FCE indicated the employee was able to perform the physical demands of his job only at a “sedentary” level, whereas the position description for the job categorized the physical demands as “light.” After the employee’s light duty assignment ended, the employer required another FCE, but provided the FCE physician a position description that increased the physical demand rating of the job from “light” to “medium.” The results of the second FCE indicated the employee was unfit to perform the job, and the employer terminated his employment. Almost three years later, the employee applied for and was granted disability benefits from the Social Security Administration (“SSA”) based on his physical limitations.

The employee asserted the employer interfered with his FMLA rights by failing to reinstate him to his original or equivalent position. The district court denied the employer’s motion for summary judgment. First, it rejected the argument that the employee’s Social Security application established his inability to perform essential functions of the job. Consistent with its prior analysis of the employee’s ADA claim, the court found that the employee’s representations to the SSA about his physical abilities three years after his employment ended did not preclude a finding that he was physically able to perform the job at the time of his termination.

Second, the court rejected the employer’s argument that the employee was not entitled to FMLA benefits because he could not perform the essential functions of the job. While an employer may refuse to restore an employee to his past position when restoration would give a “right, benefit, or position of employment” that the employee would not have received if the employee had never left work (29 U.S.C. 2614(a)(3)(B)), the court concluded the unexplained increase in workload requirements submitted as part of the employee’s second FCE would allow a trier of fact to conclude the employer artificially raised the exertion level to prevent the employee from returning to his position.

Adams v. Auto Rail Logistics, Inc., 2012 WL 5439962 (6th Cir. Nov. 8, 2012)

The employee missed work on December 26, 2007, in order to care for his sick daughter. Although he no longer needed to care for his daughter after December 26, he did not return to work until January 8, 2008, claiming that a human resources manager told him not to return to work until he submitted medical certification supporting his daughter's condition. On that date, he submitted medical certification, but also received a notice of termination. The employee contended the employer interfered with his rights under the FMLA by terminating him even though he provided his medical certification within fifteen days. The employer claimed it terminated him because it believed he misused his leave time under the FMLA.

At the close of trial, the jury was instructed that even if the employee proves each of the elements of liability for a failure to reinstate an employee who needed to care for a family member with a serious health condition, "the Defendant can avoid liability if they prove by a preponderance of the evidence that they would have discharged [the employee] even if Defendants had not considered [the employee's] absence on December 26, 2007." The jury returned a defense verdict. The plaintiff appealed, arguing that the district court erred in instructing the jury on the "same decision" defense because the Sixth Circuit does not recognize it. The employee argued that the instruction was incompatible with prior circuit caselaw holding that an employer violates the FMLA so long as the termination was caused in part by an FMLA leave. The plaintiff further argued that in order to establish the defense, the employer was required to prove fraud under state law by clear and convincing evidence.

The Sixth Circuit found no error in the jury instruction on the grounds that it was another way of saying that defendants are not liable under the FMLA if they prove that the dismissal "would have occurred regardless of the employee's request for or taking of FMLA leave," which is consistent with Sixth Circuit precedent. The Court further held that, because nothing in the FMLA prevents employers from ensuring that employees on leave from work do not abuse their leave, fraud and dishonesty are lawful bases for termination. However, the employer is not required to prove the elements of fraud under state law. It need only demonstrate that it believed the plaintiff was misusing the FMLA such that it would have discharged the plaintiff despite any legitimate FMLA leave.

Rush v. E.I. DuPont DeNemours and Co., 2012 WL 5879776 (S.D. Ohio Nov. 20, 2012)

Plaintiff requested and the employer granted intermittent leave throughout the summer of 2010 for mental health issues. On September 8, 2010, plaintiff asked for permission to take an unpaid personal day on September 22, 2010, so that he could attend horse races. His request was denied because, as his employer explained to plaintiff, unpaid personal days were reserved for unplanned events. On September 23, 2010, the day after the day for which plaintiff had requested leave, plaintiff requested intermittent FMLA for that day and the next day. The employer learned that the horse races plaintiff wanted to attend on September 22, 2010 actually spanned the entire week. When the employer informed plaintiff that it was investigating his use of FMLA for September 23 and 24, 2010, plaintiff became angry, exited the building and left the premises. He called the following day to inquire about his status and when he could return to work. He was informed that the employer had considered his conduct a resignation. Plaintiff denied that he had resigned.

The court granted defendant's Motion for Summary Judgment as to plaintiff's FMLA interference claim but denied the motion as to plaintiff's FMLA retaliation claim. As to the interference claim, the court concluded that there was a genuine issue of material fact as to whether plaintiff was entitled to take intermittent leave on September 23 and 24, 2010. The court disagreed with plaintiff's assertion that the employer's investigation was tantamount to a denial of FMLA benefits, and found that there was enough suspicion surrounding his request that the employer was justified in seeking recertification. As to plaintiff's retaliation claim, the court concluded that, under the circumstances, there was a genuine issue of material fact as to whether the employer held an honest belief that justified the separation of plaintiff's employment.

Summarized Elsewhere:

Turner v. Parker-Hannifin Corp. 2012 WL 1229125 (W.D. Pa. Apr. 12, 2012)

Sledge v. Comcast ABB Management, LLC, 2012 WL 2368319 (N.D. Ill. June 20, 2012)

Avent v. Kraft Foods Global, Inc., 2012 WL 3555378 (E.D. Va. Aug. 16, 2012)

D. Timing of Restoration

IV. INABILITY TO RETURN TO WORK WITHIN 12 WEEKS

Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266 (3d Cir. 2012)

Plaintiff suffered a stroke and took FMLA leave. Plaintiff's doctor cleared him to return to work full-time but with a lifting restriction. Defendant discharged plaintiff and told him he could not be hired back with any lifting restrictions. He was told that once he no longer had lifting restrictions, he could reapply for employment. Between the time of his discharge and the time he was cleared to work without restrictions, plaintiff received disability benefits from his insurer.

Plaintiff alleged that defendant violated the FMLA because it refused to let him return to work once he was cleared to work, albeit with restrictions. The Third Circuit stated that to establish a claim for a violation of FMLA rights, plaintiff must have been entitled to his former position under the FMLA. To be entitled to his former position, plaintiff must have been able "to perform the essential functions of his job without an accommodation." Plaintiff argued, despite the lifting restrictions imposed by his doctor, that he was able to perform the essential functions of his job. However, so that he would be entitled to benefits from his insurer, plaintiff represented to his insurer that he was unable to perform the duties of his regular occupation. Given those representations, the Third Circuit found that plaintiff was precluded from asserting he could perform the essential functions of his job by the doctrine of judicial estoppel. As such, his FMLA claim was barred, and the Third Circuit affirmed the district court's order granting summary judgment in favor of defendant.

Steinker v. Enovapremier., 2012 WL 3597392 (S.D. Ind., Aug. 20, 2012)

The employee suffered a series of medical conditions that resulted in him missing work for long periods of time. When the employee was missing work, the employer did not employ more than 50 employees; therefore, the leave the employer approved was not FMLA leave. The employee then suffered mental health problems. The employer, now employing more than 50 employees, required the employee to complete FMLA paperwork and granted the employee a leave for a period of twelve weeks. At the end of the employee's leave, one of the employee's doctors completed a return-to-work form, but stated that the employee was unable to return to work without any restrictions. Because the employee was not released to return to work at the end of his leave, the employer discharged him. The employee sued the employer for interference with his FMLA rights and for retaliation.

The District Court granted summary judgment to the employer on both counts. As to the employee's retaliation claim, the court noted that "suspicious timing alone" – the fact that the employee was discharged on the date his FMLA leave ended was insufficient to demonstrate a causal connection between the employee's discharge and his FMLA leave. Further, with respect to the employee's claim of interference, the court found that the employer was willing to return the employee to work at the end of his leave, but the employee's physician stated that the employee was not able to return. The court thus held that the employee's interference claim failed.

Wilder v. Talbot County, 2012 WL 1901335 (D. Md. May 23, 2012)

The employee sued defendant for failure to reinstate him and retaliation under the FMLA. The employee returned from a vacation in January and began experiencing knee pains. The employer granted his request for FMLA leave effective February 2; his leave expired on April 27. On April 17, the employee's doctor released the employee to return to work on May 4, but was under certain restrictions for the next four weeks. In late April, the employee's supervisor informed him that he could not return to work with the restrictions. Instead, the employee was offered the option to retire, which he accepted on July 1. Nearly two years later, the employee sued, arguing that he was not allowed to return to work and that his "effective termination" was in retaliation for requesting FMLA leave.

The court granted summary judgment on the failure to reinstate claim on grounds that, at the time the employee's FMLA leave expired on April 27, his doctor stated he could not perform the essential functions of his job. That alone justified the employer's termination of the employee. The employee argued that some of the duties he was required to perform would probably not be necessary during the four week period his doctor mentioned. The court disagreed, ruling that "that a physical ability might not be needed, however, does not necessarily render it non-essential." The court also rejected the employee's view that the doctor's note should not be deemed evidence of the essential functions of his job. It explained that while an employer has the option to provide a list of such functions to an employee's physician, it is not required to do so. The court also granted the employer's motion for summary judgment on the employee's retaliation claim. It held that the employee's failure to perform the essential functions of his job was a legitimate, non discriminatory reason for his termination. Because the employee provided no proof to rebut this reason, his retaliation claim failed.

Summarized Elsewhere:

Peoples v. Langley/Empire Candle Co., 2012 WL 171340 (D. Kan. Jan. 20, 2012)

Demyanovich v. Cadon Plating & Coatings, LLC, 2012 WL 6025762 (E.D. Mich. Dec. 4, 2012)

Townsend v. St. John's Hosp., 2012 WL 4434713 (C.D. Ill. Sept. 24, 2012)

Robert v. Bd. of County Comm'rs of Brown County, Kans., 691 F.3d 1211 (10th Cir. 2012)

Lehman v. Maricopa County Community College, 2012 WL 3638715 (D. Ariz. Aug. 24, 2012)

Upchurch v. Mount Carmel Health System, 2012 WL 3811802 (S.D. Ohio Sep 04, 2012)

Doolin v. Hinkle Contracting Corp., 2012 WL 3028510; 115 FEP 1627 (E.D. Ky. July 25, 2012)

V. SPECIAL CATEGORIES OF EMPLOYEES

A. Employees of Schools

B. Key Employees

1. Qualifications to Be Classified as a Key Employee
2. Standard for Denying Restoration
3. Required Notices to Key Employees
 - a. Notice of Qualification
 - b. Notice of Intent to Deny Restoration
 - c. Employee Opportunity to Request Restoration

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

I. OVERVIEW

II. INTERRELATIONSHIP WITH LAWS

A. General Principles

B. Federal Laws

1. Americans With Disabilities Act

a. General Principles

b. Covered Employers and Eligible Employees

Summarized Elsewhere:

Diehl v Bank of America, N.A., 470 Fed.Appx. 771 (11th Cir. 2012)

c. Qualifying Events

i. Serious Health Conditions and Disabilities

ii. Triggering Events for Leave of Absence Rights

d. Nature of Leave and Restoration Rights

Robert v. Bd. of County Comm'rs of Brown County, Kans., 691 F.3d 1211 (10th Cir. 2012)

Plaintiff worked for defendant as a supervisor of felony offenders. Her job included 18 “essential functions” as listed in her written job description, such as performing drug screenings, ensuring compliance with court orders, testifying in court, and “field work,” which consisted of visiting the homes of individuals who had been released from prison to assist them in their re-entry into society. As a result, the work involved potentially dangerous situations. Plaintiff experienced severe pain in her back and hips, which later was diagnosed as sacroiliac joint dysfunction. Walking became impossible, and she needed crutches and a wheelchair to get around. Plaintiff also required a lengthy leave of absence before returning. Plaintiff resumed her job functions several months later, but soon thereafter, her symptoms returned. She performed partial duties for some time, and the other officers picked up some of her remaining duties. Ultimately, she required surgery and another extensive leave of absence.

Plaintiff’s FMLA leave expired on July 5; defendant also appeared to have provided additional leave that, in total, amounted to about six months of leave. On July 17, plaintiff’s doctor told her that she “might be able to walk with a cane in two to three weeks, and unassisted two weeks after that.” Although it is unclear what medical information actually made it to the

employer, defendant discharged plaintiff because she was unable to return to work at full capacity after her leave ended. Robert later sued, alleging ADA discrimination and FMLA retaliation. The district court granted the employer's motion for summary judgment, finding that plaintiff had failed to provide a definite estimate of her ability to resume site visits. In affirming the decision, the Tenth Circuit outlined the employee's burden in showing that a leave of absence is "reasonable." First, the employee is required to provide "an estimated date when she can resume her essential duties." Second, the employee's leave request "must assure an employer that an employee can perform the essential functions of her position 'in the near future.'" The Court cut its analysis short, finding that plaintiff failed to meet the first prong because there was no evidence in the record that the employer had any estimate of the date plaintiff would resume the fieldwork essential to her position. The court further found that the doctor's prediction that she "might" be able to walk with a cane in a month's time did "not suffice to assure the county that she would then be able to perform site visits and other fieldwork."

- i. Health Benefits
 - ii. Restoration
 - iii. Light Duty
 - e. Medical Inquiries and Records
 - f. Attendance Policies
- 2. COBRA
 - 3. Fair Labor Standards Act
 - 4. 42 U.S.C. § 1983
 - 5. Title VII of the Civil Rights Act

Algie v. NKU, 456 Fed.Appx. 514 (6th Cir. 2012)

In 2005, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) against his employer. In 2006, he filed his first lawsuit against defendant alleging discrimination and retaliation under Title VII and the FMLA. Plaintiff alleged that defendant began a series of retaliatory actions after he filed that first lawsuit. In October 2007, defendant terminated plaintiff's employment, and plaintiff filed a third charge with the EEOC. In June 2008, plaintiff filed a second lawsuit alleging defendant's adverse employment actions constituted retaliation under both Title VII and the FMLA.

The Court affirmed the district court's grant of summary judgment in favor of defendant on the Title VII claims, but vacated and remanded on the FMLA retaliation claim, since the district court had apparently construed it as a Title VII medical disability claim. The district court's order dismissed only the perceived disability, and thus, the FMLA retaliation claim had either been erroneously addressed as a Title VII claim or had not been addressed at all.

Summarized Elsewhere:

Williams v. United States Steel Corporation, 2012 WL 3233736 (N.D. Ind. Aug. 6, 2012)

Cham v. Station Operators, Inc., 685 F.3d 87, 19 WH Cases2d 520 (1st Cir. 2012)

6. Uniformed Services Employment and Reemployment Rights Act
7. IRS Rules on Cafeteria Plans
8. ERISA [New Topic]
9. Government Contract Prevailing Wage Statutes [New Topic]
10. Railway Labor Act [New Topic]
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

Richey v. AutoNation, Inc., 149 Cal. Rptr. 3d 280 (Cal. Ct. App. 2012)

A car dealership discharged plaintiff, one of its sales managers, believing plaintiff had engaged in outside employment while on medical leave subject to the California Family Rights Act (“CFRA”). Plaintiff sued for reinstatement, and the trial court compelled arbitration of the employee’s CFRA claim in accordance with a mandatory arbitration agreement that required the arbitrator to resolve the dispute “based solely upon the law governing the claims and defenses” and prohibited the arbitrator from “invok[ing] any basis (including, but not limited to notions of “just cause”) other than such controlling law.”

The arbitrator found the employer honestly believed plaintiff violated the employer’s policy and denied the claim. Reversing the trial court’s judgment confirming the arbitrator’s decision, the court of appeals held the arbitrator exceeded his powers in invoking the “honest belief defense,” which the court observed only a minority of federal circuits had adopted. The court noted an employer under the CFRA bears the burden of determining whether requested leave is protected, and if the employer grants leave but denies reinstatement, the employer must show the employee would not otherwise have been employed if leave had not been taken. Restating this latter burden as one of “proving a misuse of CFRA leave,” the court determined

the “honest belief defense” shifted that burden off the employer and thus denied the employee a hearing on the merits of his CFRA claim.

- b. Effect of Different Scope of Coverage
 - i. Employer Coverage
 - ii. Employee Eligibility
 - c. Measuring the Leave Period
 - d. Medical Certifications
 - e. Notice Requirements
 - f. Fitness-for-Duty Certification
 - g. Enforcement
 - h. Paid Family Leave Laws [New Topic]
2. Workers’ Compensation Laws
- a. General Principles
 - b. Job Restructuring and Light Duty

Green v. City of North Little Rock, 2012 Ark.App. 21 (Ark. App. Jan. 4, 2012)

Plaintiff was injured on the job while working as a police officer. Although plaintiff submitted initial paperwork indicating his intention to take FMLA leave, he never completed the paperwork. Plaintiff was released to return to a desk job and the police department, assuming he would request light-duty work, began processing paperwork to allow him to do so. However, plaintiff told the police chief that he intended to resign, and the police department then rescinded its decision to allow plaintiff to work in a light duty capacity. Plaintiff filed suit, alleging FMLA interference and retaliation. Defendant filed motion for summary judgment with the trial court, asserting that there is no right to light duty work. plaintiff responded by arguing that he was denied light duty work when others who did not take FMLA leave were given that benefit and that he had been forced to retire before his FMLA leave was exhausted. The trial court granted defendant’s motion and plaintiff appealed.

The appellate court found that plaintiff had no evidence that he was constructively discharged in retaliation for taking FMLA leave. Plaintiff asserted that he was told “resign or be terminated,” but the court found no connection between this alleged statement and his FMLA claim. Plaintiff further contended that defendant interfered with his FMLA rights by denying him the opportunity to work light duty. The court found that the FMLA does not entitle employees to light duty work and, therefore, plaintiff’s FMLA rights were not violated. In addition, plaintiff decided to resign before the police department rescinded its approval of light-

duty work. Therefore, the denial of light duty work could not have triggered plaintiff's decision to retire.

- 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]

McAllister v. Quality Mobile X-Ray Services, 2012 WL 3042972 (M.D. Tenn. July 25 2012)

The employee was discharged roughly three months after she notified her employer that she was pregnant and planned to take leave. The employee brought interference and retaliation claims under the FMLA and a claim for common law retaliatory discharge. In deciding the employer's Rule 12(b)(6) motion to dismiss, the court held that the FMLA preempted the employee's common law retaliation claim to the extent it was based on an FMLA violation. The court observed that a common law cause of action for retaliatory discharge was first recognized to prevent employers from circumventing their obligations under a workers compensation statute that did not provide remedial measures. Because the FMLA contains a comprehensive remedial scheme to address the violation of statutory rights, the court reasoned there is no need to extend the common law tort to overlap with the FMLA. Furthermore, the employee's claims for emotional distress and punitive damages would frustrate Congressional intent by providing remedies unavailable under the FMLA. While the employee argued that the FMLA's savings clause precludes preemption, the court concluded that although the FMLA allows states to provide greater family and medical leave rights, it does not allow them to provide additional remedies.

Anderson v. Shade Tree Services, Co., 2012 WL 3288120 (E.D. Mo. Aug. 10, 2012)

Plaintiff originally filed his suit against defendants in state court, alleging that his termination was in violation of Missouri public policy in that it violated the FMLA's anti-termination provision. Defendants removed the action to federal court on the basis of the FMLA violation allegation. The case was before the Eastern District of Missouri on plaintiff's motion to remand to state court. The question presented was whether remedies codified in the FMLA preempt the state common law tort of wrongful termination to the extent the basis for claiming the termination was wrongful is violation of public policy based on violation of the FMLA. The court answered in the affirmative, finding that the exclusive remedy available to a plaintiff discharged in violation of the FMLA is under the federal statute, not common law. As such, the court ruled that the lawsuit invoked a federal question, the court had subject-matter jurisdiction to hear that question, and plaintiff's motion to remand the case to state court was denied.

D. City Ordinances [New Topic]

III. INTERRELATIONSHIP WITH EMPLOYER PRACTICES

Summarized Elsewhere:

Chappell v. The Bilco Company, 675 F.3d 1110, 18 WH Cases2d 1641 (8th Cir. 2012)

A. Providing Greater Benefits Than Required by the FMLA

Lehman v. Maricopa County Community College, 2012 WL 3638715 (D. Ariz. Aug. 24, 2012)

Plaintiff worked for defendant as a Coordinator of Adult Re-Entry Services. She filed suit against defendant, claiming, *inter alia*, interference with her rights under the FMLA, alleging that defendant improperly considered her FMLA leave as a negative factor in its 2008 decision to lay her off. The parties filed cross-motions for summary judgment. The district court denied plaintiff's motion and granted defendant's motion.

Under defendant's leave policy, if an eligible employee exhausted FMLA leave, the employee was permitted to request an additional medical leave of absence. Defendant also had a policy requiring that any employee being laid off for budgetary reasons must be given notice of the layoff no later than December 15 of the preceding fiscal year. Plaintiff requested FMLA leave in 2008 due to knee replacement surgery, and began leave on July 8, 2008. Because plaintiff had not fully recovered by the time she exhausted her FMLA leave on September 16, 2008, she began her additional medical leave of absence under defendant's policy on September 17, 2008. In July of 2008, defendant began to consider proposals for budget reductions and ultimately recommended the elimination of plaintiff's position. In November of 2008, defendant contacted plaintiff to notify her that her employment would be terminated on June 30, 2009, due to budget cuts. Plaintiff remained on medical leave until February 2, 2009. Because her prior duties already had been reassigned, plaintiff was assigned to a temporary position until her termination date. In the spring of 2009, she was assigned to another temporary position with defendant for a one-year period. The plaintiff filed suit after her temporary position ended on June 30, 2010.

Plaintiff argued that a number of actions taken by defendant while she was on leave showed that her FMLA leave played a negative role in defendant's decision to lay her off. The court rejected all of the plaintiff's arguments in granting defendant's motion for summary judgment. The court found that a September 2008 memorandum recommending plaintiff for layoff because her duties already had been reallocated did not constitute direct evidence that her FMLA leave played a negative role in her layoff, because plaintiff had exhausted her FMLA leave at the time the memorandum was written and, therefore, was no longer entitled to job protection. The court also found that plaintiff failed to present any evidence that a spreadsheet prepared in connection with the layoffs which listed plaintiff's name and the notation "Unpaid Leave 3 mos." showed that her leave was a negative factor in the layoff decision, where defendant presented evidence that the spreadsheet was created to calculate overlooked savings. The court also rejected plaintiff's contention that a timeline prepared months after defendant made the layoff decision, which detailed plaintiff's medical leaves over the prior five years, showed that her FMLA leave played a part in the layoff decision. Finally, the court found that the exclusion of plaintiff's name from two December 2008 memoranda recommending layoffs

did not mean that plaintiff's layoff was not due to budgetary reasons, but, instead, due to her FMLA leave.

Burton v. Lawhorn, et al., 2012 WL 5308069 (M.D. Ala. Oct. 9, 2012)

The *pro se* plaintiff was a former nursing home employee who filed suit against three supervisors when she was fired after exhausting her FMLA entitlement. The magistrate judge recommended that defendant's motion to dismiss be granted under both a theory of interference and retaliation because plaintiff exceeded the 12 week allotment of leave prior to seeking to return. Plaintiff argued that even if she exceeded the 12 week FMLA entitlement, she still had enough personal pursuant to the company's policies to extend her leave beyond 12 weeks. The magistrate judge rejected this argument stating that if plaintiff had a cause of action against the employer, it was not based in the FMLA. Thus, even if plaintiff had enough personal leave to cover her absence, she still failed to state a claim for relief under the FMLA.

The district judge adopted the magistrate's recommendation in *Burton v. Lawhorn, et al.*, 2012 WL 5305074 (M.D. Ala. October 26, 2012).

Summarized Elsewhere:

Smith v. Hargray Comm. Group, 2012 WL 360098 (D.S.C. 2012)

B. Employer Policy Choices

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

Valentino v. Wickliffe City School District Board of Education, 19 WH Cases2d 802 (N.D. Ohio 2012)

Plaintiff was a school bus driver who was granted FMLA leave to help her son and daughter-in-law care for their son, who was diagnosed with cancer, as well as plaintiff's three other grandchildren. In granting plaintiff's FMLA leave request, the school board determined that plaintiff had worked the requisite 1,250 hours in the previous twelve months. While plaintiff was on leave, the school board treasurer asked the payroll clerk to re-determine FMLA eligibility for all of the employees on FMLA leave by counting only hours worked toward the 1,250 hour requirement and not counting hours paid but not worked, such as sick and vacation time. The school board's past practice was to count hours paid but not worked toward the 1,250 hour requirement. Applying this new calculation method, the payroll clerk determined that plaintiff had worked less than 1,250 hours in the previous 12 months. Plaintiff's supervisor contacted plaintiff to inform her that she was not eligible for FMLA leave and that she had to return to work. After plaintiff informed the school board, through counsel, that she would continue her FMLA leave until it expired, plaintiff was discharged for job abandonment.

Plaintiff filed suit against the school board and treasurer, alleging FMLA interference and retaliation. In deciding defendants' motion for summary judgment, the district court initially determined that the treasurer could not be held individually liable under the FMLA. Next, the court addressed a dispute between the parties as to the applicable twelve month period for

determining whether plaintiff worked the requisite 1,250 hours. Defendants argued that the twelve months immediately preceding the leave applied while plaintiff relied on the twelve month period described in her collective bargaining agreement. The court noted that “[t]his is somewhat of an uncharted area” and that it had been unable to locate a case finding that the twelve month period in a collective bargaining agreement should be used to determine FMLA eligibility. It then noted that 29 U.S.C. §2652 states the FMLA does not diminish the obligation of an employer to comply with a collective bargaining agreement, an employment benefit program, or a plan “that provides greater family or medical leave rights to employees” than the FMLA. The court held that the collective bargaining agreement controlled because it provided greater rights than the FMLA. The court denied defendants’ motion for summary judgment, finding that plaintiff had worked 1,250 hours in the twelve month period designated in the collective bargaining agreement and because plaintiff could prove both FMLA interference and retaliation.

2. Employee Notice of Need for Leave

Verges v. Honda Manufacturing of Alabama, LLC, 2012 WL 3260367 (N.D. Ala. Aug. 8, 2012)

Plaintiff’s wife suffered from multiple serious medical conditions and resided in a nursing home. Plaintiff had requested and was approved for intermittent FMLA leave to care for his wife for the calendar year of 2009. In April 2009, plaintiff received a call from his daughter stating that his wife was distressed and that he should go check on her at the nursing home. Plaintiff believed that it was an emergency situation and left his shift early. Plaintiff could not locate either of his supervisors, but he reported his absence to security and contacted defendant’s third-party FMLA administrator to request FMLA leave. At the time of the leave, plaintiff was on a final warning for inappropriate behavior and mistakes he had made on the job. This final warning was the final step before termination. Violations of defendant’s attendance policy, however, did not follow the progressive discipline scheme. Defendant discharged plaintiff one week later for violating its attendance policy. Plaintiff then filed suit, alleging FMLA interference and retaliation.

Defendant filed a motion for summary judgment as to the retaliation claim, asserting that plaintiff attempted to exercise a right that was not protected by the FMLA by violating defendant’s attendance policy. The court determined that there was a genuine issue of material fact as to whether plaintiff violated defendant’s policy. While the policy required employees to seek permission before leaving a shift early, it also distinguished between ordinary absences and absences due to family medical leave, implying that they would be treated differently. The court also concluded that plaintiff had met his burden of establishing an adverse employment action and causation because only seven days passed between the employee leaving his shift and his discharge.

The court next examined whether defendant provided a legitimate reason for plaintiff’s discharge, pointing out that it is entitled to raise such reasons as an affirmative defense to FMLA liability. Defendant asserted that it would have discharged plaintiff regardless of the reason he left his shift early pursuant to its attendance policy. The court stated that there was a genuine issue of material fact as to whether the policy would have called for plaintiff’s discharge, given

the distinction it makes between ordinary absences and absences protected by the FMLA. Therefore, there remained a factual issue as to whether defendant had legitimate reasons to discharge plaintiff. The court went on to say that even if defendant had provided a legitimate reason for plaintiff's discharge, plaintiff had raised a genuine issue of material fact as to pretext. The court pointed to the temporal proximity between plaintiff's leave and his discharge as well as the genuine issue of material fact as to whether plaintiff actually violated defendant's attendance policy. The court also noted plaintiff's assertion that he was given contradictory reasons for his discharge.

Summarized Elsewhere:

Sadeh v. Venetian Casino Resort, LLC, 2012 WL 3065442 (D. Nev. Jul. 27, 2012)

3. Substitution of Paid Leave
4. Reporting Requirements

Short v. Hartford Bakery, Inc., 2012 WL 266951 (S.D. Ind. Jan. 30, 2012)

Plaintiff had been off intermittently for a job-related injury and was then hospitalized due to a motorcycle accident that occurred April 24, three days prior to his scheduled return to work date. Plaintiff called in to defendant's answering service on April 27, pursuant to its attendance policy, and left a voice mail indicating that he was in the hospital. He was released from the hospital April 28, but did not call the answering service. Plaintiff instead went in to see the V.P. of Human Resources on April 29 to turn in a doctor's note, which indicated he needed to be off work for the following month. The V.P. reminded plaintiff that he needed to continue to follow the attendance and reporting policy until his FMLA paperwork was submitted and his leave approved, meaning that plaintiff needed to call in to the answering service every day, an hour before his shift. Plaintiff did not call the answering service April 29-May 1. Defendant's policy stated that if an employee fails to call in three times, the employee will be discharged. Plaintiff had received his FMLA paperwork on April 30 and returned it May 19; five days after the deadline communicated in defendant's April 30 letter. On May 13, defendant sent plaintiff a letter informing him that he was discharged, effective May 1, for failure to follow the attendance policy.

The court granted defendant's motion for summary judgment on plaintiff's FMLA interference claim, pointing out that an employer is entitled to enforce its attendance policy as long as it does not do so to interfere with or retaliate against an employee for exercising his or her FMLA rights. The court recognized that until plaintiff's FMLA paperwork was submitted and his leave approved, plaintiff was subject to the requirements of defendant's attendance policy. The court held that, although defendant's strict adherence to its attendance policy was harsh, defendant applied the policy to plaintiff in the same manner it would be applied to an employee not seeking leave under the FMLA. Therefore, defendant did not unlawfully interfere with plaintiff's exercise of his FMLA rights.

Chappell v. The Bilco Company, 675 F.3d 1110, 18 WH Cases2d 1641 (8th Cir. 2012)

The employee was discharged in August 2007 after amassing too many absence points under the employer's attendance program. He had previously sued his employer for violating his FMLA rights, but reached a settlement in July 2006. Under the attendance system, points were assessed for unexcused absences and failing to call-in and speak to a supervisor; disciplinary action was taken at certain point levels or upon certain frequency of accruing points. A point was deducted for every month without an occurrence.

The employee brought both interference and retaliation claims against the employer as to incidents in which he was assessed points. The district court granted the employer's motion for summary judgment, and the Eighth Circuit affirmed. As to the interference claim, the Circuit court determined that the points were assessed against the employee under the attendance program, not because he used FMLA. The court relied on an earlier in-circuit decision that permitted an employer to take action against an employee for violating the employer's call-in policy while on FMLA leave. The court also held that no interference occurred where negative consequences – assessment of a point for not speaking to the supervisor – occurred even if the leave was not FMLA leave.

As to the retaliation claim, the Eighth Circuit held that the employee failed to establish a prima facie case. Specifically, he did not suffer a materially adverse employment action as required by the *McDonnell Douglas* burden-shifting framework. The employee claimed that he suffered adverse employment actions when the employer failed or refused to give him cross-training and moved him from one machine-operator position to another. Even if he had stated a prima facie case, he could not establish pretext. Other workers not on FMLA were disciplined under the policy, and the employer allowed the plaintiff employee FMLA leave on numerous occasions.

Summarized Elsewhere:

Huberty v. Time Warner Enter. Co., 2012 WL 406983 (N.D. Ohio Feb. 8, 2012)

Srouder v. Dana Light Axle Manufacturing, LLC, 2012 WL 1080411 (E.D. Ky. March 30, 2012)

5. Fitness-for-Duty Certification
6. Substance Abuse

Shirley v. Precision Castparts Corp., 2012 WL 2577535 (S.D. Tex. July 3, 2012)

Defendant discharged plaintiff for violating the company's drug-free workplace policy. Plaintiff brought claims under the ADA and FLMA against defendant. Plaintiff voluntarily sought treatment for his addiction to prescription drugs and requested FMLA leave. Defendant granted plaintiff's request for FMLA leave and plaintiff entered into a treatment program. Plaintiff left the program early and began an outpatient program with another doctor.

Defendant's policy provided that anyone suffering from a drug or alcohol program who rejects treatment or who leaves a treatment program prior to being properly discharged will be terminated. Defendant informed the patient that failing to complete the treatment program

amounted to a terminable violation. Defendant allowed plaintiff to reenter the treatment program, but plaintiff once again checked out early after detox rather than completing the program. Defendant discharged plaintiff after he failed to complete treatment for the second time. Plaintiff brought suit against defendant.

In its motion for summary judgment, defendant argued that plaintiff never specifically requested FMLA leave. However, this argument failed because plaintiff is only required to notify defendant of a serious health condition. Defendant also argued that plaintiff violated the company's drug-free workplace policy by failing to complete treatment, and therefore was not eligible for FMLA benefits. Defendant provided evidence that plaintiff left the treatment when the doctor thought it advisable for him to stay. The court found that plaintiff's right to regain his position after FMLA leave was contingent upon completion of the program and compliance with the policy. The court found that defendant did not violate the FMLA by terminating plaintiff based on a clear violation of the policy manual. The court granted defendant's motion for summary judgment.

7. Collecting Employee Share of Group Health Premiums
8. Other Benefits
9. Other Employment During FMLA Leave
10. Restoration to an Equivalent Position for Employees of 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

Lovland v. Employers Mutual Casualty Company, 674 F.3d 806, 18 WH Cases.2d 1552 (8th Cir. 2012)

Plaintiff, a claims supervisor employed by defendant, suffered a back injury in 2008. In early 2009, plaintiff's supervisor, noting that plaintiff had incurred an excessive number of absences, offered plaintiff the opportunity to retroactively designate her absences attributable to her inability to perform her work because of a serious health condition as FMLA leave. Plaintiff then retroactively designated four workweeks and three individual days on which she had been absent as FMLA leave. Even after this designation, plaintiff used 39.5 hours of scheduled paid time off (PTO), 88.25 hours of unscheduled PTO, and 5.5 hours of leave without pay in 2008. After noting that plaintiff had used similar amounts of unscheduled PTO in 2006 and 2007, the supervisor met with and gave plaintiff a corrective action notice, noting that she had accrued significant amounts of unscheduled PTO above and beyond time classified as FMLA leave, and listing attendance expectations for plaintiff. It is undisputed that plaintiff understood that further non-FMLA absences could result in termination of her employment.

Plaintiff's attendance record improved immediately after receipt of the corrective action notice and plaintiff was granted new FMLA leave in April of 2009 to care for her terminally ill father. After her father's death, plaintiff missed two consecutive days of work without notifying a supervisor, as required by defendant's policy, though plaintiff did notify a coworker that she would miss the first of the two days. Defendant's policy defined such an absence as a voluntary resignation and plaintiff's employment was terminated shortly thereafter on the basis of noncompliance with the corrective action notice as well as the policy. Plaintiff filed suit against defendant alleging claims of interference and retaliation under the FMLA.

The Eighth Circuit affirmed dismissal of plaintiff's FMLA claims. On appeal, plaintiff argued that a combination of decisions from other circuits, an Eighth Circuit concurrence, and a change in Department of Labor regulations supported her contention that discrimination occurring after taking FMLA leave could be challenged under 29 U.S.C. § 2615(a)(1)'s exercise of rights provision, rather than under 29 U.S.C. § 2615(a)(2)'s discrimination provision. However, the appellate court determined that, under binding Eighth Circuit precedent, claims of retaliation have been treated as arising only under § 2615(a)(2), and affirmed the district court's dismissal of the plaintiff's § 2615(a)(1) claim. The appellate court further noted that, even if plaintiff could have asserted her § 2615(a)(1) claim on a showing that her use of FMLA leave had been perceived as a negative factor in a subsequent adverse employment action, plaintiff failed to show that the use of the leave caused or even influenced defendant's decision to take corrective action against her.

The appellate court also affirmed the district court's grant of summary judgment to defendant on plaintiff's § 2615(a)(2) retaliation claim. Plaintiff had established a prima facie

case of retaliation, but defendant articulated legitimate, non-discriminatory reasons for plaintiff's discharge – namely, her pattern of excessive work absences and her failure, for two consecutive days, to show up to work or to notify her supervisor of her absence. Plaintiff asserted that defendant's reason was mere pretext, and that (1) she had actually been discharged in retaliation for taking FMLA leave because the corrective action notice was issued as retaliation for taking FMLA leave, and she had been discharged pursuant to the notice; (2) other similarly situated employees were not reprimanded when they reported absences to coworkers rather than supervisors; or (3) defendant had changed its rationale for plaintiff's discharge from violation of the FMLA-referencing corrective action notice to her failure to notify her supervisor of her absences. The appellate court found that the district court properly rejected all three of plaintiff's theories of pretext, finding that she had provided insufficient evidence to support each.

Muhammad-Smith v. Psychiatric Solutions, Inc., 2012 WL 2533965 (N.D. Ohio June 29, 2012)

Plaintiff was employed with the employer as a patient intake assessor. During her employment, plaintiff frequently complained of discriminatory treatment resulting from discipline she received for absences and performance issues. The employer attempted to counsel plaintiff on her performance issues; however plaintiff was dismissive, and continued to complain about discriminatory treatment. The employer decided to discharge plaintiff after determining that her performance issues would not improve. A termination meeting was scheduled; however plaintiff did not attend because she left work early due to high blood pressure. Her doctor subsequently prescribed leave for an indeterminate period. According to the employer, plaintiff's failure to appear at the termination meeting resulted in the termination becoming effective on the date of the meeting. Plaintiff, however, was not notified of her termination until she received an undated termination letter six days later. Three days before plaintiff received the termination letter, the employer received the FMLA paperwork from plaintiff's doctor and responded by sending the necessary FMLA forms. Plaintiff subsequently filed suit alleging violations of Title VII, the FMLA, and state statutes.

In denying the employer's motion for summary judgment on plaintiff's FMLA retaliation claim, the district court found that an issue of fact existed as to when the decision to terminate plaintiff was made. The employer argued that because the decision to terminate was made before plaintiff sought FMLA leave, no causal connection existed and the plaintiff could not establish a prima facie case. The court rejected this argument, finding that the employer sending the FMLA paperwork to the doctor after the termination decision was allegedly made was inconsistent with the argument that their decision to terminate was made before plaintiff sought FMLA leave and was sufficient to establish a causal connection and therefore a prima facie case of retaliation. The court also determined that the testimony of plaintiff's supervisor indicating that the employer did not have cause for termination based on performance, coupled with false testimony regarding the creation date of the termination letter, was sufficient to allow a jury to determine whether pretext existed. The court also denied the employer's motion for summary judgment as to plaintiff's FMLA interference claim. Although the employer argued that it did not refuse or know of any medical need for leave prior to terminating plaintiff, the court determined that evidence existed that plaintiff made the request for FMLA leave prior to being terminated, and thus a genuine issue of material fact existed.

Burnsed v. Pasco Medical Center, LLC, 2012 WL 3264901 (M.D. Fla. Aug. 10, 2012)

Plaintiff, a part-time respiratory therapist at defendant hospital, alleged interference with and retaliation for exercise of her FMLA rights. Defendant filed a motion for summary judgment, which the court denied. Plaintiff had been suffering severe ulcerative colitis and chronic asthma most of her life. In September or October of 2009, plaintiff began her employment with defendant. Until summer of 2010, when plaintiff received a new supervisor, the employer had no issues with plaintiff's performance. The new supervisor expressed serious concerns about plaintiff's work performance and took issue with her absences. Specifically, on or about September 13, 2010, plaintiff was unable to come to work due to her medical problems and her supervisor prepared a corrective action discipline record regarding plaintiff's excessive absences. When plaintiff was presented with the disciplinary record on or about September 15, 2010, she reminded her supervisor of her health conditions and told him she would "check into" FMLA and she would only need FMLA leave intermittently. Five days later, on September 20, 2010, plaintiff was presented with a Performance Improvement Plan ("PIP") addressing work deficiencies. That same day, plaintiff submitted a request for intermittent leave under the FMLA, which was granted. Despite plaintiff's frequent phone calls, defendant failed to schedule plaintiff for any work shifts for several weeks. Thereafter, plaintiff's employment was terminated.

In denying defendant's motion for summary judgment, the court found, as to plaintiff's FMLA interference claim, there was evidence that defendant interfered with plaintiff's right to reinstatement because defendant precluded plaintiff from working shifts, which in turn prevented her from being able to comply with the PIP. As to the retaliation claim, applying the traditional *McDonnell Douglas* burden shifting framework, the court found that the close temporal proximity (five days) between plaintiff's protected conduct of expressing her intent to take FMLA leave and being placed on a PIP regarding alleged poor performance created a genuine issue of material fact of a causal connection between the protected FMLA activity and the adverse action. The court also found there was ample evidence of pretext for the termination – the stated reason for the termination was failure to comply with the PIP, yet the employer made it impossible for the employee do so by failing to schedule her for work. The court also considered that plaintiff's supervisor reacted negatively toward her absences and desire to take FMLA leave. The court concluded that a jury could find that the employer issued plaintiff a PIP, removed her from the work schedule, and ultimately terminated her because of her need for FMLA intermittent leave.

Summarized Elsewhere:

St. Cyr v. Brandywine Senior Living, LLC, 2012 WL 2344858 (D. N.J. June 20, 2012)

Calero v. Cardone Industries, Inc., 2012 WL 2547356 (E.D. Pa. June 29, 2012)

A. Interference With Exercise of Rights

Powell-Pickett v. AK Steel Corp., --- F. Supp. 2d ---, 2012 WL 5248424 (S.D. Ohio Oct. 24, 2012)

Defendant first hired plaintiff to work as a temporary replacement worker during a union lockout, at which time she underwent a physical examination and completed a medical history questionnaire. Following the lockout, plaintiff reapplied and was hired as a regular, full time employee, at which time she underwent a physical examination. In September 2008, plaintiff submitted a request for FMLA leave, including 16-days to assist her daughter who was scheduled for surgery, along with 6-months of intermittent leave thereafter to transport her daughter to doctor appointments. Plaintiff was granted and used the 16-days of FMLA leave. Then in February 2009, plaintiff took a leave of absence for a medical condition that her doctor said would render her totally disabled for one month, after which she could return to work. Before returning to work, however, per company policy plaintiff underwent another physical examination with a company physician, to whom she disclosed additional past and present medical issues and a prior work-related injury with another employer. Plaintiff was subsequently suspended and terminated for inconsistencies in her initial medical questionnaire.

Thereafter, plaintiff filed suit, alleging that the employer violated the FMLA by denying her request for FMLA leave in September 2008 to assist her daughter. Defendant moved for summary judgment, which was granted by the United States District Court for the Southern District of Ohio. While the parties did not dispute that plaintiff requested, was granted, and took 16-days of leave surrounding her daughter's surgery, plaintiff claimed that the employer denied her request for the unspecified "intermittent" leave of 6 months following her daughter's surgery. Ultimately, the Court determined that plaintiff failed to establish a *prima facie* case of FMLA interference because she did not allege (nor did the record show) that she ever submitted a request for intermittent leave for a particular date for a particular reason within the 6-month window, let alone a timely request. Nor did the record establish that the employer approved plaintiff to take intermittent leave at any time in the 6-month window without requesting or properly documenting the leave. To prevail on a claim for FMLA interference, an employee must show that she was entitled to leave, notified the employer of her intention for leave, and was denied the leave – and in the case of foreseeable leave to care for a child, is required to timely advise her employer of the reason for leave and the treatment schedule.

Sullivan-Robinson v. Arkansas Parole Board, 2012 WL 5354797 (E.D. Ark. Oct. 29, 2012)

Plaintiff was an employee of the Arkansas Parole Board who requested FMLA leave in 2007 due to pregnancy complications. She was granted retroactive leave after filing a complaint with the employer. Over the next few years, plaintiff applied, but was not selected, for several promotions. In 2011, plaintiff presented an FMLA leave request form to her supervisor, who requested that plaintiff provide the required medical certification for processing the leave request. Plaintiff refused. After the employer also directed plaintiff to provide the required certification to her supervisor, she again refused and also attempted to circumvent her supervisor. Plaintiff was suspended, placed on probation, and ultimately discharged for insubordination.

Plaintiff filed a lawsuit alleging retaliation and interference in violation of the FMLA. Defendants moved for summary judgment on the basis that plaintiff's interference and retaliation claims had no evidentiary support. The United States District Court for the District of Arkansas agreed and granted summary judgment as to the retaliation claims, finding that plaintiff failed to

present evidence showing her FMLA request played a role in the suspension or termination decisions or showing her FMLA complaint played a role in the failure to promote decisions. The Court also granted summary judgment on plaintiff's interference claim, finding that plaintiff failed to submit evidence that she was entitled to FMLA leave. Finally, the Court indicated that it was legal under the FMLA for the employer to require that all FMLA paperwork first be presented to an employee's direct supervisor.

Washburn v. Gymboree Retail Stores, Inc., 19 WH Cases2d 1634 (W.D. Wash. Sept. 4, 2012)

Plaintiff was an assistant manager at one of the employer's retail locations. After her diagnosis of multiple sclerosis in March 2009, plaintiff requested periodic absences throughout the year – her manager always allowed the absences, but did not classify them as FMLA leave. Eventually, however, plaintiff required an extended period of leave and the employer contacted her to discuss and request support for an FMLA leave of absence. Plaintiff's leave request was granted and extended several times. During this time, plaintiff also complained to the employer about alleged mistreatment and retaliation by her manager and a coworker, including being given dirty looks, being glared at, and being asked to step down from the assistant manager position. When the period of authorized leave was set to expire, the employer contacted plaintiff about returning to work. Plaintiff indicated that she would return to work, but not to her previous store. Although plaintiff identified other locations where she was willing to work, the employer found no availability at the requested locations, and thus processed plaintiff's resignation.

Plaintiff filed suit against the employer and her managers, alleging that they violated her FMLA rights by: (1) failing to provide her proper notice of her FMLA rights; (2) failing to investigate or determine the amount of FMLA leave needed; (3) failing to provide leave when requested; (4) retaliating against her for requesting FMLA rights; and (5) failing to reinstate her upon returning from leave. Defendants moved for summary judgment on the basis that plaintiff suffered no harm as a result of their alleged actions.

The United States District Court for the Western District of Washington granted summary judgment in part and denied it in part. Relying on a Ninth Circuit case directly on point, the Court first denied summary judgment to the extent plaintiff asserted interference because a technical FMLA violation could exist regardless of whether plaintiff suffered damages. Thus, the Court allowed plaintiff to proceed with her claims of failing to provide notice, failing to determine the amount of leave time needed, and failing to provide leave when requested. As to plaintiff's retaliation claim, however, the Court granted summary judgment after finding that the coworker conduct complained of (i.e., being shunned, being glared at) was insufficient to constitute interference. However, the Court allowed plaintiff to proceed on this claim to the limited extent she alleged demotion (i.e., the request that she step down from her position), reasoning that such conduct could deter an employee from taking leave. Finally, the Court granted summary judgment on plaintiff's failure to reinstate claim because plaintiff said she would not return to her old position, and employers have no duty to return employees to a new position following FMLA leave.

Tomici v. New York City Dept. of Education, 2012 WL 6608510 (E.D.N.Y. 2012)

Plaintiff, a probationary public school teacher, brought suit against her former employer for interference and retaliation under the FMLA. Plaintiff suffered a miscarriage in December 2008 and, due to alleged medical issues resulting from the miscarriage, orally requested information about FMLA leave procedures on or about March 27, 2009. The employer's payroll secretary explained the procedures and sent plaintiff a follow-up email that day reiterating the need for proper medication documentation to confirm her leave. On April 1, 2009, plaintiff submitted a doctor's note that lacked a diagnosis and was improperly dated. The employer told plaintiff to submit another doctor's note containing sufficient information to permit processing of the leave request. Plaintiff did not submit a second doctor's note or other FMLA documentation until about a month later. On May 7, 2009, the employer terminated plaintiff's employment for misconduct while on FMLA leave.

Plaintiff's interference claim rested on a theory of discouragement. The district court explained that discouraging an employee from exercising rights protected by the FMLA can amount to a denial of benefits upon a showing that the employer's purported acts of discouragement would have dissuaded a similarly situated employee of ordinary resolve from attempting to exercise his or her FMLA rights. The district court granted summary judgment to the employer on the grounds that no rational juror could find that the employer's request for proper documentation discouraged plaintiff from taking FMLA leave. Plaintiff presented no evidence that there was anything unusual about the employer's need for a documented and specific medical explanation for her absence. With regard to plaintiff's retaliation claim, the district court found that plaintiff met her initial burden making out a *prima facie* case of retaliation because it was undisputed that she was terminated while on FMLA leave. However, the district court granted summary judgment to the employer because numerous documented instances of plaintiff's misconduct predated her FMLA application and established a legitimate nondiscriminatory reason for plaintiff's discharge.

Womack v. Brown-Forman Corp., 2012 WL 4450892 (E.D. Tenn. Sept. 25, 2012)

Plaintiff, a female distillery employee, brought suit against her former employer after a demotion, alleging both interference with her FMLA rights and retaliation in violation of the FMLA, as well as Title VII discrimination. Plaintiff had taken vacation time to assist her ill husband and mother. She was not informed of her right to request FMLA leave. During this time, she was frequently disciplined for job performance, leaving the office without notifying co-workers, and for an abrasive attitude, which resulted in her being placed on performance improvement plans. After some time, plaintiff learned of her right to request FMLA leave, and on the day she requested FMLA leave, she was demoted.

Plaintiff's lawsuit alleged both FMLA interference and FMLA retaliation. Plaintiff alleged that defendant interfered with her FMLA rights by demoting her and by not giving her notice of her FMLA eligibility. However, the demotion did not interfere with plaintiff's ability to take FMLA leave, and she did take FMLA leave after her demotion. Further, no harm came to plaintiff by the lack of notice, as it was company policy for employees to first exhaust vacation time as part of FMLA leave. The court therefore granted summary judgment to the employer on the FMLA interference theory. On the retaliation claim, the court found that plaintiff established a *prima facie* case, and that the employer proffered a legitimate, non-discriminatory reason for the demotion, namely, plaintiff's annual evaluations showing her performance needed

improvement and the disciplinary notices. However, the court found there was additional suspicious evidence, such as references by the employer to the employee's absences and her personal troubles in dealing with family illness, and a reference by her supervisor that another supervisor was looking for an "excuse" to punish the employee, such that the court could not determine that the demotion was not retaliation for exercising her right to take FMLA leave. Therefore, the court denied summary judgment to the employer on the issue of FMLA retaliation.

O'Sullivan v. Siemens Indus., Inc., 19 WH Cases2d 1121, 2012 WL 4355528 (E.D. Mich. Sept. 24, 2012),

Plaintiff, a sales representative, brought claims of FMLA interference and retaliation against her former employer after her supervisor changed her sales territory while she was on FMLA leave. Plaintiff never returned to work, alleging she was constructively discharged because the new sales territory she would have to work allegedly had lower sales potential than her former sales territory.

Plaintiff alleged interference with her FMLA rights. Here, the dispute centered on whether plaintiff was denied the benefits of FMLA leave. Plaintiff was not discharged, but instead argued she was constructively discharged when her sales territory was changed while she was on leave. However, to be constructively discharged, the employee must prove that the conditions of employment were objectively intolerable. As several other employees who previously had that territory had good sales performances and testified that the territory was not objectively intolerable, the court held that she failed to prove constructive discharge. However, an employee does not need to establish constructive discharge she was denied the benefits of FMLA leave, but rather must establish that she was not given an equivalent job when she returned to work. In this case, however, plaintiff never returned to work, and she thus could not prove she was not given an equivalent job. The court therefore granted the employer's motion for summary judgment on plaintiff's interference claim.

Plaintiff also claimed FMLA retaliation. The court found that, although plaintiff's sales territory changed, her base salary, commission structure, job duties, and title all remained the same. Further, based on the performance of other employees, plaintiff would have had the opportunity to earn the same income she earned in her previous territory. Therefore, the court found that plaintiff failed to establish an adverse action and granted summary judgment to the employer on plaintiff's FMLA retaliation claim.

Pereda v. Brookdale Senior Living Communities, Inc., 666 F.3d 1269 (11th Cir. 2012)

Plaintiff was employed at a senior living facility operated by defendant. The employee started working for the employer on October 5, 2008. In June 2009, before she was eligible for FMLA leave, the employee informed the employer that she was pregnant and would need FMLA leave following the birth of her child in November 2009 (by which time she would be eligible for FMLA leave). According to plaintiff, once her employer learned of her pregnancy, the employer began harassing her; denigrated her performance; placed her on a performance improvement plan with unattainable goals; and punished her for leaving work for prenatal doctor visits, despite the fact that she was entitled to, and used, accrued sick and personal leave for those visits. The

employer terminated her employment in September 2009 – about 11 months after her hire and prior to the birth of her child.

The Eleventh Circuit reversed the district court’s dismissal, holding that that the FMLA protects employees who make a pre-eligibility request for post-eligibility leave from both interference and retaliation. The court reasoned that, because the FMLA requires advance notice of foreseeable leave, employees who provide such notice are protected for interference prior to the occurrence of the “triggering event” (in this case, the birth of the child). After examining several elements of the FMLA’s regulatory scheme, the court concluded that accepting the district court’s holding (that the plaintiff could not bring an FMLA claim because she was not entitled to the leave at the time she requested it) would turn the advance notice requirement into a “trap,” creating a loophole through which employers could require advance notice from ineligible employees while having complete freedom to terminate those employees before they attain eligibility, in order to avoid having to accommodate their FMLA rights.

Tomici v. New York City Dept. of Education, 2012 WL 6608510 (E.D.N.Y. 2012)

Plaintiff, a probationary public school teacher, brought suit against her former employer for interference and retaliation under the FMLA. Plaintiff suffered a miscarriage in December 2008 and, due to alleged medical issues resulting from the miscarriage, orally requested information about FMLA leave procedures on or about March 27, 2009. The employer’s payroll secretary explained the procedures and sent plaintiff a follow-up email that day reiterating the need for proper medication documentation to confirm her leave. On April 1, 2009, plaintiff submitted a doctor’s note that lacked a diagnosis and was improperly dated. The employer told plaintiff to submit another doctor’s note containing sufficient information to permit processing of the leave request. Plaintiff did not submit a second doctor’s note or other FMLA documentation until about a month later. On May 7, 2009, the employer discharged plaintiff for misconduct while on FMLA leave.

Plaintiff’s interference claim essentially rested on a theory of discouragement. The district court explained that discouraging an employee from exercising rights protected by the FMLA can amount to a denial of benefits upon a showing that the employer’s purported acts of discouragement would have dissuaded a similarly situated employee of ordinary resolve from attempting to exercise his or her FMLA rights. The district court granted summary judgment to the employer on the grounds that no rational juror could find that the employer’s request for proper documentation discouraged plaintiff from taking FMLA leave. Plaintiff presented no evidence that there was anything unusual about the employer’s need for a documented and specific medical explanation for her absence. With regard to plaintiff’s retaliation claim, the district court found that plaintiff met her initial burden making out a *prima facie* case of retaliation because it was undisputed that she was discharged while on FMLA leave. However, the district court granted summary judgment to the employer because numerous documented instances of plaintiff’s misconduct predated her FMLA application and established a legitimate nondiscriminatory reason for plaintiff’s discharge.

Dove v. Community Education Centers Inc., 2012 WL 5403508 (E.D. Pa. Nov. 5, 2012)

Plaintiff began working as a prison guard at the defendant correctional facility in May 2010. In February 2010, plaintiff informed his employer that he was dealing with depression and seeing a psychiatrist. From March 2011 through June 2011, plaintiff requested intermittent time off work. During that time, he alleged he was subjected to unfair and disparate discipline, subjected to disparaging comments about his mental health problems, including management calling him “crazy”, and assigned inferior work assignments. Plaintiff was discharged on July 1, 2011 for allegedly failing to keep a control room door secured earlier in the week. Plaintiff sued claiming interference and retaliation under the FMLA. Defendant filed a motion to dismiss under Rule 12(b)(6) claiming that plaintiff’s complaint failed to state a claim under the FMLA. The court denied defendant’s motion.

On the interference claim, defendant first argued that plaintiff failed to allege that he was employed for at least twelve months after his hiring in May 2010. In rejecting this argument, the district court noted that plaintiff alleged he requested leave beginning in March 2011 through his termination in June 2011 and, thus, he would be covered for actions occurring in May and June. The court also rejected defendant’s argument that plaintiff failed to allege he was denied medical leave prior to his termination because “the mere failure to inform an employee of his FMLA rights is sufficient to establish interference if the Plaintiff suffered prejudice as a result.” The court noted that plaintiff had alleged he was fired as a result of requesting FMLA leave.

On the retaliation claim, the court rejected defendant’s argument that plaintiff had not alleged an adverse action or that any adverse action was based on his requests or entitlement to FMLA leave. The court observed that plaintiff had alleged he was discharged and given inferior work assignments, both of which constituted adverse changes. Finally, the court concluded that the overlap between the time periods in which plaintiff alleged his hostile work environment occurred and he requested leave, particularly in combination with the disparaging comments allegedly made to the employee, was sufficient to suggest the adverse actions were caused by his FMLA leave requests.

Washburn v. Gymboree Retail Stores, Inc., 19 WH Cases2d 1634 (W.D. Wash. Sept. 4, 2012)

The plaintiff was an assistant manager at one of the employer’s retail locations. After her multiple sclerosis diagnosis in March 2009, the plaintiff requested periodic absences throughout the year. Her manager always allowed the absences, but did not classify them as FMLA leave. Eventually, however, the plaintiff required an extended period of leave, and the employer contacted her to discuss and request support for FMLA leave. The plaintiff’s leave request was granted and extended several times. During this time, the plaintiff complained to the employer about alleged mistreatment and retaliation by her manager and a coworker, including being given dirty looks, being glared at, and being asked to step down from her assistant manager position. When her FMLA leave was set to expire, the employer contacted the plaintiff about returning to work. She indicated that she would return to work, but not to her previous store. Although the plaintiff identified other locations where she was willing to work, the employer found no availability at the requested locations, and thus processed the plaintiff’s resignation.

The plaintiff filed suit against the employer and her managers, alleging they violated her FMLA rights by: (1) failing to provide her proper notice of her FMLA rights; (2) failing to investigate or determine the amount of FMLA leave needed; (3) failing to provide leave when

requested; (4) retaliating against her for requesting FMLA rights; and (5) failing to reinstate her upon returning from leave. The defendants moved for summary judgment on the basis that plaintiff suffered no harm as a result of their alleged actions.

The court granted summary judgment in part and denied in part. Relying on a Ninth Circuit case, the court first denied summary judgment to the extent the plaintiff asserted interference because a technical FMLA violation could exist regardless of whether the plaintiff suffered damages. Thus, the court allowed the plaintiff to proceed with her interference claims. As to the plaintiff's retaliation claim, however, the court granted summary judgment because the coworker conduct complained of (i.e., being shunned, being glared at) was insufficient to constitute retaliation. However, the court allowed the plaintiff to proceed on this claim to the limited extent she alleged a demotion (i.e., the request that she step down from her position), finding that such conduct could deter an employee from taking leave. Finally, the court granted summary judgment on the plaintiff's failure to reinstate claim because plaintiff said she would not return to her old position, and employers have no duty to return employees to a new position following FMLA leave.

Sullivan-Robinson v. Arkansas Parole Board, 2012 WL 5354797 (E.D. Ark. Oct. 29, 2012)

The plaintiff was an employee of the Arkansas Parole Board who requested FMLA leave in 2007 due to pregnancy complications. She was granted retroactive leave after filing a complaint with the employer. Over the next few years, the plaintiff applied, but was not selected, for several promotions. Later in 2011, the plaintiff presented an FMLA leave request form to her supervisor, who requested that the plaintiff provide the required medical certification for processing the leave request. The plaintiff refused. After the employer also directed the plaintiff to provide the required certification to her supervisor, the plaintiff again refused and attempted to circumvent her supervisor. The plaintiff was suspended, placed on probation, and ultimately discharged for insubordination.

The plaintiff filed a lawsuit alleging retaliation and interference in violation of the FMLA. The defendants moved for summary judgment on the basis that the plaintiff's interference and retaliation claims had no evidentiary support. The court agreed and granted summary judgment as to the retaliation claims, finding that the plaintiff failed to present evidence showing her FMLA request played a role in the suspension or termination decisions or showing her FMLA complaint played a role in the failure to promote decisions. The court also granted summary judgment on the plaintiff's interference claim, finding the plaintiff failed to submit evidence that she was entitled to FMLA benefits. Finally, the court indicated it was legal under the FMLA for the employer to require that all FMLA paperwork first be presented to an employee's direct supervisor.

Powell-Pickett v. AK Steel Corp., --- F. Supp. 2d ---, 2012 WL 5248424 (S.D. Ohio Oct. 24, 2012)

The defendant first hired the plaintiff to work as a temporary replacement worker during a union lockout, at which time she underwent a physical examination and completed a medical history questionnaire. Following the lockout, the plaintiff reapplied and was hired as a regular,

full time employee, at which time she underwent another physical examination. Later in September 2008, the plaintiff submitted a request for FMLA leave, including 16 days to assist her daughter who was scheduled for surgery, along with 6 months of intermittent leave thereafter to transport her daughter to and from doctor appointments. The plaintiff was granted and used the 16 days of FMLA leave. Then in February 2009, the plaintiff took a leave of absence for a medical condition that her doctor said would render her totally disabled for one month, after which she could return to work. Before returning to work and per company policy, however, the plaintiff underwent another physical examination with a company physician. During the examination, the plaintiff disclosed additional past and present medical issues and a prior work-related injury with another employer. The plaintiff was subsequently suspended and terminated for inconsistencies with her initial medical questionnaire.

Thereafter, the plaintiff filed suit, alleging the employer violated the FMLA by denying her request for FMLA leave in September 2008 to assist her daughter. The defendant moved for summary judgment, which the court granted. While the parties did not dispute that the plaintiff requested, was granted, and took 16 days of leave surrounding her daughter's surgery, the plaintiff claimed the employer denied her request for the 6-month unspecified "intermittent" leave following her daughter's surgery. Ultimately, the court determined the plaintiff failed to establish a *prima facie* case of FMLA interference because she did not allege (nor did the record show) that she ever submitted a request for intermittent leave for a particular date for a particular reason within the 6-month window, let alone a timely request. Nor did the record establish that the employer approved the plaintiff to take intermittent leave at any time in the 6-month window without requesting or properly documenting the leave. After all, to prevail on a claim for FMLA interference, an employee must show that she was entitled to leave, notified the employer of her intention for leave, and was denied the leave, and – in the case of foreseeable leave to care for a child – is required to timely advise her employer of the reason for leave and the treatment schedule.

Summarized Elsewhere:

Nichols v. City of Mitchell, 2012 WL 5471159 (Bkrctv. D.S.D. Nov. 9, 2012)

Butler v. Champion, 2012 WL 78200 (S.D.Ohio 2012)

Caloia v. Putnam Investments, LLC, 2012 WL 3600345 (Aug. 21, 2012)

1. *Prima Facie* Case [New Topic]

Ellison v. Oaks 422 LLC, 2012 WL 876723 (E.D. Pa. March 15, 2012)

Plaintiff, a supervisor formerly employed by defendant furniture stores and their common parent companies, had been approved for periods of FMLA leave on at least six occasions between 2004 and 2010, the last of which concluded no later than July 3, 2010. Plaintiff was disciplined several times throughout 2009 and in November 2010, plaintiff was the subject of numerous disciplinary actions, including a one-day suspension for verbal altercations with colleagues, an investigation into an allegation that he had directed a subordinate to falsify company reports, and, ultimately, discharge in January of 2011 for failure to comply with that

investigation. Plaintiff claimed that, after returning from his last FMLA leave, he was treated with animosity by his coworkers and by his direct supervisor, though he was unsure if the manager treated other subordinates any differently.

After his discharge, plaintiff filed an action against defendants alleging claims of interference and retaliation under the FMLA. Defendants subsequently filed a motion for summary judgment as to plaintiff's claims. In granting defendants' motion as to the interference claim, the court found that there was no evidence that defendants prevented plaintiff from taking FMLA leave or that defendants discharged plaintiff to prevent him from taking additional FMLA leave in the future. Turning to plaintiff's retaliation claim, the court found that plaintiff had not established a *prima facie* case of retaliation. There was no dispute that plaintiff had taken multiple FMLA leaves and that he had suffered an adverse employment action when he was discharged. However, the court applied the standard set out in *Urey v. Grove City College*, 94 F. App'x. 79, 81 (3d Cir. 2004), that "if at least four months pass after the protected action without employer reprisal, no inference of causation is created," and determined that the six months that had passed between the end of plaintiff's last period of FMLA leave and his discharge created no inference of causation. The court further found that plaintiff had not offered evidence that he was treated with antagonism as a result of his taking FMLA leave; his coworkers had no influence on any adverse employment action taken against plaintiff, and there was no evidence that any animosity on the part of plaintiff's supervisor was in any way related to the plaintiff's use of FMLA leave.

Although the court found that plaintiff had failed to establish a *prima facie* case of retaliation, it continued its analysis and found that defendants had articulated plaintiff's disciplinary record as a legitimate, non-discriminatory reason for his discharge, and that plaintiff presented no evidence to support his contention that defendants' reason was pretext. Moreover, plaintiff did not dispute the legitimacy of defendants' articulated reason. In light of its findings, the court granted summary judgment to defendants on the retaliation claim as well.

Rowe v. U.S. Bancorp, 2012 WL 733859 (C.D. Ill. March 6, 2012)

Plaintiff, a mortgage opener suffering from Multiple Sclerosis, contended that she was subjected to increased criticism, less cooperation, and provided less support following her request for six weeks' leave for surgery. After completing the medical certification for the six-week leave, confirming her surgery date, and initiating an FMLA claim with the employer's insurer, plaintiff was discharged for poor performance one day before she was set to begin her leave. The effective date of her discharge was set a few days before her initial leave period was set to expire. Plaintiff later sought a four-day extension to her leave period, but the employer apparently did not consider extending the leave period.

Plaintiff subsequently filed suit under a host of statutes, including the FMLA. The employer filed a motion to dismiss her FMLA interference claim, arguing that it provided plaintiff with most or all of the leave she requested. The court, however, noting that plaintiff's initial leave period was cut short by four days and her request for an additional four days' leave was not acted on, denied defendant's motion.

Bowman v. St. Luke's Quakertown Hospital, 2012 WL 6527402 (E.D. Pa. Dec. 13, 2012)

Plaintiff, an emergency medical technician, suffered a transient ischemic attack (TIA) on December 23, 2009. Plaintiff requested leave under the FMLA, but was informed by his employer that it was unnecessary as he had accrued over 200 hours of sick leave. Upon returning to work, Plaintiff alleged he was subjected to discriminatory treatment on the basis of his disability. Beginning in March 2010, plaintiff was disciplined for excessive absenteeism. Plaintiff claimed his absences were a result of additional TIAs and that he never exceeded his accrued sick leave or failed to follow his employer's call-off procedures. Plaintiff was discharged in August 2010 due to excessive absenteeism. Plaintiff filed suit, alleging that his employer interfered with his FMLA rights by failing to offer and afford him leave.

The court denied defendant's motion to dismiss. First, the court considered whether plaintiff alleged that he was an eligible employee. Defendant contended that plaintiff did not expressly plead that he worked 1250 hours during the 12 month period preceding his leave. The court rejected defendant's argument, finding that plaintiff plead that he worked for defendant for over five years and that defendant did not allege that plaintiff's employment was interrupted to an extent that he failed to work the requisite hours. Second, the court considered whether plaintiff alleged that he was entitled to FMLA leave. Defendant argued that plaintiff failed to allege that he suffered from a serious health condition. The court rejected defendant's argument, finding that plaintiff suffered from multiple TIAs over the course of several months which required medical leaves of absence.

Finally, the court considered whether plaintiff notified defendant of his need for FMLA leave. Specifically, defendant contended that plaintiff never informed defendant that he suffered additional TIAs, that these additional TIAs were the cause of his absences, or that he desired FMLA leave for these absences. The court found that whether the subsequent absences provided defendant with adequate notice was not ripe for resolution.

Townsend v. St. John's Hosp., 2012 WL 4434713 (C.D. Ill. Sept. 24, 2012)

Plaintiff alleged that her discharge at the conclusion of her 2007 FMLA leave constituted both FMLA interference and retaliation. Plaintiff worked as a case manager for the employer's fifth floor cardiac unit. Plaintiff had requested (and been granted) FMLA leave in 2006 and early 2007. On June 11, 2007, plaintiff began taking FMLA leave for an ankle fracture that required surgery. The employer mistakenly believed that the plaintiff's FMLA leave expired on August 26, 2007. On July 31, 2007, plaintiff's doctor advised the hospital that she could not work until her next appointment four weeks later. Accordingly, because plaintiff would be unable to return to work when her FMLA leave expired, the employer posted plaintiff's position and hired her replacement.

Plaintiff contended that her FMLA leave did not actually expire until September 3, 2007. On August 28, 2007, plaintiff's doctor advised that she could return to work on September 3rd with the use of crutches and a walking boot as needed. The employer told plaintiff that she could not return to work with any restrictions, but (as per hospital policy) provided plaintiff with 90 days to find another job for which she was qualified. When plaintiff did not find another job, her employment was terminated on January 11, 2008.

The court granted the employer's motion for summary judgment as to plaintiff's FMLA interference claim, but denied summary judgment as to plaintiff's FMLA retaliation claim. As to the FMLA interference claim, plaintiff made an equitable estoppel argument that the hospital could not impose an incorrect August 20, 2007 return to work date. However, the court found that plaintiff did not suffer any interference with her rights because she was unable to return to work on August 20, 2007 when the hospital deemed her leave period to have expired. The court also ruled that any dispute as to plaintiff's FMLA expiration date was immaterial because the hospital provided plaintiff with 100% of the leave to which she was entitled.

As to the FMLA retaliation claim, the court found a genuine issue of material fact as to whether there was a causal connection between plaintiff's FMLA leave and her termination. The court largely based its ruling on an ambiguous e-mail from human resources to plaintiff's supervisor stating: "hopefully, he will extend her leave for another week which will get us past the 12-week mark." The court also found a material factual issue regarding whether the hospital permitted other employees to return to work with restrictions.

Turner v. Florida Prepaid College Board, 2012 WL 4208923 (N.D. Fla. Sept. 20, 2012)

Plaintiff filed suit against her former employer for race discrimination and retaliation based on her race and on her FMLA leave. Specifically, plaintiff contended that the employer retaliated against her for exercising her rights under the FMLA by terminating her employment the same day she returned from leave.

The employer moved for summary judgment on the grounds that plaintiff had no evidence supporting her FMLA retaliation claim and the court agreed. Plaintiff presented evidence that, while out on FMLA leave, she informed the employer's human resources department that her supervisor had been discriminating against her based on race, age, religion, and for exercising her FMLA leave rights. However, the facts were undisputed that plaintiff had not previously raised any such FMLA-retaliation issues and admitted that she did not previously believe she had been treated unfairly. The facts were also undisputed that plaintiff's supervisor made a recommendation to terminate her employment before the FMLA leave began and before the supervisor was even aware of plaintiff's leave request. Plaintiff admitted in deposition that she was not aware of any actions taken by her employer that impacted her ability to take FMLA leave – it was not until after plaintiff returned to work in January 2011 that she contended the retaliation commenced with her termination. Accordingly, the court granted summary judgment for the employer in large part because the termination recommendation by plaintiff's supervisor was made prior to plaintiff's FMLA leave.

Cordero v. AFI Food Service, LLC, 2012 WL 5989424 (D. N.J. Nov. 29, 2012)

Plaintiff was employed as a full-time receiver at a warehouse located in Elizabeth, New Jersey. The employee requested FMLA leave to care for his wife, who was diagnosed with cancer. At the time of the request, the employee was not eligible for FMLA leave, but was granted paid time off to care for his wife. Once the employee was eligible for leave, the employee failed to deliver FMLA paperwork until six months after his eligibility under the

FMLA. About one month later, the employee was discharged. The employee alleged that his discharge was in retaliation for taking intermittent leave. The employer moved for summary judgment on the basis that the employee was discharged as a result of multiple mistakes costing employer thousands of dollars. The employee acknowledged that he had violated workplace rules, had made the mistakes, and that other employees had also been discharged for similar matters in accordance with the employer's policy.

The district court granted the employer's motion for summary judgment on the grounds that the employer had established a nondiscriminatory reason for the employee's discharge. The district court rejected the employee's arguments that he had been retaliated against, noting that the employee was granted leave despite not specifically requesting leave and failing to complete FMLA paperwork as required by the employer's policy. In addition, the district court rejected the employee's pretext argument, and that the mistakes resulted from the stress of being denied FMLA leave, because the employee had multiple write-ups throughout this employment and the employee had acknowledged that he could be terminated for even one write-up.

Stroud v. Greystar Management Services, LP and JPI Mgm't, 2012 WL 3136214 (D. Md., Jul 31, 2012)

The employee was hired by JPI Management on June 7, 2007. On January 6, 2009, the employee was warned to avoid involvement in employee-related issues after complaining about a fellow employee being denied a FMLA leave. Later that month, defendant took over for JPI, and JPI was no longer the plaintiff's employer. In March 2009, plaintiff received another warning, but this time from defendant, about assisting other employees in exercising their rights. Plaintiff was later discharged and alleged that between March 2009 and her discharge, she was subjected to disparate treatment.

In her suit, plaintiff alleged that defendant interfered with other employees' rights and discriminated against her for opposing its actions. The district court granted defendant's motion to dismiss because the alleged violations occurred when defendant was not her employer. The court also denied plaintiff leave to amend because she could not cure the claims against defendant.

Wells v. Cincinnati Children's Hosp. Med. Ctr., 860 F. Supp. 2d 469 (S.D. Ohio)

Plaintiff, a nurse, alleged that the hospital where she worked violated her FMLA rights when it suspended her from work and did not reinstate her to the same unit after she returned from leave. Plaintiff worked in the Critical Airway unit before she took FMLA leave to have surgery. When she returned to work, she was placed in a position with a lower salary because defendant determined that she could not perform the duties required by her prior position. Defendant argued that plaintiff was not entitled to restoration when she came back to work because her twelve weeks of FMLA leave had expired by the time she returned. However, of the three doctors who evaluated plaintiff during her FMLA leave, one cleared the plaintiff for work before her FMLA leave expired. The court found that because one of the three doctors cleared plaintiff for work, there was a material issue of fact whether the plaintiff could perform all of the

essential functions of her job before the expiration of her FMLA leave. Accordingly, the court denied summary judgment for defendant on this issue.

Plaintiff also alleged that defendant violated her rights by retaliating against her. Defendant suspended plaintiff from work after she returned from her FMLA leave because she exhibited unusual behavior as a result of the pain medication she was prescribed after her surgery. The court found that because plaintiff had been on intermittent leave for over a year at the time she was suspended, any temporal connection between her use of FMLA leave and the decision to suspend her was tenuous. It further noted that the record established that the decision to suspend plaintiff was precipitated by her unusual behavior. The court noted that defendant actually required plaintiff to use her available FMLA leave when she was being evaluated for her fitness to return to work. Thus, it would be highly unlikely that defendant both urged plaintiff to take leave to address a serious medical condition and subsequently retaliated against her for having done so. For these reasons, the court found that there was no causal connection between the suspension and plaintiff's FMLA leave. Accordingly, the court entered summary judgment for defendant on this issue.

Elsayed v. The University of Houston, 2012 WL 2870699 (S.D. TX, July 11, 2012)

Plaintiff sued her former employer alleging interference and retaliation under the FMLA. Plaintiff alleged that while she was on maternity leave, she received information from her coworkers that her superiors were impatiently asking whether she had delivered her baby. She alleged that she received a telephone call from her supervisor, who threatened that if she did not return to work early from leave, she would not have any advancement opportunities. Plaintiff also alleged that another supervisor suggested during a staff meeting that defendant start interviewing for plaintiff's position because she was not coming back. Upon her return to work, plaintiff was reinstated to her pre-leave position. Plaintiff alleged that management greeted her with hostilities and refused to offer her a convenient and private room to pump her breast milk. After she complained to management and human resources, plaintiff alleged she was singled out for disciplinary action and that her relationship with her supervisor and management grew more intense, rude and insulting. She was suspended without pay and eventually discharged.

Defendant moved to dismiss plaintiff's FMLA interference claim for failure to state a claim. The court granted defendant's motion, with leave to amend the complaint. The court found that plaintiff's allegations did not state a viable cause of action for interference with FMLA rights because she did not allege she was denied leave or that she refrained from taking leave because of the employer's discouragement.

Johnson v. Dollar General et al., 2012 WL 3072997 (N.D. Iowa Jul 30, 2012)

In November 2008, plaintiff had a heart attack and was granted six weeks "company" leave as he did yet qualify for FMLA leave. On April 30, 2009, plaintiff had flu-like symptoms for which he called his doctor. He was advised to go to the hospital due to his medical history, but he refused stating he knew he had the flu and was not experiencing a heart attack. He sought no further medical attention. He called his assistant manager and requested five vacation days, and then left a voice mail for the district manager stating that he was having chest pains. The

parties agreed the manager attempted to reach plaintiff by telephone on May 1 and May 5 but disagreed in the content of the message. Defendants contended that the May 5 message instructed plaintiff merely to contact the manager, whereas plaintiff claimed that he was given 30 minutes to return the call or be fired. Nonetheless, plaintiff did not contact the district manager until after midnight to resign for “medical reasons.”

Plaintiff sued claiming defendants violated the FMLA by (1) not notifying him of his rights, (2) failing to grant him a FMLA leave, (3) retaliating against him for exercising his rights, (4) discriminating against him for exercising his rights, and (5) using a pretext to fire him. In addressing defendant’s motion for summary judgment as to plaintiff’s interference claim, the court analyzed whether plaintiff had a serious health condition, and determined that because plaintiff had not received any continuing treatment, his interference claim failed. The court also dismissed the claim of failure to notify plaintiff of his rights for the same reason.

Next, the court addressed the retaliation claim and found that notice of need for leave is protected conduct irrespective of whether the employee is actually eligible for leave. Stated another way, at issue was only whether the plaintiff gave notice that he needed leave for a condition that he believed, in good faith, might be covered by FMLA. The court found that he did not have a good faith belief that his leave might be protected because he had not received treatment, had not complained to the doctor about chest pains, and the doctor had not instructed him to take any time off. Thus, because he had not engaged in protected conduct, the retaliation claim was dismissed.

Staley v. U.S. Bank National Association, 115 FEP Cases 1347 (D. Idaho 2012)

The employee worked for the employer as a teller coordinator for four years and received two promotions, one in 2008 and one in 2009. In late 2009, the employee announced she was pregnant with her second child. The employee planned to take twelve weeks of maternity leave beginning on April 26, 2010. On April 2, 2010, an anonymous caller contacted the employer’s ethics hotline and reported that the employee was using her corporate credit card to make purchases for her family during business trips. During an investigation, the employee acknowledged that she purchased food for her family, but did not exceed her \$35.00 daily travel allotment and the amount she spent on her family totaled approximately \$60.00. On the Monday following her interview, employee overheard the investigator speaking in a negative tone about her pregnancy. Later that day, the employee was terminated. The employee filed suit, alleging the employer interfered with her rights under the FMLA.

The district court denied the employer’s motion for summary judgment on the employee’s FMLA claim, holding that the employee had produced sufficient evidence to create a genuine issue of material fact as to whether her intention to take maternity leave under the FMLA was a factor in her termination. Stating that it would not apply *McDonnell Douglas* burden shifting to an FMLA claim, the court noted the plaintiff only needed to show that her intention to take medical leave under the FMLA was a negative factor in the decision to terminate her. Employee had produced evidence to survive employer’s motion for summary judgment by showing that the a decisionmaker commented negatively on her pregnancy hours before her termination and by showing that employer had not terminated similarly situated non-

pregnant workers for violations of the same credit card policy in which employee was allegedly terminated.

Peru v. T-Mobile USA, Inc., 2012 WL 4097279 (D. Col. Sept. 17, 2012)

Plaintiff was employed by defendant in various customer service positions between 2001 and 2009. She suffers from a disability and claims that beginning in 2007, defendant's representatives began a campaign of "harassment, hostility, bullying and mistreatment" because of her condition. In July 2007, she sought an accommodation in the form of a 32-hour work week and the right to take intermittent leave under the FMLA. However, the defendant refused to properly accommodate her or to provide the requested leave and, instead, held her absences against her in making promotion decisions and in determining her commissions. As a result, plaintiff ultimately resigned and filed suit against defendant, alleging claims under the ADA, the FMLA and various state law breach of contract and tort claims. Following discovery, the defendant moved for summary judgment.

The district court denied defendant's summary judgment motion as to plaintiff's FMLA interference claim, holding that plaintiff had demonstrated that on several occasions, she requested and believed that she was taking approved FMLA leave, yet defendant counted those absences as unexcused and, despite multiple efforts by plaintiff to correct the mis-designations, defendant failed or refused to do so in some instances, resulting in significant reductions in plaintiff's commission-based compensation. However, given the good faith efforts of defendant to attempt to accommodate plaintiff's health condition and to correct mis-designations of her absences, and absent other evidence sufficient to establish a constructive discharge, the court granted summary judgment as to plaintiff's FMLA retaliation claim.

Melilli v. Southeastern Penn. Transp. Auth., 2012 WL 4473132 (E.D. Pa. Sept. 28, 2012)

Plaintiff worked for defendant from 1987 until his termination from employment in October 2008. During his employment, the employee had a history of attendance issues, including non-FMLA occurrences. In January 2008, plaintiff requested FMLA leave to care for his wife, but his leave request was not approved. Instead, plaintiff called in sick on the days he was needed to care for her and, as a result, was eventually dropped from the employer's roll. Plaintiff was later reinstated. Then, in August 2008, plaintiff requested and received FMLA leave due to his own serious health condition of panic and anxiety disorders, on an intermittent basis of three to five days per month. In September 2008, plaintiff attempted to take FMLA leave after already reporting to work for the day. Although defendant's third party administrator approved this leave, plaintiff's supervisors denied the request, telling plaintiff that he had "to call in before your shift with FMLA." The supervisors conceded in deposition that this was incorrect and that they never informed plaintiff of their mistake. On October 16, 2008, after already using his five days of allotted FMLA leave for the month, the third party administrator informed plaintiff that he would have to submit a revised medical certification in order to be approved for additional FMLA leave each month.

Later that same day, plaintiff was caught sleeping, or assuming the position of sleep, on top of a bus while at work. After a formal hearing on October 31, 2008, plaintiff was terminated from employment. The hearing officer issued a report stating that the sleeping incident justified

the plaintiff's termination from employment, and also citing to the plaintiff's "less than stellar work record" including his "seriously flawed attendance/performance record." Plaintiff filed suit, alleging claims of FMLA interference based on the three separate events occurring in January, September, and October 2008, and FMLA retaliation as a result of his termination from employment. The defendant filed a motion for summary judgment on each of the plaintiff's claims.

The district court granted the defendant's motion for summary judgment as to the January and October 2008 claims of FMLA interference, holding that these claims were barred by the two-year statute of limitations and that the three-year statute of limitations for willful violations did not apply. However, with respect to the September 2008 interference claim, the court found there to be a genuine issue of material fact as to whether the denial of the plaintiff's request for FMLA leave was willful. The district court also found that the plaintiff established a *prima facie* case of FMLA interference with respect to the September 2008 incident, because there was no dispute that the plaintiff was entitled to FMLA benefits, to which he was denied. Finally, the court denied summary judgment as to the FMLA retaliation claim, determining that plaintiff established a *prima facie* case of FMLA retaliation. The court found that the hearing officer's discussion of plaintiff's attendance issues in his report "undoubtedly included FMLA leave" and, therefore, a jury could find that the discharge decision was causally related to the plaintiff's leave. The court determined that the defendant's reason for the plaintiff's discharge, sleeping or in a sleeping position on top of a bus, constituted a legitimate, non-retaliatory reason. However, based on the hearing officer's reference to the plaintiff's attendance issues and a statement by plaintiff's supervisor to the third party FMLA administrator that the plaintiff "is an abuser" of the FMLA, the court found a genuine issue of material fact existed as to the issue of pretext, thus precluding summary judgment on the FMLA retaliation claim.

Summarized Elsewhere:

***Branham v. Gannett Satellite Infor. Network, Inc.*, 2012 WL 1155928 (M.D. Tenn. Apr. 6, 2012)**

***Lorenz v. Magee Women's Hosp. of U.P.M.C.*, 2012 WL 1229369 (Apr. 12, 2012)**

***Wilson v. Virgin Islands Water & Power Auth.*, 2012 WL 745613 (3d Cir. March 8, 2012)**

***Karr v. Dow Agrosciences LLC*, 2012 WL 1365438 (Apr. 19, 2012)**

***Pettus v. Harvey*, 2012 WL 1247111 (Apr. 13, 2012)**

***McKenna v. Liberty Mut. Group Inc.*, 468 Fed.Appx. 413 (5th Cir. 2012)**

***Wirey v. Richland Community College*, 2012 WL 6681214 (C.D. Ill., Dec. 21, 2012)**

***Weiler v. Draper Chevrolet Co.*, 19 WH Cases2d 1728, 2012 WL 3758732, (E.D. Mich. Aug. 29, 2012)**

***Kinds v. Ohio Bell Tel. Co.*, 2012 WL 3075304 (N.D. Ohio, Jul. 30, 2012)**

Furry v. Lehigh Valley Health System, 2012 WL 4510760 (E.D. Pa. Sept. 28, 2012)

2. Interference Claims [New Topic]

Lorenz v. Magee Women's Hosp. of U.P.M.C., 2012 WL 1229369 (Apr. 12, 2012)

The employee, who worked as a department assistant, had disagreements with her supervisor regarding hospital policies. The supervisor changed the employee's work assignment to work at a specific location on selected days, yelled at and humiliated the employee during training, and threw documents on the floor for the employee to pick up. The employee requested a medical leave due to anxiety, high blood pressure and panic attacks, and the employer approved the employee's leave. The employee returned to work and requested to move back to her original work assignment as a reasonable accommodation. The employer allowed the employee to return to her original work assignment. The employee continued to work at her original work assignment until she resigned and took another job that paid \$2.00 less per hour.

The employee then filed suit against the employer, alleging FMLA interference. The Western District Court in Pennsylvania denied the employer's motion to dismiss the FMLA interference claim. According to the court, while the employer granted the employee's FMLA leave, the employee's statement that the employer threatened to retaliate if the employee took intermittent leave under the FMLA was sufficient to support a reasonable inference that the employer discouraged the employee from taking FMLA leave. Additionally, the court found that the employee's action of taking a job that paid \$2.00 less per hour was sufficient to create a reasonable inference that the employer interfered with the employee's FMLA right.

Bradley v. Little Rock Wastewater Util., 2012 WL 174382 (E.D.Ark. Jan. 20, 2012)

Plaintiff suffered from diabetes and his supervisor was aware of his condition because plaintiff often attributed time he took off work to his diabetes. Plaintiff also took FMLA leave due to a hip injury. After plaintiff was discharged ten months following his leave, plaintiff filed suit alleging FMLA interference and retaliation.

The court held that plaintiff could not establish an interference claim because he did not give defendant notice of his need for FMLA leave. The court stated that his supervisor's knowledge of his diabetes was not sufficient because plaintiff never missed work for more than three consecutive days due to his diabetes. Instead, because his absences attributable to his diabetes were short and sporadic, they did not constitute a sufficient period of incapacity that would require FMLA leave. The court also found that plaintiff failed to make out a *prima facie* case for FMLA retaliation. The court pointed to the fact that his discharge occurred more than ten months after his FMLA leave due to his hip injury. Moreover, defendant pointed to several performance-based reasons for plaintiff's discharge.

Peoples v. Langley/Empire Candle Co., 2012 WL 171340 (D. Kan. Jan. 20, 2012)

On February 19, 2009, plaintiff informed defendant that she needed FMLA leave beginning February 26 for a hernia repair surgery. Plaintiff submitted an FMLA request form,

which indicated that she expected to be absent for four to six weeks. The form also informed plaintiff that she was required to submit a fitness-for-duty certificate in order to be restored to her position. Plaintiff received a Notice of Eligibility and Rights and Responsibilities dated February 23 reiterating this information. On March 3, plaintiff underwent surgery and on March 10, plaintiff received a notice indicating that her FMLA leave request was approved.

In early May, plaintiff submitted a doctor's note to defendant indicating that she was not able to return to work. On May 20, defendant sent plaintiff a letter notifying her that her twelve-week period of FMLA leave had been exhausted and that her employment was terminated because she had not returned to work. Plaintiff was then cleared by her doctor to return to work without restriction starting May 28.

In her suit alleging FMLA interference, plaintiff claimed that she was not aware that her FMLA leave started on February 26 and that she believed it started on March 10 when it was approved. The court determined that plaintiff's subjective belief as to when her FMLA leave began is not legally significant. The court found that the plaintiff's Complaint established that she requested FMLA leave beginning February 26 and that she was not released to work until May 28, thirteen weeks later. Because defendant had no obligation to reinstate plaintiff on May 28, it granted summary judgment in favor of defendant.

Zahler v. Empire Merchs., LLC, 2012 WL 273698 (E.D. N.Y. Jan. 31, 2012)

The employee was a 55 year-old sales representative who belonged to a union and had worked for defendant since 2004. In March 2010, the employee took FMLA leave to care for her ill father who was undergoing cardiac surgery. While on leave, the employee received a call from her boss, demanding that the employee produce a survey of one of her sales accounts. The employee explained that she was at the hospital with her father and had poor internet service. According to the employee, her boss repeatedly threatened her with losing the account if she failed to submit the survey. The employee returned to work in May 2010, but was subsequently discharged for failing to earn the minimum commission level required by the collective bargaining agreement between the employer and union.

The United States District Court for the Eastern District of New York denied the employer's motion to dismiss the employee's FMLA interference and retaliation claims. With regard to the interference claim, the court first acknowledged that fielding occasional calls about one's job while on leave is a "professional courtesy" that typically does not interfere with FMLA rights. In this case, however, the court found that the employer's call went beyond professional courtesy calls because the employee's boss "repeatedly" demanded that the employee send the survey, he persisted in this demand, and he threatened to take the account away from the employee, even though he was aware she was exercising her FMLA rights. Therefore, the employee alleged sufficient facts to survive a motion to dismiss her FMLA interference claim. The court found that the same allegations allowed the employee's FMLA retaliation claim to survive a motion to dismiss. The court noted that the boss' phone call demanding production of the survey, in conjunction with the threat of forfeiting the account (and consequently, the commissions from that account), plausibly constituted a materially adverse employment action. Because the boss' actions could dissuade a reasonable worker from exercising his or her FMLA

rights for fear of receiving such a harassing and threatening phone call, the employer's motion to dismiss the employee's FMLA retaliation claim was denied.

Anderson v. Roche Carolina, Inc., 2012 WL 368710 (D.S.C. Feb. 3, 2012)

The employee suffered from migraine headaches and, as a result, was approved for intermittent FMLA leave in March 2009. She took FMLA leave from June 24 to June 30. On June 30, her doctor told that she should remain off work until July 6. That evening, the employee's manager called and, according to the employee, pressured her to come back to work. During the call, the employee told her manager that she was approved for FMLA leave. The manager was previously unaware of this. When the employee returned to work, she requested an accommodation of being able to eat small snacks and take breaks when she felt migraines coming on. She also requested some time off to find the right medication. On July 10, her doctor prescribed her a medication that can cause drowsiness; she did not tell the employer about this medication. At a July 16 meeting, the employee's manager told her that the snacking had to stop and that she needed to stop sleeping at work. The employer then discharged the employee for sleeping on the job, taking a medication that she knew would make her sleepy, and failing to clear the medication with the employer's medical staff.

The employee brought claims under the FMLA, alleging wrongful denial of FMLA benefits and retaliation. The United States District Court for the District of South Carolina denied the employer's motion for summary judgment as to the denial of FMLA benefits claim. The court concluded that there were factual disputes about whether the employee had requested additional FMLA leave when she claimed to have asked for time off to find the right medication and whether she was discharged in lieu of being afforded such leave. The court granted the employer's motion as to the retaliation claim. According to the court, even assuming that the employee showed a *prima facie* case, she had not presented evidence of pretext because there was no evidence that she was not discharged for sleeping on the job and failing to provide the employer information about her medication.

Valdez v. McGill and Mueller Supply Co. 462 Fed. Appx. 814 (10th Cir. 2012)

Plaintiff was a warehouse supervisor. In April 2005, he advised his supervisor that he had cancer and would need surgery. He submitted FMLA paperwork and, even though he worked at a worksite with fewer than 50 employees, was approved for leave. He went out for surgery and returned in May 2005. Beginning in January 2006, plaintiff was approved for intermittent leave to accommodate several, recurrent medical conditions. On January 24, 2007, he presented a doctor's note that he would not be able to return to work until February 8. On February 7, the company sent plaintiff a note stating that he had exhausted his FMLA entitlement. That same day, plaintiff obtained a note from his doctor stating that he would need to remain out on leave until March 1. The company discharged plaintiff on February 8. Plaintiff filed suit, alleging violation of the ADA, FMLA, and state law. The district court granted the employer summary judgment, and plaintiff appealed.

With regard to the FMLA claim, plaintiff alleged that the company discharged him before he had exhausted all of his leave, and he pointed to a discrepancy between the company's official

records and his supervisor's records. The court of appeals affirmed summary judgment noting that the company's records were never impeached and that the discrepancy did not create an issue of material fact as plaintiff had exhausted his leave entitlement under either set of records. The court of appeals also upheld summary judgment on plaintiff's claim of FMLA retaliation, noting that the denial of reinstatement following FMLA leave is properly characterized as an interference claim, not one for retaliation, and that, in any event, plaintiff had received all of the leave to which he was entitled.

Hayes v. Elementary School District No. 159, 2012 WL 580713 (N.D. Ill., Feb. 22, 2012)

Plaintiff, defendant's business manager, took leave due to a pregnancy. Plaintiff's physician sent defendant a letter on September 9, 2009 stating that plaintiff could not return until September 21, 2009 due to medical complications. On September 22, 2009, plaintiff's physician sent a second letter stating that she could not return until after she gave birth due to her pregnancy complications. Plaintiff, at that time, also sent a letter to defendant asking that her leave be allowed under the FMLA, which defendant granted after completing a certification. Defendant later informed plaintiff that her FMLA leave expired on December 14, 2009 and that she would be discharged if she did not return to work by that date. Plaintiff requested to work from home two days per week to allow her to return to work. Defendant rejected plaintiff's request. Plaintiff elected not to return to work at the end of her leave, and the district discharged her on January 15, 2010. She sued alleging FMLA retaliation and interference.

The district court granted defendant's motion for summary judgment as to both claims. It explained that plaintiff "failed to point to sufficient evidence to proceed under" either the direct or indirect methods of proof. "The undisputed record shows that Defendants provided [plaintiff] with the leave that she was entitled to under the FMLA, but that when she took more leave than was provided for under the FMLA, her employment was terminated." The court pointed out that defendant only took an adverse employment action against her after plaintiff sought benefits beyond those provided by the FMLA.

Dorsey v. Jacobson Holman, PLLC, 476 Fed. Appx. 861 (D.C. Cir. Apr. 9, 2012)

Plaintiff was employed as a secretary for the company when she took leave to undergo two surgeries to treat carpal tunnel syndrome. The company treated her leave as protected under the FMLA, though it did not notify her of that fact. When her leave expired, she failed to return to work because she was physically unable to do so. The company terminated her for failure to return to work.

Plaintiff filed suit against the company, among others, alleging that it had interfered with her FMLA rights by belatedly notifying her that her FMLA leave and workers' compensation leave would run concurrently, and had retaliated against her for exercising her FMLA rights by terminating her. The company moved for summary judgment on both claims, and the district court granted same. Plaintiff appealed.

The court affirmed the district court's grant of summary judgment on both claims. First, it held that because the FMLA does not provide relief unless the employee has been prejudiced

by a violation, it could not provide relief here on the interference claim. The plaintiff had provided no evidence that she could have structured her leave differently had she known the leave was concurrent, such that no harm was shown. Second, it held that the company had offered a lawful reason for discharging plaintiff – that she had remained absent from work after her leave expired, and was not able to return to her pre-surgery position. Thus, her claim for retaliation failed.

Roark v. LaGrange, 2012 WL 1080368 (N.D. Ill. March 30, 2012)

Plaintiff claimed that after he discussed taking FMLA leave with his employer, he was discharged. Plaintiff alleged claims of FMLA interference and retaliation. The district court stated that, to bring an interference claim, plaintiff had to show that he was denied the benefit of returning to his job. The record showed that his discharge occurred after he told defendant he intended to take leave under the FMLA. Defendant argued that plaintiff would have been discharged even if he had not taken leave because of performance concerns. The district court, however, found defendant's argument unavailing because there were evidentiary gaps regarding plaintiff's alleged performance concerns. In denying defendant's motion for summary judgment, the district court held that the gaps in the evidentiary record taken together with the close proximity of plaintiff's request for FMLA leave and his discharge, created a fact issue as to whether defendant interfered with plaintiff's FMLA rights.

With respect to the retaliation claim, the district court considered the direct evidence plaintiff had, suggesting defendant terminated him because he took FMLA leave, not because of his poor performance. This evidence included plaintiff's positive reviews and that he performed the tasks with which defendant took issue. The court found that plaintiff's evidence, coupled with the close proximity of his discharge with his request for leave, was sufficient to create a fact issue. As such, the district court denied defendant's motion for summary judgment on plaintiff's retaliation claim.

Srouder v. Dana Light Axle Manufacturing, LLC, 2012 WL 1080411 (E.D. Ky. March 30, 2012)

Throughout his employment, plaintiff took FMLA leave for several different medical conditions. In addition to FMLA certification supporting his leave, plaintiff submitted a doctor's note with a lifting restriction. Defendant informed plaintiff that with the restriction, there was no assignment currently available for him. Plaintiff informed defendant that he would have the restriction removed. Plaintiff attempted to have it removed, but his doctor refused to do so. The next four days, plaintiff was absent from work and failed to call in as required by the defendant's attendance policy. Plaintiff stated he did not come to work because he was not able to get his lifting restrictions removed and he had been told there was no available light-duty work. He stated he did not call in because the defendant knew he was not going to be there, and thought that, because he unable to work, he did not need to call in. After he was discharged for failing to call in his absences, plaintiff asserted an FMLA interference claim against his former employer.

In determining whether plaintiff made out a claim for retaliation, the district court considered whether plaintiff provided defendant with sufficient notice of his upcoming surgery,

entitling him to FMLA leave. The district court found that evidence demonstrated that plaintiff did not contend he was entitled to FMLA leave for the absences resulting in his termination. Instead, plaintiff testified he did not show up because he thought there would be no work for him. Even if his lifting restriction would have somehow qualified him for FMLA on the days he was absent, he never provided defendant with FMLA medical certification for those days. The district court also found that plaintiff was discharged for his failure to comply with defendant's call-in policy, which was sufficient to justify his termination. As such, the district court found that defendant did not interfere with his FMLA rights and granted defendant's motion for summary judgment.

Serby v. New York City Dep't of Education, 2012 WL 928194 (E.D.N.Y. March 19, 2012)

Plaintiff, formerly a probationary science teacher, had received mostly negative feedback regarding her job performance in her first year of teaching (2006-2007). Plaintiff was transferred to another school for her second year (2007-2008), where her performance through the first few months of the school year was characterized as "satisfactory," though she continued to have difficulty with classroom management. In December 2007, plaintiff discovered that she had a tumor on her kidney and notified the school principal of her need for leave for treatment and recovery. At some point before plaintiff notified the principal of her need for leave, the principal called a meeting of all teachers where she announced that teachers were not to take sick leave or to be absent after the upcoming Christmas break because the school could not afford substitutes.

Plaintiff subsequently underwent kidney surgery and went out on FMLA leave for approximately one month; her leave time was charged to her sick leave bank, and plaintiff did not assert that she was prevented or prohibited from taking medical leave. Plaintiff subsequently returned to work and received several evaluations in which her performance was found to be unsatisfactory and substandard; plaintiff contended that at least some of these evaluations occurred at a time when class sizes were temporarily increased and state examinations were disrupting regular classroom routines. The principal recommended that plaintiff's probationary service be discontinued. After a review process that centered on plaintiff's unsatisfactory ratings and noted that plaintiff's January 2008 leave had reduced additional opportunities for observation, plaintiff was discharged.

Plaintiff filed an action against the defendant department of education and individual school administrators alleging, *inter alia*, claims of interference and retaliation under the FMLA. In ruling on cross motions for summary judgment, the district court granted summary judgment to defendants on the FMLA interference claim, finding that plaintiff had failed to prove her claim of interference based on discouragement, as she failed to show that the principal's generalized statement regarding employee absences to constitute discouragement that would have dissuaded a similarly situated employee of ordinary resolve from attempting to exercise his or her FMLA rights. The district court also found that plaintiff had failed to prove her claim of FMLA retaliation. Assuming, under the *McDonnell Douglas* framework, that plaintiff had established a prima facie case of FMLA retaliation, the court found that defendants clearly articulated several legitimate nondiscriminatory reasons for her discharge, including her poor ratings in her first year teaching and her ongoing issues with classroom management, and that plaintiff had not

established any factual basis to support her contention that defendants considered her filing for FMLA leave to have been a motivating factor in their decision to discharge plaintiff.

Penaloza v. Target Corp., 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)

The employer granted plaintiff, who was pregnant, 30-day provisional leave pending her return of the FMLA medical certification form. The parties disputed whether the employee ever returned the form, but in any event the employer was unable to reach plaintiff while she was gone to discuss her return-to-work date. Fourteen weeks after plaintiff began her leave, defendant terminated her employment.

Plaintiff brought claims of FMLA interference and retaliation, and the district court granted summary judgment in favor of the employer on both claims. The court held that the employer did not interfere with plaintiff's FMLA rights by discharging her 14 weeks after she went on leave because she took more than the 12 weeks she was entitled to under the FMLA. On the retaliation claim, the court found that plaintiff engaged in protected activity when she made the request for FMLA leave, and that she suffered an adverse employment action when her employment was terminated. However, the court held that she was not retaliated against because she failed to show a causal connection between her request and discharge. The events were not sufficiently proximate in time to establish causation because she was discharged more than three months after engaging in protected activity, and several weeks after her 12 weeks of leave expired. Finally, even if plaintiff had stated a prima facie claim of retaliation, she offered no evidence to show that the employer's proffered reason for discharging her—her failure to return to work—was pretext.

Grant v. JPMorgan Chase Bank, N.A., 2012 WL 5966644 (S.D. Tex. Nov. 28, 2012)

Plaintiff was employed in defendant's fraud department. The fraud department holds a strict schedule of work hours, breaks, and lunches to ensure adequate coverage for customers. In 2008, the employee began exhibiting poor performance including poor attendance and punctuality, including several unexcused absences in December 2008 and January 2009. At this time, the employee's mother became ill and the employee became her mother's primary caretaker. The employee received verbal and written warnings for continued tardiness and absences throughout 2009 until she was approved for FMLA leave in October 2009. Defendant acknowledged the intermittent nature of the employee's leave at the time of the approval. On January 13, 2010, the employee was discharged. The employee alleged that the employer interfered with her FMLA rights and that she was terminated in retaliation for taking FMLA leave.

The district court granted the employer's motion for summary judgment. The court granted the motion as to the FMLA interference claim on the grounds that the employee was granted FMLA leave and the employer's policies accounted for FMLA absences in performance reviews. The court granted the employer's motion as to the retaliation as well because there was no evidence presented that the employee was treated less favorably than other employees who did not have FMLA leave or terminated as a result of her use of FMLA leave. The court rejected the employee's argument that extended breaks during the work day were protected under the

FMLA. The court stated that “temporary” FMLA leave resulting from extended break times was not protected by the FMLA.

Singh v. New York State Department of Taxation and Finance, 2012 WL 5988547 (W.D. N.Y. Nov. 29, 2012)

Plaintiff was employed by defendant as a Tax Auditor Trainee II beginning in December 2001. The employee was employed for a probationary period for one year. In April 2002, the employee was promoted to Tax Auditor I which extended her probationary period through April 2003. The employee took FMLA leave for the birth of her child from November 22, 2002 until June 19, 2003, which further extended her probationary period until December 2003. Upon returning from FMLA leave, the employee received an evaluation in September 2003 which indicated that she needed improvement in a variety of core areas. In November 2003, the employee received another review indicating that her performance was unsatisfactory. In consultation with the human resource department, the employer chose to transfer the employee to another department, and initiated a second probationary period. Within two weeks, the employee resigned and her last day of employment was January 2, 2004. The employee file suit, alleging FMLA violations.

The district court granted the employer’s motion for summary judgment. The court rejected the employee’s claim for interference on the basis that she had actually received the full twelve (12) week leave entitlement under the FMLA. The court rejected the employee’s claim for retaliation on the basis that the employee failed to make a *prima facie* case of retaliation because a reasonable employee in the employee’s position would not consider the reassignment of the employee from 9:00 AM to 5:00 PM schedule to a schedule of 8:00 AM to 4:00 PM to constitute a material adverse employment if unaccompanied by changes in work hours, job duties, title, salary, benefits, or promotional opportunities. The court also rejected the employee’s claim against a supervisor in their individual capacity because the supervisor did not constitute an “employer” under the statute as he did not have any involvement in the personnel decisions relating to the employee.

Brown v. Scriptpro, LLC, 700 F.3d 1222, 19 WH Cases2d 1675 (10th Cir. 2012)

Plaintiff was employed by defendant as a Customer Service Operations analyst from March 2007 until November 2008. In June 2008, the employee’s supervisor prepared an employee performance review stating that the employee needed to improve in both “Planning and Organization of Work” and “Work Relationships” along with related comments. In September 2008, coworkers complained of the employee’s belligerence towards customers. In October 2008, the employee’s supervisor changed. The employee requested paid time off for the birth of his child, which was granted. At no point did the employer advise the employee of his rights under the FMLA, although the handbook which the employee executed did require an employee to provide notice to the human resources department if an employee needed FMLA leave. In November 2008, the employee had a dispute with his new supervisor related to alleged arrangements to enable the employee to work at home after the birth of his child. Two days after this argument, the employee was discharged and was informed it was related to the unresolved performance issues documented in his employee review.

The Tenth Circuit affirmed the district court's grant of summary judgment in favor of the employer. The court rejected the employee's interference claim on the basis that the employer provided undisputed evidence that the employee would have been discharged regardless of his request for FMLA leave and the employee failed to provide sufficient evidence to the contrary. The court also rejected the employee's claim of retaliation on the basis that the employee had failed to proffer sufficient evidence to show that the employer's reason for termination was pretextual.

Lawson v. Bethesda Lutheran Communities, Inc., 2012 WL 5947488 (N.D.Ind. Nov. 27, 2012)

Plaintiff was employed by defendant as a Program Manager, directing programs to help disabled individuals. The employer had received several complaints about the employee's abrasive personality and poor people skills from 2007 to 2011. During that same time, the employee had two performance evaluations that had documented the employee's abrasive interaction with coworkers. After receiving complaints of the employee's harsh behavior following a snow storm in February 2011, the employer initiated an investigation into the employee's behavior. As a result of the investigation, the employer interviewed the employee in late March 2011 and placed the employee on administrative leave pending the completion of the investigation. That afternoon, the employee sought treatment from a physician assistant for anxiety and obtained a note stating that the employee was not able to work until April 5, 2011. The employer sent FMLA paperwork to the employee to be completed. On April 6, 2011, the employer discharged the employee prior to receiving any FMLA paperwork from the employee.

The district court granted the employer's motion for summary judgment. The court rejected the employee's claim for interference on the basis that the employer set forth evidence that the employee would have been discharged for poor performance and inappropriate conduct, and the employee failed to provide sufficient evidence that these incidents did not occur or that the employer's investigation was a "sham." The court rejected the employee's claim for retaliation on the basis that the employee's allegations that (1) the timing of the termination; (2) she was not told that she was subject to termination; and (3) that she was "blind-sided" by the allegations of poor performance were sufficient circumstantial evidence of retaliation. The court held that the employee had not sufficiently overcome evidence set forth by the employer that the allegations were not false, and therefore the employee had not met its burden.

Miles v. Nashville Electric Service, 2012 WL 3561809 (M.D. Tenn. Aug. 16, 2012)

After taking FMLA leave for a "psychotic break," plaintiff returned to work and provided her employer a doctor's release allowing her return to work without restrictions. She worked a partial day on her first day back. The following day, plaintiff told her supervisor that she would not come back to work, and provided written notice of her resignation later that day. Plaintiff testified that the decision to resign was one she made independently, without input from her employer. Three days later, plaintiff attempted to rescind her resignation in writing, but the employer did not accept the rescission. Plaintiff sued her former employer for unlawful FMLA interference, alleging two theories of liability. First, plaintiff alleged that the employer's initial failure to refuse her return to work interfered with her FMLA rights because the employer should

have known that returning to work was inappropriate for plaintiff at the time. Second, she alleged that the employer's refusal to accept her rescission of resignation was interference because her judgment was impaired when she resigned and the employer had previously allowed employees to rescind their resignations.

The court granted summary judgment in favor of the employer. It held that the employer had no duty to "second guess" plaintiff's doctor and refuse her return to work. In dismissing the resignation claim, the court held that the FMLA did not provide a right to rescind one's resignation. On both claims, plaintiff failed to cite to supporting legal authority. In dicta, the court declined to extend sovereign immunity to the employer, a city-run electric service.

Sams v. Protective Life Corp., 2012 WL 2862604 (N.D. Ala. 2012)

As of September 2009, plaintiff had accrued 15 attendance incidents for the year. She was therefore referred to human resources to request FMLA paperwork, which she did. However, she did not timely complete the paperwork, even after the employer provided it three separate times and set a deadline for its return. On November 23, 2009, the employer decided to terminate her employment effective December 2, 2009 for her continuing attendance violations. On December 2, 2009, prior to the termination meeting, plaintiff returned her completed FMLA paperwork.

The employer moved for summary judgment on plaintiff's claims under the FMLA and ADA. Plaintiff, representing herself, did not respond to the motion, and the court therefore granted the employer's motion. With respect to plaintiff's FMLA claim, the court reasoned that the undisputed evidence showed that the employer had provided her with FMLA forms on three separate occasions during a three-month time period, told her to return the forms in a timely manner, and finally set a deadline for her to do so. However, she failed to return the forms in a timely manner, and at the same time incurred 21 attendance violations. Although she eventually returned the forms, she did not do so until well after both the employer's deadline for their return and the decision to terminate her employment. Accordingly, the court concluded that the evidence did not support any inference that the employer interfered with plaintiff's rights, and to the contrary, the company showed repeated attempts to assist plaintiff in exercising her rights.

Smith v. DeTar Hospital LLC, 2012 WL 2871673 (S.D. Tex. 2012)

Defendant employed plaintiff as a staff accountant for approximately ten years. Following plaintiff's separation, she alleged that the employer and several individual defendants interfered with her FMLA rights by not allowing her to take time off to care for her sick mother and discharged her in retaliation for exercising her right to take leave under the FMLA. The defendant employer and individual defendants moved for summary judgment on both of the FMLA claims, arguing that plaintiff was not discharged but instead voluntarily resigned. The court agreed with the defendants that former employees are not eligible for prescriptive protections from their former employers under the FMLA. The court agreed with the defendants' explanation that because plaintiff's resignation preempted any potential termination, plaintiff did not suffer an adverse employment action sufficient to establish a prima facie case of

retaliation. The court therefore granted defendants' motion for summary judgment with respect to the interference claim and the retaliation claim.

Spring v. Sealed Air Corp., 483 F. Appx 765, 769 (3d Cir. 2012)

Plaintiff, a bag sealer, injured his back at work in November 2008. In December, plaintiff suffered an adverse reaction to medication, and had his doctor fax his employer a note stating that his injury was work related. Plaintiff failed to immediately report the injury, and was suspended pending an investigation. Plaintiff was never denied FMLA leave. Plaintiff was subsequently discharged for his performance history and the alleged failure to report the workplace accident. Plaintiff sued for violations of the FMLA and retaliatory discharge under state law. The district court granted the defendant's motion for summary judgment, and plaintiff appealed.

The Third Circuit affirmed. A plaintiff will not prevail on an interference claim if the defendant can establish that it terminated the plaintiff "for a reason unrelated to his intention to exercise his rights under the FMLA." The court held that plaintiff's termination had nothing to do with taking FMLA leave. Moreover, the court found that, under the burden-shifting framework, plaintiff failed to establish a retaliation claim under the FMLA. Plaintiff argued that the defendant's policy requiring immediate notification of workplace injuries was evidence of pretext. The court, however, noted that the defendant's policy requiring immediate reporting of injuries did not undermine the defendant's nondiscriminatory reason for firing plaintiff nor showed that plaintiff's taking of FMLA leave was a motivating reason for his termination.

Merritt v. Harrah's Entertainment, Inc., 2012 WL 3061490 (D. Nev. Jul. 26, 2012)

Plaintiff, who suffered from lupus and foot problems, worked for defendant as a casino host. When she was hired in 2004, she informed defendant that she suffered from these conditions, that her lupus would likely get worse, and that when she had a lupus flare-up, she would need to take leave. Throughout her tenure with defendant, plaintiff requested and received numerous FMLA leaves as well as leave under defendant's medical leave policy. In mid-2009, plaintiff took several months of FMLA leave and company medical leave to have and recover from surgery. Several months later, in April 2010, plaintiff requested approximately one week of leave for foot pain. She was qualified for – and received – FMLA leave for the initial leave period. Plaintiff then extended her leave for several weeks; at the same time, defendant informed plaintiff that she had exhausted her FMLA leave and that she had only two weeks of company-sponsored medical leave remaining. Defendant advised plaintiff that she could apply for a personal leave of absence, which she did but failed to provide an anticipated return date. Defendant ultimately denied plaintiff's request for personal leave due to business needs in plaintiff's department. Because plaintiff could not return to work at this time, defendant ended her employment.

Plaintiff sued defendant for, among other things, interference with her FMLA rights, claiming that defendant used her past FMLA leave as a "negative factor" in the decision to terminate her. Defendant moved for summary judgment, arguing it had granted many FMLA leaves for the plaintiff over the years. The district court denied defendant's motion for summary judgment, concluding that a reasonable inference could be drawn that defendant considered

plaintiff's past FMLA leaves in making its decision to terminate her. The court agreed that defendant had continually granted plaintiff's leave requests and had not discouraged her from taking FMLA leave, but also noted that defendant terminated plaintiff soon after her approved absences expired. Based on this evidence, a reasonable factfinder could infer that defendant took the plaintiff's past FMLA leaves into account when making its termination decision.

Delp v. Rolling Fields, Inc., 2012 WL 3144050 (W.D. Pa. Aug. 1, 2012)

The employee worked at the employer's senior living and nursing home facility as a caregiver. In November 2009, plaintiff took approximately two weeks of medical leave under the FMLA. The company granted plaintiff's request for leave, and she returned to work in the same job position, with the same job duties and same rate of pay. In January 2010, plaintiff informed three supervisory employees that she was pregnant and due in September 2010. Over the next several months, a number of employees complained about difficulties they had working with plaintiff. In May 2010, defendant notified plaintiff that they intended to reassign her away from her care team because of her inability to positively interact with members of the team. Plaintiff was given shifts to work on other care teams, but plaintiff did not report to work. Plaintiff testified that she could not recall why she did not report to work. Defendant terminated plaintiff in June 2010 for violating its "No Call, No Show" policy.

Plaintiff filed suit, pleading both interference and retaliation claims under the FMLA. Defendant filed a motion for summary judgment on those claims. The court held that plaintiff's interference claim with respect to her November 2009 medical leave was "meritless," given that it was undisputed she was granted leave and returned to the same job position with the same job duties and same rate of pay. The court also granted summary judgment in defendant's favor on plaintiff's claim that defendant interfered with her right to take leave in September 2010. The court rejected the employer's argument that plaintiff failed to notify defendant of her need to take leave because she never applied, holding that plaintiff established notice by announcing that she was pregnant and due in September. The court, however, granted summary judgment in defendant's favor because plaintiff failed to raise a triable issue of fact that she was terminated for a reason other than violating the "No Call, No Show policy." The court determined plaintiff's acknowledgment that she intended to work the shifts offered to her but could remember why she did not report to work was fatal to her interference claim. The court also granted defendant's motion for summary judgment on plaintiff's retaliation claim. Plaintiff argued that she satisfied the causation element of her retaliation claim because the temporal proximity of her request for leave was close in time to her May 19, 2010 reassignment and June 8, 2010 termination. The court rejected this argument, finding that plaintiff's reassignment and termination, five and six months after she first informed defendant she was pregnant, was not unusually suggestive of a retaliatory animus.

Williams v. United States Steel Corporation, 2012 WL 3233736 (N.D. Ind. Aug. 6, 2012)

Plaintiff worked for defendant steel manufacturing company as a Utility Technician. Plaintiff requested and was granted intermittent leave under the FMLA in connection with difficulties she experienced with asthma. Plaintiff missed three to five days per month in the months of April, May and June. As a result of plaintiff's FMLA absences, defendant had to pay

another employee to work overtime so that production would not be shut down. Because of her FMLA absences, defendant removed plaintiff from her position working on the line and moved her into a less critical non-line position. Although plaintiff was paid the same base rate of pay in the non-line position, she earned less in wages because she was paid less incentive pay working in the non-line position. Plaintiff alleged she was treated less favorably than male co-workers who missed work. Plaintiff filed a lawsuit alleging claims for gender discrimination, harassment, negligent supervision, and intentional infliction of emotional distress.

Defendant filed a motion for summary judgment, and the district court granted the motion. Noting that plaintiff “may have had a strong case for interference of her rights under the FMLA or retaliation for exercising her rights thereunder,” plaintiff did not plead those claims. The court found plaintiff failed to establish a connection between her reassignment to a non-line position and her gender. Plaintiff acknowledged in her deposition that her reassignment was due to her intermittent FMLA leave. In addition, plaintiff acknowledged another woman was allowed to continue working on the line, despite having several absences, suggesting plaintiff was not reassigned on account of her gender.

Ballato v. Comcast Corp., 676 F.3d 768, 18 WH Cases2d 1843 (8th Cir. 2012)

Plaintiff was a customer account executive for defendant from 2007 to 2009. After taking several days of approved leave, plaintiff emailed his supervisor on June 4, 2009, to ask if he was still employed, which his supervisor answered affirmatively. However, defendant placed plaintiff on administrative leave the next day due to issues with his work performance and behavior, and, though human resources called the plaintiff to discuss this, plaintiff never returned the phone calls. When plaintiff attempted to request FMLA leave later that day, he was informed that he was not in the employer’s directory. Plaintiff believed that he had been fired and did not request leave or show up to work from June 8 to June 10. Under defendant’s attendance policy, an employee was considered to have voluntarily resigned after three consecutive unexcused absences without notice. After learning of the reason for his termination, plaintiff filed suit, claiming interference and retaliation under the FMLA. The district court granted defendant’s motion for summary judgment, and plaintiff appealed.

On appeal, plaintiff argued that defendant unlawfully interfered with his FMLA rights by failing to note his leave request on June 5, and that he was terminated for not notifying his employer of his absence or showing up for work that day. However, the court found that even if defendant interfered with plaintiff’s rights on June 5, he was not terminated that day. Moreover, even though plaintiff thought he had been fired on June 5, he failed to take affirmative action to correct his erroneous assumption. Plaintiff’s “unilateral determination that he was fired” did not excuse him from his responsibility to return defendant’s phone calls or confirm his employment status before he stopped showing up for work or calling in to request FMLA leave. Thus, the court of appeals found no interference by defendant and affirmed the district court’s grant of summary judgment.

Bertrand v. City of Lake Charles, 2012 WL 1596706, 19 WH Cases2d 497 (W.D. La May 3, 2012)

Plaintiff sued her former employer under the FMLA, alleging that defendant interfered with her FMLA rights by depriving her of FMLA leave and retaliating against her for taking leave. Plaintiff suffered from Crohn's Disease and took intermittent leave under the FMLA on many occasions between 2001 and her resignation in 2009. After a severe flare-up in late 2008, plaintiff took leave for several days in November and December 2008, and on every day in 2009 until she resigned on February 18. During this time, plaintiff was excused from work by her doctor day-by-day until January 22, 2009, when her doctor signed a note stating plaintiff could not return to work until February 23. Until the doctor's note, defendant required plaintiff to call her supervisor daily and inform him that she would be absent from work that day. The plaintiff was charged with FMLA leave on three different City holidays during her 2008-09 leave. Because of this, plaintiff's leave expired on February 18, 2009, and when plaintiff could not return to work the next day, she was forced to resign.

At the conclusion of the bench trial, the district court found that defendant did interfere with plaintiff's FMLA rights by improperly counting holidays against her leave entitlement. The Department of Labor provides that when an employee uses FMLA leave in increments of less than one week, holidays do not count against FMLA entitlement when the employee was not scheduled to work on those days. Plaintiff was using FMLA leave in increments of less than one week until January 22; thus, the three City holidays before that date should not have counted against her leave.

The court also found that plaintiff proved that defendant retaliated against her for taking FMLA leave. First, plaintiff showed a prima facie case of retaliation because of the temporal proximity between her FMLA leave request and defendant's decision to erroneously count holiday time toward her leave entitlement and subsequently force her to resign. Next, defendant was unable to articulate a legitimate, non-retaliatory reason for its adverse employment actions against plaintiff.

Horton v. Channel, 2012 WL 3025154 (E.D. Ark. July 24, 2012)

On the employer's Rule 12(b)(6) motion to dismiss, the court held that the following allegations in plaintiff's complaint stated sufficient facts to support an FMLA interference claim: (1) the employee gave notice of need for FMLA leave; (2) the employer accused the employee of faking the illness; (3) the employee was accused of not calling in when ill; and (4) the employee was terminated on the day she returned from leave.

Kurtzman v. University of Cincinnati, et al., 2012 WL 1805486 (S.D. Ohio May 17, 2012)

Plaintiff worked as a veterinarian for defendant under the immediate supervision of a department head, who was in turn supervised by a university vice president. In 2008, plaintiff became seriously ill and took extended sick leave. According to plaintiff, his immediate supervisor suspected he was "faking" his illness, became increasingly hostile toward him, and retaliated against him in a variety of ways. After plaintiff returned from leave, his immediate supervisor significantly reduced plaintiff's supervisory responsibilities, and plaintiff's employment was later terminated. Plaintiff filed suit against the university and the two individual defendant supervisors. In addition to state claims, plaintiff alleged that defendants violated his rights under the FMLA under both interference and retaliation theories.

The court granted summary judgment to the individual defendants on the FMLA claims because they were not "employers" for purposes of the FMLA. The court cited Sixth Circuit precedent that the FMLA does not impose individual liability on public agency employers. However, the court denied defendants' motions for summary judgment on both the interference and retaliation claims. Regarding the interference claim, defendants' motion for summary judgment was based on the fact that plaintiff was given all the leave he requested, and when he was reinstated he did not suffer immediate loss of pay or title. However, the court found that there was evidence that plaintiff had significantly reduced responsibilities and authority when he returned to work, that he was later relieved of additional supervisory authority, and that his job title was reduced as well. The court held that there were genuine disputes of fact as to whether defendants denied plaintiff his substantive right to reinstatement by reducing his status and authority "step by step." With regard to the retaliation claim, the court focused on whether plaintiff had produced evidence to show that defendants' stated reasons for his termination were merely a pretext for discrimination. The court found the record would support a reasonable inference that plaintiff's immediate supervisor held plaintiff's use of FMLA leave against him, demoted plaintiff, and laid the groundwork for his termination for that reason.

Wiley v. AS America, Inc., 2012 WL 1681817 (M.D. Tenn. May 14, 2012)

Plaintiff filed a complaint alleging that she took leave from work on or about December 3, 2009; that on June 3, 2010, plaintiff attempted to return to work; and that defendant had informed her on or about May 19, 2010, that she could no longer work for defendant. Defendant filed a motion to dismiss, contending that the facts alleged in the complaint did not constitute a violation of the FMLA. However, the court concluded that it could not determine merely on the basis of the allegations of the complaint that plaintiff was "indisputably unable to return to work" at the conclusion of the 12-week period of statutory leave. Therefore, the court denied defendant's motion to dismiss.

Latowski v. Northwoods Nursing Center, 2012 WL 4475542 (E.D. Mich. 2012)

Plaintiff, a nurse's assistant, filed several claims, including an FMLA interference action, after being discharged from a nursing facility. Plaintiff disclosed that she was pregnant, leading her employer to request a doctor's note indicating any work restrictions. Her physician provided a statement reading "No lifting over 50 pounds." She was removed from her scheduled shift and told that she could not resume work until the restriction had been lifted. Two weeks later, plaintiff was contacted by her employer and told that she was eligible for FMLA leave. She declined to request FMLA leave. Five days later, she received a letter from the facility's administrator confirming that she had not requested FMLA leave and accepting her resignation. Plaintiff filed an EEOC charge and returned to the facility to obtain copies of her personnel records. An administrator met with her and stated again that she was entitled to FMLA leave. Plaintiff declined to request FMLA leave and subsequently filed suit.

Plaintiff argued that she had been forced to either take FMLA leave or lose her job. The court stated that an employee may have an interference claim if their employer forces them to take FMLA leave despite their not having a "serious health condition" that precludes them from

working. The claim ripens when and if the employee seeks FMLA leave at a later date but it is denied because they were wrongfully forced to use FMLA leave in the past. Finding that her claim had not ripened because she did not seek FMLA leave, the court dismissed plaintiff's FMLA claim.

Folts v. South Lyon Senior Care and Rehab Center, LLC, 2012 WL 995209 (E.D. Mich. Mar. 23, 2012)

Following her husband's diagnosis with Legionnaires' disease in September 2008, plaintiff applied for and was granted intermittent leave under the FMLA to care for him. She continued to take intermittent leave over the next year. Although the employer's policies required an employee on FMLA to provide a doctor's note or other written confirmation for each FMLA absence, plaintiff did so inconsistently. In December 2009, the employer provided plaintiff with a form for recertification of her eligibility for FMLA leave, which plaintiff completed. However, she was subsequently notified that additional information was required to evaluate her leave request. Plaintiff failed to provide the information, and likewise failed to seek an extension or take any steps to collect the needed documentation. Consequently, her FMLA leave recertification was denied, her December absences were deemed unexcused, and her employment was terminated. Plaintiff filed suit alleging interference and retaliation under the FMLA, and the employer moved for summary judgment.

The district court denied the employer's motion for summary judgment. With respect to plaintiff's interference claim, the district court found a genuine issue of material fact as to whether the employer interfered with her access to FMLA leave by rejecting her recertification, which was arguably legally sufficient without the additional information requested. Likewise, a genuine issue of material fact existed as to whether the employer provided adequate warning in its letter that failure to provide the additional medical information would result in termination of employment. Finally, the district court found that the employer was not entitled to summary judgment on the claim that it interfered with plaintiff's FMLA rights when it asked her to work on two days that she had asked to have designated as FMLA leave days, noting that contacting an employee regarding work-related matters while the employee is on leave may constitute interference with FMLA rights. As to her retaliation claim, the district court found that plaintiff presented sufficient facts upon which the jury could conclude that her recertification was sufficient and she should have been found eligible for FMLA leave.

Barker v. Professional Educators of Tennessee, 2012 WL 4793544 (M.D. Tenn. Oct. 9, 2012)

Plaintiff was a former employee of a state-wide professional organization for teachers. Her complaint alleged that as part of her maternity leave, she reached an agreement with her employer to work from home prior to commencing FMLA leave. Shortly before the employee was scheduled to return to work, the employer refused to reinstate her and gave her the choice of either resigning or being discharged. When the employee refused to resign, she was discharged. The employee filed suit and, while the pleadings did not clearly specify the type of FMLA claim being asserted, the district court treated it as an FMLA interference claim based upon plaintiff's discharge of employment after utilizing FMLA leave. Defendant brought a motion for judgment on the pleadings in its favor.

In her complaint, plaintiff mistakenly listed the date her work from home arrangement began as the date of her leave commencement. Defendant argued that by using the listed date as the starting date, plaintiff had exhausted more than 12 weeks of leave when she was terminated. In response to defendant's motion, plaintiff filed a motion to amend the pleadings stating that the listed leave commencement date was a typographical error. The district court concluded that reading the disputed paragraph in the context of the other allegations in the complaint led to a reasonable inference that the mistaken date was indeed a typographical error. Using the plaintiff's corrected date, the district court found that plaintiff had sufficiently pleaded a cause of action for FMLA interference because she was given the option of resigning or being terminated prior to the expiration of her 12 week FMLA entitlement. The district court also granted plaintiff's motion for leave to amend to correct the mistaken date.

Stone v. St. Vincent Hosp. and Health Care Ctr., 2012 WL 5844748 (S.D. Ind. Nov. 19, 2012)

Plaintiff worked as a per diem nurse ("PRN") for a hospital. The employer required PRN's to work one shift per month, but plaintiff generally worked full-time hours. In February 2009 plaintiff's minor daughter was hospitalized. Plaintiff told her supervisor that her daughter was hospitalized for an undetermined amount of time and that plaintiff "needed to remove" herself from the schedule "for a few weeks." Plaintiff's supervisor told her to keep her informed regarding her return to work. Plaintiff believed that she called the hospital around February 23, 2009 – the day her daughter was released – and told someone that she would return to work on March 16, 2009. Plaintiff returned to work on March 16, 2009, but on March 18, 2009, plaintiff told her supervisor that her daughter's condition had deteriorated and that she was required to take leave to care of her. Plaintiff's supervisor told her not to worry about her job or contacting the hospital. The next communication plaintiff had with her employer was a May 28, 2009 letter from her supervisor informing her that her employment was terminated due to her failure to work at least one shift per schedule.

The court found that plaintiff's termination was lawful and did not interfere with the exercise of plaintiff's FMLA rights, particularly because plaintiff never attempted to contact her supervisor or human resources to inform them of when she expected to return to work and she did not fill out the appropriate paperwork. The court found that the FMLA "does not authorize employees on leave to keep their employers in the dark about when they will return from leave."

Penaloza v. Target Corp., 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)

The employer granted the employee, who was pregnant, 30-day provisional leave pending her return of the FMLA medical certification form. The parties disputed whether the employee ever returned the form, but in any event the employer was unable to reach the employee while she was gone to discuss her return-to-work date. Fourteen weeks after the employee began her leave, the employer terminated her. The employee brought claims of interference and retaliation, and the district court granted summary judgment in favor of the employer for both. The court held that the employer did not interfere with the employee's FMLA rights by terminating her 14 weeks after she went on leave and did not return to work because she took more than the 12 weeks she was entitled to under the FMLA.

On the employee's retaliation claim, the court found that she engaged in protected activity when she made the FMLA request, and that she suffered an adverse employment action when she was terminated. However, the court held that she was not retaliated against because she failed to show a causal connection between her request and termination. The events were not sufficiently proximate in time to establish causation because she was terminated more than three months after taking the protected activity, and several weeks after her 12 weeks of statutory leave expired. Finally, even if the employee had stated a prima facie claim of retaliation, she offered no evidence to show that the employer's proffered reason for terminating her—her failure to return to work—was pretext.

Hanczyc v. Valley Distributing and Storage Company, 2012 WL 3890213 (M.D. Pa. 2012)

The court denied the employer's motion for summary judgment on plaintiff's interference and retaliation claims under the FMLA. The court concluded that there was a genuine issue of material fact as to whether the employer refused to provide plaintiff all the FMLA leave he requested because plaintiff testified that after he had surgery, management told him the employer did not offer FMLA leave. The court also concluded there was a fact issue on the reason for plaintiff's termination. While the employer maintained it terminated plaintiff due to performance, plaintiff presented sufficient evidence from which a jury could find that was a pretext for retaliation. Specifically, plaintiff provided evidence that the employer's CEO had said at a meeting that if she could not fire plaintiff, she would find a way to make him quit.

Larmanger v. Kaiser Foundation Health Plan of the Northwest, 2012 WL 3921777 (D. Or. 2012)

Plaintiff claimed her employer interfered with her rights under the FMLA when it terminated her just a few weeks after she renewed her request for intermittent FMLA leave. The court granted the employer's motion for summary judgment, finding insufficient evidence of a causal link between plaintiff's FMLA usage and her termination. Plaintiff had been on a corrective action plan for months before her FMLA renewal request; she had never been denied FMLA leave; and she had been subject to numerous performance-related complaints before she was terminated.

Summarized Elsewhere:

Myers v. Kettering Med. Ctr., 2012 WL 174807 (S.D. Ohio Jan. 20, 2012)

Green v. City of North Little Rock, 2012 Ark.App. 21 (Ark. App. Jan. 4, 2012)

McGinnis v. N.Y. Univ. Med. Ctr., 2012 WL 251961 (S.D.N.Y. Jan. 25, 2012)

Byrd v. New Prime, Inc., 2012 WL 651436 (W.D.Mo., Feb. 27, 2012)

Sechler v. Modular Space Corp., 2012 WL 1355586 (Apr. 18, 2012)

Rowe v. U.S. Bancorp, 2012 WL 733859 (C.D. Ill. March 6, 2012)

Reardon v. Mass. General Hospital, 2012 WL 948425, 26 A.D. Cases 334 (D. Mass. March 19, 2012)

Holder v. Ill. Dep't of Corr., 2012 WL 223357 (S.D.Ill. Jan. 25, 2012)

Varise v. H & E Healthcare, L.L.C., 2012 WL 5997202 (M.D. La. Nov. 30, 2012)

Wegelin v. Reading Hospital and Medical Center, 2012 WL 5962444 (E.D.Pa. Nov. 29, 2012)

Allen v. U.S. Postal Service, 2012 WL 3763618 (W.D. Wash. Aug. 29, 2012)

Reyes v. New York City Health and Hospitals Corp., 2012 WL 3764061 (E.D. N.Y. Aug. 29, 2012)

Drew v. Quest Diagnostics, Inc., 2012 WL 2341690 (S.D. Ohio June 20, 2012)

Ayanna v. Dechert LLP, 19 WH Cases2d 1329 (D. Mass. 2012)

Cullison v. Dauphin County, PA, 2012 WL 3027776 (M.D. Pa. May 18, 2012)

Law v. Hunt County, Texas, et al., 19 WH Cases2d 482 (N.D. Tex. 2012)

Ferguson v. N. Broward Hosp. Dist., 478 F. App'x 565, 18 WH Cases2d 1847 (11th Cir. 2012)

Weidema v State Department of Transportation, 2012 WL 2873942 (Minn. Ct. App. July 16, 2012)

Spurling v. C&M Fine Pack, Inc., 2012 WL 2931206 (N.D. Ind. July 18, 2012)

Koller v. Riley Riper Hollin & Colagreco, 850 F. Supp. 2d 502 (E.D. Pa. 2012)

Winterhalter v. Dykhuis Farms, Inc., 19 WH Cases2d 686 (6th Cir. 2012)

Amb's v. Sir Home Improvement, 2012 WL 1909355 (W.D. Mich. May 25, 2012)

Turevsky v. FixtureOne Corp., 2012 WL 5199368 (E.D. Pa., Oct. 19, 2012)

Thomsen v. Stantec, 2012 WL 1863986, (2d Cir. May 23, 2012)

Stevens v. Board of Trustees, 2012 WL 3929896 and 2012 WL 3929894 (S.D. Ill. Sept. 9, 2012)

Ainsworth v. Loudon Cnty. Sch. Bd., 851 F. Supp. 2d 963 (E.D. Va. 2012)

Smith v. City of Niles, 2012 WL 5862088 (6th Cir. Nov. 19, 2012)

Martinez v. Harley-Davidson, Inc., 2012 WL 3881615 (E.D. Wis. Sept. 6, 2012)

B. Other Claims

Summarized Elsewhere:

Gambill, et al. v. Duke Energy Corp., 456 Fed. Appx. 578 (6th Cir. 2012)

1. Discrimination Based on Opposition

Gilbert, et al., v. St. Rita's Professional Services, LLC, 2012 WL 2344583 (N.D. Ohio June 20, 2012)

Plaintiffs alleged an FMLA retaliation claim against defendant. Only one of the plaintiffs took FMLA leave due to pregnancy. Upon her return, she was transferred to another position, along with another plaintiff, who was related to her. The third plaintiff was discharged the same day, allegedly because she decided to reinstate the first plaintiff after she returned from leave. Defendant filed a motion to dismiss, which the court denied as to the first plaintiff's retaliation claim but granted as to the other two plaintiff's claims.

In dismissing the FMLA claims of the first and second plaintiffs, the court determined that the third plaintiff did not oppose an unlawful action under the FMLA by reinstating the first plaintiff. As to the second plaintiff, the court determined that there are no protections under the FMLA for associating with someone who took protected FMLA leave – unlike associational discrimination claims permissible under Title VII. The court determined that the first plaintiff stated an FMLA retaliation claim because she alleged that she was demoted upon her return from leave.

Lopez v. Four Dee, Inc., 19 WH Cases2d 837 (E.D.N.Y. 2012)

The employee alleged that her employment was terminated as a result of her sister's exercise of FMLA-protected rights. Relying on (i) the statutory language of the FMLA which prohibits discrimination "against any individual for opposing any practice made unlawful" by the FMLA, and (ii) the United States Supreme Court's recent decision in *Thomson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 868 (2011), the district court held that a reasonable jury could conclude that the employer and individual supervisor violated the FMLA by firing the employee as retaliation against her sister because of the latter's exercise of her FMLA-protected rights. Put another way, the court reasoned that a reasonable jury could conclude that the employer and individual supervisor intended to punish the employee by firing her sister.

Summarized Elsewhere:

Crisses v. Gucci America, Inc., 2012 WL 3834634 (S.D. N.Y., Aug. 21, 2012)

2. Discrimination Based on Participation

Williams v. New York City Health & Hospitals, 2012 WL 5506128 (S.D.N.Y. Nov. 13, 2012)

Plaintiff was a clerical associate who worked in the admitting department of a medical center. The plaintiff sued his former employer claiming that it interfered with his rights under the FMLA and improperly retaliated against him for taking FMLA leave to care of himself and/or his disabled wife and daughter.

The plaintiff requested four FMLA leaves over the course of his employment for the plaintiff's depression and anxiety and his wife's craniotomy surgery. The employer granted each request. The employer offered evidence that between December 26, 2008 and October 5, 2009, plaintiff worked less than 1,250 hours. Beginning in 1989, the plaintiff was repeatedly disciplined for violations of the employer's time and attendance policies. He never disputed the violations at the time he received the warning and admitted he had time and attendance problems at work. Pursuant to the employer's disciplinary policy, plaintiff was ultimately suspended without pay and placed on a last chance agreement on April 7, 2010. In March 2011, plaintiff was charged with excessive lateness and absenteeism. A disciplinary meeting was held in April 2011. The plaintiff requested and received intermittent FMLA leave in May-July 2011. His employment was terminated effective July 7, 2011.

In granting summary judgment for the employer, the court held the plaintiff's interference claims were barred. His claims prior to December 22, 2008 were time barred, and the plaintiff was not an "eligible employee" for the other alleged instances of interference because he worked fewer than 1,250 hours in the 12 months prior to those leaves. With respect to the plaintiff's retaliation claims, the court noted plaintiff's lengthy history of excessive lateness and absenteeism which culminated when he violated his last chance agreement. The court further noted that the fact that plaintiff's lateness and absenteeism may have been attributed to caring for his own and his family's medical conditions was insufficient to give rise to an inference of retaliatory intent.

Summarized Elsewhere:

Holland v. Shinseki, 2012 WL 162333 (N.D. Tex. Jan. 18, 2012)

Overfield v. H.B. Macgruder Mem'l Hosp., Inc., 2012 WL 243341 (N.D. Ohio Jan. 25, 2012)

Zahler v. Empire Merchs., LLC, 2012 WL 273698 (E.D. N.Y. Jan. 31, 2012)

Wehrley v. American Family Mutual Ins. Co., 2012 WL 415421 (D. Colo. Feb. 9, 2012)

Lovland v. Employers Mutual Casualty Company, 674 F.3d 806, 18 WH Cases.2d 1552 (8th Cir. 2012)

Smith v. DeTar Hospital LLC, 2012 WL 2871673 (S.D. Tex. 2012)

Weidema v State Department of Transportation, 2012 WL 2873942 (Minn. Ct. App. July 16, 2012)

Walker v. Trinity Industries, 2012 WL 1858935 (E.D. Mo. May 22, 2012)

Juarez v. Verizon Services Corp., --- F.Supp.2d ----, 2012 WL 3764878 (M.D. Fla. 2012)

Folts v. South Lyon Senior Care and Rehab Center, LLC, 2012 WL 995209 (E.D. Mich. Mar. 23, 2012)

III. ANALYTICAL FRAMEWORKS

A. Substantive Rights Cases

1. General

McClelland v. CommunityCare HMO, Inc., 2012 WL 681455 (N.D. Okla., Feb. 29, 2012)

Plaintiff served as a group billing reconciliation specialist for defendant. In March 2003, she requested FMLA leave for gallbladder surgery, but she was not eligible because she had not worked the requisite 12 months. She later took FMLA leave twice in 2005 for surgery on her left foot. She had surgery on her right leg in 2007 and surgery on her right knee in 2008, and was granted FMLA leave for both. In July 2009, plaintiff requested FMLA leave for left knee replacement surgery scheduled for October 2009. Before that surgery could occur, plaintiff injured her right knee and took 64 hours of FMLA leave in August 2009. Her doctor suggested that she have her right knee replaced in October 2009 instead of the left knee as originally planned. Plaintiff was aware that her August 2009 FMLA leave would reduce the amount she would have following her knee replacement surgery in October 2009. The human resources department thereafter informed plaintiff twice, once in writing, that she would have 416 hours of FMLA leave remaining. She had the right knee replacement surgery on October 6, 2009. On November 13, 2009, human resources sent plaintiff a letter explaining that she had 184 hours of FMLA leave remaining, and, at its expiration, she would have to make arrangements to return to work on or before December 16, 2009. On December 3, 2009, plaintiff emailed a request for an extension of leave, but did not submit additional medical paperwork as required under defendant's policy. The human resources department contacted plaintiff and asked if there was any way she could return to work by December 16, 2009 – well-after her FMLA leave expired – even with restrictions. Plaintiff would not agree to return in any capacity until cleared by her doctor and would not provide a return to work date. Defendant sent plaintiff a letter informing her that she would be discharged if she could not return by December 16, 2009. She did not and was discharged. Plaintiff sued for retaliation and interference.

Granting defendant's motion for summary judgment, the district court, pointing to plaintiff's own deposition testimony, explained that plaintiff "received a full 12 weeks of leave over the course of 12 months and she did not receive a partial benefit," as she was informed at least twice of when her FMLA leave would expire. It rejected her later "affidavit" stating that she was advised that she had "enough" time left, which she claimed suggested that she had another full 12 weeks of leave. The affidavit, according to the court, was self-serving and an attempt to create a "sham" fact issue where one did not exist. Further, there was no evidence, the court explained, of retaliatory motive because defendant had granted her leave requests in the past; had given her accurate advice about her leave amounts; encouraged her to return to work

even with restrictions; and even encouraged her to reapply for an extension of leave – showing that “defendant tried to avoid terminating plaintiff’s employment.”

Summarized Elsewhere:

Donald v. Sybra, Inc., 667 F.3d 757, 18 WH Cases2d 993 (6th Cir. 2012)

Hayes v. Elementary School District No. 159, 2012 WL 580713 (N.D. Ill., Feb. 22, 2012)

Elsayed v. The University of Houston, 2012 WL 2870699 (S.D. TX, July 11, 2012)

2. No Greater Rights Cases

Sabourin v. University of Utah, 676 F.3d 950, 18 WH Cases2d 1633 (10th Cir. 2012)

The employee sued after he was discharged, claiming that elimination of his position was an act of interference and of retaliation under FMLA and that his termination also constituted both interference and retaliation. The employer filed a motion for summary judgment, which the district court granted, and the Tenth Circuit affirmed.

As to the reduction in force (“RIF”), the evidence established that the decision to eliminate his position occurred before he sought FMLA leave. Therefore, (i) the RIF was not related to his exercise or attempted exercise of his FMLA rights and could not support an interference claim, and (ii) the RIF was not caused by the request for FMLA leave so it could not support a retaliation claim.

The employee claimed that his discharge soon after he sought and took FMLA leave was in retaliation for that leave, but the employer supported its discharge decision by “extensive undisputed evidence of his efforts to impede and obstruct efforts by his employer to perform his job in his absence.” For example, plaintiff took documents home with him on leave, but refused to supply copies; he prevented the employer from obtaining reports he submitted; and he erased his laptop before returning it. These requests were not unreasonable and were not an impermissible demand for work during FMLA leave. Accordingly, the employer (i) established that it had not engaged in interference violating the statute because it not only asserted a reason for firing the employee but provided undisputed evidence of the reason and (ii) had not engaged in retaliation inasmuch as it did not terminate the employee’s job because of his leave.

Cox-Frietch v. Ohio Bureau of Worker’s Compensation, 2012 WL 508977 (S.D. Ohio Feb. 15, 2012), aff’d, No. 12-3305, 2012 WL 6051972 (6th Cir. Dec. 6, 2012)

The employee was counseled regarding her performance before she requested leave under the FMLA. Indeed, approximately two years prior to her discharge, the employee was placed on a performance improvement plan for her unsatisfactory work performance. Thereafter, she was repeatedly reprimanded and counseled regarding her poor work performance. One of these counseling meetings occurred the day before the employee requested FMLA leave to care for her sick mother and one counseling session occurred after she requested leave. Pursuant to her request, the employee was granted 70 hours of intermittent FMLA leave, which was all of the

leave she requested. Pursuant to the employer's policy, the employee's paid sick leave was substituted for the unpaid FMLA leave. Subsequently, less than a month later, after being counseled regarding her performance, the employee was suspended for failure to comply with her performance improvement plan. The employee admitted that this discipline was unrelated to her use of FMLA leave. Shortly thereafter, the employee's mother died. Nonetheless, the employee continued to use sick leave, although this use of leave was unrelated to her FMLA leave. Ultimately, three months after her need for FMLA leave ended, the employee's sick leave reached a level where the employer, pursuant to its policy, required the employee to submit physician verification in order to obtain sick leave. The employee was notified that failure to comply with this policy will result in discipline. The employee continued to be disciplined for her performance deficiencies, including receiving two separate five-day suspensions – one for her performance and another for failure to provide a doctor's note pursuant to the employer's policy. The employee was warned, at this time, that any continued behavior could result in discharge. Less than two months later, the employee engaged in a shouting match with another employee for which she was notified that a pre-disciplinary hearing was being scheduled. Prior to the hearing, the employee engaged counsel who contended that the employer's attempt to discipline the employee was retaliation for exercising rights under the FMLA. Less than a month later, the employer discharged the employee.

The employee then filed suit against the employer and her former supervisor alleging that they interfered with her rights under the FMLA and retaliated against her in violation of the FMLA. The employer moved for summary judgment on these claims, which the district court granted. As an initial matter, the court noted and the employee conceded that the employee's claim related to the self-care provision of the FMLA was barred by the Eleventh Amendment. In addition, the court concluded that the employee could not state a claim for interference as she admitted that she received all of the FMLA leave she requested. The court rejected the employee's claim that the employer's policy requiring physician verification interfered with her rights under the FMLA. The court found that this neutral policy merely required the employee to provide a valid doctor's note in order to verify the purpose of the leave, which did not conflict with the FMLA requirement to provide medical certification for FMLA leave. The court also concluded that the employer's placement of the employee on physician verification status and imposition of progressive discipline was not interference under the FMLA as these actions were unrelated to her use of FMLA leave and she "cannot use her request for FMLA leave to create a right of continued employment where no such rights exists and where disciplinary proceedings were already in progress."

The court likewise concluded that the employee could not establish a claim for retaliation under the FMLA, as the employee failed to establish a causal link between her use of FMLA leave and the discipline imposed by the employer. The employee had well-documented performance problems, which predated her use of FMLA leave and it was undisputed that she engaged in inappropriate conduct. The fact that the employee hired counsel who wrote a letter accusing the employer of retaliation in violation of the FMLA is not sufficient to establish a causal connection. In addition, it found a lack of temporal proximity because more than a year passed between the employee's use of FMLA leave and her discharge. The court held that the employer provided a legitimate reason for the disciplinary action, including the employee's

undisputed insubordination, and the employee failed to show that these reasons were pretext for retaliation under the FMLA.

Nurse v. Windham Community Memorial Hospital, 2012 WL 6727620 (D. Conn. Dec. 28, 2012)

Plaintiff worked as a laboratory technician at defendant hospital from 2004 through October 2008, when she was discharged. During her employment, plaintiff made several mistakes that caused harm to or endangered patients and jeopardized the accreditation of defendant's laboratory. She also engaged in misconduct, including forging another employee's signature on time records and unspecified sexual behavior.

In June 2008, plaintiff began an FMLA leave for chronic depression. The certification form completed by plaintiff's physician at the *beginning* of her June FMLA leave stated that, when plaintiff eventually returned to work, she may need intermittent leave. In August 2008, plaintiff returned from FMLA leave with a note from her physician that released plaintiff for work without restrictions, making no mention of intermittent leave. Plaintiff was absent with the flu for a few days in September 2008, but otherwise worked when scheduled. In October 2008, however, the hospital discharged plaintiff for four stated reasons: (1) absenteeism; (2) poor work performance; (3) falsification of time records; and (4) improper conduct. The defendant provided plaintiff specifics as to her poor work performance, time card falsification, and improper conduct, all or most of which predated her FMLA leave. Plaintiff's only absenteeism had been for a few days in September for personal illness. The only other relevant period of absenteeism had been plaintiff's FMLA leave, which defendant did not reference in the termination letter.

Plaintiff sued defendant, alleging both an FMLA interference and retaliation. The district court granted defendant's motion for summary judgment on both claims. Plaintiff's interference claim was based on her argument that when she returned to work she should have been allowed to return on a part-time basis. The court rejected this argument, since plaintiff's physician released her for unrestricted duty and made no mention of part-time work. The court did, however, engage in a discussion about the difference between an intermittent leave and a reduced leave schedule.

The court also rejected plaintiff's retaliation claim. Although one of defendant's stated reasons for plaintiff's discharge was absenteeism, and most of her absences were related to FMLA leave, the court found that it was more important to focus on the "substantial" or "motivating factor" in an employer's actions, or the reason that "made a difference in the [employer's] decision." Inasmuch as plaintiff's absenteeism was just one of four reasons cited by defendant for discharging plaintiff, albeit the most recently occurring reason, the court concluded it was not a difference maker in this case. The court ultimately rejected plaintiff's retaliation claim based on its conclusion that she was unable to establish a prima facie case of FMLA retaliation because the record showed that plaintiff was not qualified for the position of medical laboratory technician based on the serious mistakes plaintiff had made while working as a lab technician for defendant.

Carrero-Ojeda v. Autoridad de Energía Eléctrica, 2012 WL 2434594 (D. P.R., June 27, 2012)

Plaintiff brought a claim for harassment and retaliation under the FMLA against the employer, PREPA, a public corporation. Plaintiff, a managerial employee, worked as an administrative coordinator for defendant. Plaintiff requested two months of leave under the FMLA to take care of an ailing parent. During her leave, plaintiff was the subject of an administrative investigation. In addition, during her leave, the employer promoted three employees which plaintiff alleged deprived her of an opportunity for promotion. Plaintiff was also subject to several minor changes in her terms and conditions of employment. In addition, plaintiff was charged of violating the employer's rules of conduct. Several hearings were held, and her discharge was recommended. Pending the implementation of the second resolution recommending her termination, plaintiff applied for a second FMLA leave to take care of her parent. The employer granted the leave. A few months later, plaintiff applied for a third FMLA leave. By the time plaintiff had requested the third FMLA leave, her attorney received a letter from plaintiff's employer stating that plaintiff had been discharged.

In dismissing plaintiff's FMLA claims, the court reasoned that plaintiff did not prove that defendant failed to provide her with her statutory entitlements under FMLA. The court determined that there is no entitlement granting employees reinstatement once discharged for reasons unrelated to FMLA leave. Regarding plaintiff's retaliation claim, the court determined that plaintiff did not establish a casual connection between her FMLA leave and her discharge. Thus, the case was dismissed.

Smith v. Hargray Comm. Group, 2012 WL 360098 (D.S.C.)

Plaintiff was employed as the general manager of defendant for a little more than nine years when he went out on FMLA leave in late December of 2008 for a serious heart condition. Plaintiff was allowed to take over seven months of medical leave. It was undisputed that plaintiff did not return to work for seven months, and defendant believed he could not return to work and considered his employment terminated. Plaintiff requested a severance payment from defendant at the conclusion of his employment but was not paid any. Plaintiff alleged that refused to provide him severance because he had taken FMLA leave.

The court granted summary judgment in favor of defendant on plaintiff's FMLA interference claim, holding he never contended that he should have been reinstated. The court denied defendant's motion for summary judgment on plaintiff's FMLA retaliation/discrimination claims, reasoning that the alleged statement that FMLA was provided in lieu of severance could be sufficient direct evidence to proceed to trial.

Summarized Elsewhere:

Short v. Hartford Bakery, Inc., 2012 WL 266951 (S.D. Ind. Jan. 30, 2012)

Dennis v. County of Atlantic County, 2012 WL 1059420 (D. N.J. March 28, 2012)

Scruggs v. Carrier Corp., 666 F.3d 1269 (7th Cir. 2012)

Ryan v. Pace Suburban Bus Division of the Regional Transportation Authority, 27 A.D. Cases 349, 2012 WL 5077725 (N.D. Ill. Oct. 18, 2012)

Adams v. Auto Rail Logistics, Inc., 2012 WL 5439962 (6th Cir. Nov. 8, 2012)

B. Proscriptive Rights Cases

Summarized Elsewhere:

White v. Telcom Credit Union, 874 F. Supp.2d 690 (E.D. Mich. 2012)

IV. APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK

A. Direct Evidence

Jezeq v. Medco Health Solutions, 2012 WL 209372 (D.N.J. Jan. 24, 2012)

Plaintiff was hired by defendant as an Account Coordinator and later promoted to Account Manager. During his time as an Account Coordinator, plaintiff generally received positive performance reviews although he was informed that he needed to improve his attendance. During this time, plaintiff's absences were due to his wife's illness, which required numerous hospitalizations and emergency room visits. After his promotion, plaintiff continued to take days off to care for his wife and informed his supervisors of the absences. In early 2009, plaintiff's supervisor began having conversations with him about his absences. Around that same time, plaintiff began experiencing his own health problems and took twelve weeks of FMLA leave. Prior to exhausting his FMLA leave, plaintiff informed Human Resources that he needed additional time off. Defendant approved another month of leave under its short term disability program, but advised him there was no guarantee they could hold his job for him. After plaintiff exhausted his FMLA leave, defendant replaced plaintiff, notified him that his position had been filled, and gave him two weeks to apply for another position in the company.

When plaintiff was interviewing for another position with defendant, plaintiff claimed that an interviewer asked about his FMLA leave and asked him if he still had a disability. Plaintiff further claimed that the interviewer said that if he thought plaintiff would have to take leave in the future that could affect his candidacy because defendant needed people who were working and not taking time off. After plaintiff was not selected for the position, plaintiff informed HR of the interviewer's statements. After investigating the matter, HR assured him that his disability played no role in the decision not to hire him and informed him that he was discharged.

The New Jersey District Court granted defendant's motion for summary judgment on plaintiff's retaliation claim to the extent it related to his discharge, but denied it to the extent it related to defendant's failure to hire him for another position. The court found that the fact that plaintiff was discharged shortly after he exceeded his FMLA leave could not establish a *prima facie* case of retaliatory discharge because defendant had the right to discharge plaintiff as soon as he exceeded twelve weeks of leave. Also, any evidence of defendant's discriminatory reasons

for not hiring plaintiff in another position did not establish the necessary causal link between his FMLA leave and his discharge. The court found that plaintiff offered direct evidence of retaliatory failure to hire, based on the interviewer's alleged statements. The court also found that, although the interviewer did not make the final hiring decision, plaintiff sufficiently established the interviewer was part of the decision making process. defendant contended it would not have hired plaintiff even if it had not taken his FMLA leave into account because of negative feedback received from plaintiff's former supervisor and because he did not have relevant experience. The court determined this was a factual question for the jury.

Teske v. CCA of Tennessee, LLC, 2012 WL 3683525 (S.D. Ind., Aug. 24, 2012).

The employee was hired as a correctional officer for the employer in November 2008. In January 2009, she filed a claim for workers' compensation benefits due to a shoulder injury. She then suffered a knee injury in March 2009. She was out of work for a short time; when she returned in April 2009 she had restrictions that required her to remain seated while working. These restrictions were accommodated. The employee requested leave under the FMLA in June 2009 after the knee condition worsened. She was not yet eligible for FMLA leave at that time but the request was granted. She returned to work in October 2009, then went out again in November and December 2009 for bipolar disorder. She was given FMLA leave to cover this time period. She returned to work at the end of December with no restrictions. Between June and December 2009, the employee received several disciplinary notices for issues ranging from failing to report to work on time or at all. In the meantime, the employee was told by two superiors that the employer was trying to get rid of her because she had applied for and received workers' compensation benefits and FMLA time. She was terminated in early January 2010 following an altercation with an inmate and an argument with the employer after a request to transfer to a different post away from that inmate was denied. The employee later filed suit alleging, among other things, FMLA retaliation. The employer filed for summary judgment.

The district court denied the motion on the basis that the employee had offered sufficient direct evidence of retaliation to meet her prima facie case for retaliation. The direct evidence consisted of the statements offered by the employee by her two superior officers along the lines that the employer was trying to find a reason to terminate her because of her application for and use of workers' compensation and FMLA leave. Since those statements constituted direct evidence of discrimination, the court determined there was no need to engage in the burden-shifting method of proof used when the evidence of discrimination is indirect.

Phillips v. StellarOne Bank, 2012 WL 3762448, 115 FEP Cases 1473 (W.D. Va. July 16, 2012)

Plaintiff worked for defendant as a facilities manager. In 2008, plaintiff's supervisor rated plaintiff's performance as "outstanding." The following year, however, the same supervisor gave plaintiff an overall negative review and began meeting with plaintiff to discuss performance goals. At around the time that plaintiff received his 2009 review, plaintiff requested FMLA leave, at his supervisor's suggestion, for frequent migraines. Defendant granted the request. About three months after plaintiff first took FMLA leave, plaintiff's supervisor prepared a written warning to give plaintiff for his performance and sent it to the head of human

resources for approval. In an email approving the written warning, the head of human resources wrote that “[t]here is a lot of room for [plaintiff] to ‘trip up’ after this warning considering all the areas where he is below expectation and the magnitude of improvements needed.” The supervisor delivered the written warning to plaintiff, and a few months later, discharged him.

Plaintiff sued alleging he was terminated for taking FMLA leave. Defendant moved for summary judgment, arguing that plaintiff failed to establish a *prima facie* case of discrimination or to show that defendant’s proffered reason for the termination – that plaintiff’s performance was unsatisfactory – was pretext for discrimination. The court concluded that the “trip up” comment, which was made only three months after plaintiff first used FMLA leave, was sufficient to raise a triable issue of fact on plaintiff’s FMLA claim. The court acknowledged that the comment was open to different interpretations, but concluded that it raised a triable issue with respect to plaintiff’s *prima facie* case and the question of whether plaintiff’s alleged performance problems were a pretext for discrimination.

Summarized Elsewhere:

Roark v. LaGrange, 2012 WL 1080368 (N.D. Ill. March 30, 2012)

Stroud v. Greystar Management Services, LP and JPI Mgm’t, 2012 WL 3136214 (D. Md., Jul 31, 2012)

Laws v. HealthSouth Northern Kentucky Rehabilitation Hospital Limited Partnership, 2012 WL 6176797 (6th Cir. Dec. 11, 2012)

Donnelly v. Greenburgh Central School District No. 7, 691 F.3d 134, 19 WH Cases2d 865 (2nd Cir. 2012)

Callaway v. Academy of Flint Charter School, 2012 WL 5265728 (E.D. Mich. Oct. 23, 2012)

B. Application of *McDonnell Douglas* to FMLA Claims

Griffey, et al., v. Daviess/Dekalb County Regional Jail, 2012 WL 10881 (W.D. Mo., Jan. 3, 2012)

Plaintiff alleged defendant retaliated against him in violation of the FMLA based on the following: (1) he was transferred to night shifts; (2) he was demoted and his pay was reduced; (3) he was assigned to work in the women’s annex of the jail; (4) his days off were modified; (5) the defendant failed to grant him time off to see his doctors; and (6) he was terminated. Plaintiff contended there was a causal connection between these actions and his FMLA leave because each of them occurred soon after he returned from FMLA leave. Moreover, plaintiff had received successful ratings in his performance evaluation shortly before his demotion and pay cut. Defendant filed a motion for summary judgment, which the court granted in part and denied in part. The court found that plaintiff had met his *prima facie* case of retaliation under the FMLA and there was a genuine issue of material fact as to whether defendant’s stated reasons for its actions were legitimate and non-discriminatory. However, the court found that plaintiff’s claims were partially barred by the statute of limitations. The court determined that there was no

evidence to support the contention that defendant's conduct was willful and, as such, a two-year statute of limitations applied, and all allegations regarding acts that occurred prior to that time were barred.

Donald v. Sybra, Inc., 667 F.3d 757, 18 WH Cases2d 993 (6th Cir. 2012)

Plaintiff worked as an assistant manager of defendant's restaurant and had missed a week of work in 2006 and eight weeks of work in 2007 for medical conditions. Upon plaintiff's return to work in 2007, she was transferred to a different restaurant. Several months after she returned from her leave of absence, plaintiff's manager discovered that plaintiff's customer receipts did not match the cash in her drawer, resulting in her drawer being short. The manager then initiated an investigation and concluded that plaintiff had committed theft. After the investigation was completed, plaintiff took a few days off for treatment of her medical condition. Upon her return, defendant informed her of the results of the investigation and discharged her.

Plaintiff contended that her discharge was because of her medical conditions, in violation of the FMLA. The district court granted summary judgment in defendant's favor, finding that plaintiff failed to demonstrate that defendant's justification for her discharge was pretextual. In reviewing the district court's decision, the court of appeals applied the *McDonnell Douglas* burden-shifting framework to both plaintiff's retaliation claim and interference claim. The court affirmed the district court, finding that the timing of plaintiff's discharge on the day she returned from leave was insufficient to withstand summary judgment on the retaliation claim. The court also found that plaintiff did not present evidence to rebut defendant's assertion that it honestly believed that plaintiff had committed theft. The court stated plaintiff's denial that she committed theft was irrelevant; instead the critical inquiry is the employer's belief and whether that belief is informed and nondiscriminatory.

McGinnis v. N.Y. Univ. Med. Ctr., 2012 WL 251961 (S.D.N.Y. Jan. 25, 2012)

Plaintiff, who worked as a department assistant for over thirty years, took approximately three weeks of FMLA leave to take care of her sick mother. The day after her FMLA leave expired, her supervisor e-mailed her to inform her that a project had to be completed in two weeks. Almost a year later, plaintiff received a counseling memo criticizing her for failing to complete the project by the deadline. The employee was discharged six months later.

Plaintiff filed suit, alleging race discrimination and over a year later, sought to amend her Complaint to include FMLA interference and retaliation claims. The Southern District Court of New York denied plaintiff's motion to amend her Complaint to include an interference claim, but granted it to include a retaliation claim. The court found plaintiff's proposed interference claim was futile because defendant approved her leave request and she took all the FMLA leave she was entitled to take. However, the court found plaintiff's retaliation claim was not futile because she had raised genuine issues of material fact as to the factors that caused her discharge. Plaintiff offered deposition testimony from her supervisor, stating that she was out on FMLA leave for several weeks and that always puts a burden on the department because there is no one to do her job. The court also pointed to the counseling memo, which criticized her for failing to complete a project that was due shortly after she returned from her FMLA leave. Even

though defendant pointed to several issues with plaintiff's job performance, the court found there were material questions of fact as to whether defendant based its decision to discharge her, at least in part, on her FMLA leave.

Overfield v. H.B. Macgruder Mem'l Hosp., Inc., 2012 WL 243341 (N.D.Ohio Jan. 25, 2012)

Plaintiff worked as a registered nurse and performed additional duties as a charge nurse for defendant. Plaintiff initiated a conversation with her supervisor about taking leave in December to have a hysterectomy. A heated debate ensued when her supervisor asked if she could schedule the non-emergency procedure at another time because staffing was usually difficult around the holidays and she was scheduled to work both Christmas and New Year's Day. Plaintiff then spoke with the director of nursing who agreed to approve the request for whenever the physician scheduled the procedure. After learning that plaintiff had encouraged other nurses to avoid asking the supervisor for leave and to go straight to the director, the director and supervisor decided to stop giving plaintiff charge nurse duties.

During plaintiff's leave, she developed another condition which required her to extend her leave. Defendant approved her request to extend her FMLA leave until its exhaustion on February 24 and approved the extended leave under defendant's policy until March 1. Defendant's policy allowed for an extended leave beyond the statutory twelve weeks, but employees had to pay the full cost of health insurance premiums during that time and reinstatement was not guaranteed. Plaintiff returned to work part-time on February 24, but defendant informed her she could not work as a registered nurse due to restrictions imposed by her doctor. Instead, defendant changed her status to "p.r.n." (per diem or as needed). Plaintiff was cleared for unrestricted work on April 6, but she chose to continue to work part-time as a registered nurse. Although plaintiff was aware that the part-time policy required nurses to sign up to work one twelve-hour shift in thirty consecutive calendar days or be subject to termination, she asked to be put at the end of the call list and after thirty days requested a letter of termination from defendant. The employer's policy did not provide for automatic termination if a nurse failed to work the requisite shift and the employee does not dispute that she would not have been terminated had she not made her request.

Plaintiff filed suit, alleging that the removal of her charge nurse duties, her change in status from full time to "p.r.n.," and her termination constituted discrimination and retaliation for her actions under the FMLA. In granting the employer's motion for summary judgment, the court found that, although the temporal proximity between plaintiff's request for leave and the removal of charge nurse duties gave rise to an inference of retaliation, defendant provided a legitimate, non-discriminatory reason for its action. defendant pointed to the fact that charge nurse responsibilities include representing hospital administration and that plaintiff's unprofessional statements to other nurses indicated she could not adequately represent administration. The court also found that defendant met its burden of producing a legitimate, non-discriminatory reason for plaintiff's change in status. Because plaintiff was not able to return to her position when her leave expired, defendant could have discharged her at that point. By providing her with a part-time position, defendant did more than the law required. Finally, the court found that plaintiff's discharge resulted from her failing to work a twelve-hour shift in

thirty consecutive days as required by defendant's part-time policy and not because of her FMLA leave.

Reardon v. Mass. General Hospital, 2012 WL 948425, 26 A.D. Cases 334 (D. Mass. March 19, 2012)

Plaintiff, an administrative assistant at defendant hospital, asked for and received FMLA leave on seven occasions, including intermittent leave to care for her ill husband and leave to care for her own health conditions. When plaintiff used FMLA leave, her supervisor and a department operations manager each expressed to her their displeasure with her taking time off, asking whether anyone else could take her husband to his medical appointments and telling plaintiff that "it was always the wrong time for [her] to be out of the office." According to plaintiff, she was given additional work when she returned to the office. Plaintiff's physician then recommended that she take six weeks off to care for her husband and to deal with her own stress. Upon learning of the upcoming leave, the operations manager allegedly told the plaintiff to "get out."

Plaintiff was later discharged, ostensibly due to a violation of the employer's policy on the sharing of computer system credentials. Plaintiff brought an action against the hospital, her supervisor, and the operations manager alleging, *inter alia*, claims of interference and retaliation under the FMLA. Plaintiff alleged that defendants interfered with her exercise of her FMLA rights by complaining about her use of leave, assigning her more onerous work than she had been assigned prior to exercising her FMLA rights, and discharging her for having exercised her FMLA rights. All three defendants moved for summary judgment and the district court found that, because plaintiff did not allege that defendants prevented or inhibited her from taking FMLA leave, plaintiff's claim was properly regarded as solely alleging retaliation. The court found that neither the supervisor's and operations manager's comments nor the mere assignment of additional work were sufficient to constitute adverse employment actions. The court, therefore, found that plaintiff had not established a prima facie case of retaliation under the FMLA, granting summary judgment to defendants as to those comments.

As to the plaintiff's claim of retaliation based on her discharge, the court determined that plaintiff had provided no affirmative evidence demonstrating that her supervisor had participated in the decision to discharge her and granted the supervisor's motion for summary judgment as to the FMLA claims. However, the court also found that plaintiff met her burden of establishing a prima facie case of retaliation against the operations manager and hospital defendants, that defendants provided a legitimate, non-discriminatory reason discharging plaintiff, but found that plaintiff had provided enough evidence for a reasonable factfinder to determine that the stated reason was pretext for retaliation, and denied their motions for summary judgment.

Serby v. New York City Dep't of Education, 2012 WL 928194 (E.D.N.Y. March 19, 2012)

Plaintiff, formerly a probationary science teacher, had received mostly negative feedback regarding her job performance in her first year of teaching (2006-2007). Plaintiff was transferred to another school for her second year (2007-2008), where her performance through the first few months of the school year was characterized as "satisfactory," though she continued to have

difficulty with classroom management. In December 2007, plaintiff discovered that she had a tumor on her kidney and notified the school principal of her need for leave for treatment and recovery. At some point before plaintiff notified the principal of her need for leave, the principal called a meeting of all teachers where she announced that teachers were not to take sick leave or to be absent after the upcoming Christmas break because the school could not afford substitutes.

Plaintiff subsequently underwent kidney surgery and went out on FMLA leave for approximately one month; her leave time was charged to her sick leave bank, and plaintiff did not assert that she was prevented or prohibited from taking medical leave. Plaintiff subsequently returned to work and received several evaluations in which her performance was found to be unsatisfactory and substandard; plaintiff contended that at least some of these evaluations occurred at a time when class sizes were temporarily increased and state examinations were disrupting regular classroom routines. The principal recommended that plaintiff's probationary service be discontinued. After a review process that centered on plaintiff's unsatisfactory ratings and noted that plaintiff's January 2008 leave had reduced additional opportunities for observation, plaintiff was discharged.

Plaintiff filed an action against the defendant department of education and individual school administrators alleging, *inter alia*, claims of interference and retaliation under the FMLA. In ruling on cross motions for summary judgment, the district court granted summary judgment to defendants on the FMLA interference claim, finding that plaintiff had failed to prove her claim of interference based on discouragement, as she failed to show that the principal's generalized statement regarding employee absences to constitute discouragement that would have dissuaded a similarly situated employee of ordinary resolve from attempting to exercise his or her FMLA rights. The district court also found that plaintiff had failed to prove her claim of FMLA retaliation. Assuming, under the *McDonnell Douglas* framework, that plaintiff had established a prima facie case of FMLA retaliation, the court found that defendants clearly articulated several legitimate nondiscriminatory reasons for her discharge, including her poor ratings in her first year teaching and her ongoing issues with classroom management, and that plaintiff had not established any factual basis to support her contention that defendants considered her filing for FMLA leave to have been a motivating factor in their decision to discharge plaintiff.

Hall v. Ohio Bell Telephone Co., 2012 WL 3113157 (N.D. Ohio Jul 31, 2012)

Beginning in 2007, plaintiff began experiencing stress due to personal and family issues. A social worker determined that the employee suffered from an anxiety disorder and recommended a disability leave and 80 hours of FMLA leave per month. For years, plaintiff took every Monday off during which time she went to the gym, surfed the internet, and worked on a novel. Once her FMLA leave was extinguished, usually by September each year, she returned to work full-time until the next year when she again began taking intermittent leave.

When plaintiff stated in a magazine interview about her novel that one must be prepared to "take off from work to make your dream come true," she was reported to the Asset Protection Department of the company for possible FMLA leave fraud. No investigation was conducted. Next, her pattern of FMLA leave was reported. This time an investigation was conducted but

there was no finding of abuse. Meanwhile, plaintiff's performance ratings dropped which she attributed to two successive supervisors being "nitpicky." Finally, she was investigated for funeral leave abuse and discharged after she took leave for a step-grandchild's death, which was not company approved, and mischaracterized the relationship.

Plaintiff sued claiming that her discharge was pretext and in retaliation for her taking FMLA leave. First, the court agreed with plaintiff that she suffered from a serious health condition, even though she was able to work full-time the last quarter of every year. Next, because there was no direct evidence that her discharge was connected to her taking FMLA leave for years, the court applied a burden-shifting analysis to the facts. The court found sufficient evidence to prove a *prima facie* case, but also that the employer presented a legitimate non-discriminatory reason for plaintiff's discharge. Plaintiff admitted that she took funeral leave for which she was not entitled which violated the employer's Code of Business Conduct. The court thought it relevant that the employer had approved FMLA leave for years without discharge her and that another employee was disciplined for a similar offense. The employer's motion for summary judgment was granted.

Bone v. G4S Youth Services, LLC, 686 F.3d 948, (8th Cir. 2012)

In March 2007, plaintiff was hired as the education director of a juvenile facility which was overseen by the Arkansas Department of Youth Services ("DYS"). Although plaintiff worked well with her on-site supervisors, the DYS supervisors reported her for providing false information. Unrelated to this incident, and effective February 2008, plaintiff elected to change jobs to one that paid the same but had reduced responsibilities. In March 2008, plaintiff took leave for a shoulder surgery and returned in April. DYS continued to have problems with plaintiff being insubordinate which resulted in plaintiff choosing resignation over a discharge.

Among other claims, plaintiff asserted that the employer violated the FMLA by not notifying her of her rights, not reinstating her to her former position, and discharged her in retaliation for taking leave. The district court granted summary judgment in favor of defendant and the Eighth Circuit affirmed. Because defendant allowed plaintiff to take leave for her surgery and returned her to the same position she had prior to her leave, her interference claim failed. Moreover, plaintiff moved into the new position prior to her surgery. Plaintiff's retaliation claim also failed because defendant established a non-discriminatory reason for her discharge.

Winterhalter v. Dykhuis Farms, Inc., 19 WH Cases2d 686 (6th Cir. 2012)

In the spring of 2009, the employer was faced with economic uncertainty and began to reduce its operations beginning that September. The employee had surgery that required him to take FMLA leave starting in October. During the employee's leave, the employer began discussing his termination. When the employee's unit functioned well in his absence, the employer decided to terminate the employee. The employee was terminated on the day he was set to return from leave. The employer's stated reasons for the termination were economic hardship and the employee's status as the highest-paid and lowest-performing worker in his unit. The employee filed interference and retaliation claims under the FMLA.

The district court granted summary judgment against the employee. The Sixth Circuit affirmed, finding that the employee could not establish that the employer's stated reasons for termination were pretext for retaliation. In particular, the court noted that the employee did not create a genuine issue of material fact as to whether (1) the stated reasons had a basis in fact, (2) the stated reasons actually motivated the discharge, or (3) the stated reasons were sufficient to motivate discharge. With respect to the question of whether the employee's status as the highest-paid but lowest-performing work actually motivated the discharge, the employee argued that considering the effectiveness of his unit while he was on leave was impermissible because it made his leave a factor in his termination. But the court held that "merely taking [the employee's] leave as a factor in the termination decision does not defeat summary judgment in an indirect-discrimination claim [under *McDonnell Douglas*]." The court stated that in order to make this argument, the employee would have to bring his claim under a mixed-motive theory.

Finally, the court also affirmed summary judgment on the claim that the employer interfered with the employee's right to be restored to his position. Relying on its analysis of the retaliation claim, the court found that the employee failed to raise a genuine issue of material fact as to whether the employer had a legitimate reason for terminating the employee that was unrelated to the exercise of FMLA rights.

***Cham v. Station Operators, Inc.*, 685 F.3d 87, 19 WH Cases2d 520 (1st Cir. 2012)**

The employee worked as a clerk for defendant at a gas station and convenience store in Rhode Island. The employee was injured in a car accident and took leave for approximately thirty days due to a back injury. During his leave, he advised the employer that the leave would need to be extended an additional thirty days. Upon his return to work, the employee found his scheduled hours reduced from 40 hours a week to 32 hours a week, although his actual work hours varied. He quit his job and filed suit, alleging retaliation for taking FMLA leave as well as race and national origin discrimination under Title VII. At the first trial, the district court granted the employer's motion for a new trial after the employee dismissed his race and national origin discrimination claims, but not before the race discrimination evidence, which the court deemed highly prejudicial, had gone before the jury. At the second trial, only the FMLA retaliation claim was at issue. The jury returned a verdict for the employer on that claim and the employee appealed the jury's verdict.

On appeal, plaintiff challenged the district court's rulings on two motions in limine. First, the First Circuit determined that the district court did not abuse its discretion in restricting evidence of the employee's work hours to a time frame where he was being supervised by the allegedly discriminatory supervisor. The appellate court also found no error in the district court not admitting evidence of the employee's panic attack and trip to the hospital emergency room on his last day of employment, because compensatory damages are not available for FMLA retaliation claims and the evidence would have likely been confusing and prejudicial at trial.

***Burden v. City of Opa Locka*, 2012 WL 4764592 (S.D. Fla. Oct. 7, 2012)**

Plaintiffs were former police officers with defendant, a police department. They asserted claims for retaliatory termination for using FMLA's self-care provisions. On defendant's motion

for summary judgment, the district court first rejected defendant's suggestion that plaintiffs, in addition to the *prima facie* case required under *McDonnell Douglas*, had to show "impermissible animus." Although plaintiffs had an "increased burden" in an FMLA retaliation case (as opposed to an interference claim), the *McDonnell Douglas* framework itself was the vehicle to show "impermissible animus."

As to plaintiff Lazier, she worked in the Internal Affairs Department, a restricted area open only to Internal Affairs personnel. Plaintiff allowed an unauthorized employee access to Internal Affairs. An investigation ensued. She was granted leave under the FMLA for work-related stress and anxiety. Police officers went to plaintiff's home to retrieve her badge and firearm, but plaintiff refused to turn over the weapon at that time, instead returning the weapon to a civilian City employee a few days later. Additionally, while still on FMLA leave, plaintiff appeared without permission on a television interview and criticized the way she had been treated by the Police Department. Based on these incidents, the City discharged plaintiff. The district court granted the City's motion for summary judgment, finding that defendant had proffered legitimate, non-FMLA reasons for plaintiff's termination. Plaintiff could not demonstrate pretext as to the City's reasons for termination. Plaintiff never disputed giving a city-issued firearm to an unqualified civilian employee, nor the accuracy of the Internal Affairs investigation that found she disobeyed a direct order in permitting an unauthorized individual access to the Internal Affairs space. Plaintiff appeared on television without the City's prior approval. Furthermore, the district court concluded that plaintiff failed to demonstrate the true reason for defendant's action was unlawful retaliation or even that retaliation more likely than not motivated defendant's termination decision. Plaintiff failed to point to any fact that indicated the defendant's reasons were a pretext for retaliation under FMLA. The district court noted plaintiff's deposition and noted that she made only conclusory allegations of FMLA retaliation.

The district court denied defendant's motion for summary judgment as to plaintiff Robinson because of a disputed issue of fact whether plaintiff returned to work in compliance with the terms of his FMLA leave. Defendant contended that plaintiff failed to return to work after his statutory twelve-week leave expired and was therefore terminated, but plaintiff claimed he was instructed to report to the City Manager's office on expiration of leave, which he claimed to have done.

***Crisses v. Gucci America, Inc.*, 2012 WL 3834634 (S.D. N.Y., Aug. 21, 2012)**

The employee became pregnant and completed FMLA leave paperwork to take maternity leave for the birth of her child. Prior to the onset of that leave, the employee suffered complications from her pregnancy that required her to miss work. Shortly thereafter, the employer terminated the employee and several others in the employee's department, which the employer stated was part of a routine corporate restructuring. The employee sued employer for interfering with her FMLA rights and for retaliating against her for asserting her rights under the FMLA.

The district court denied the employer's motion for summary judgment on both counts. With respect to the employee's retaliation claim, the court noted that, while it was undisputed that the employee exercised her rights under the FMLA, was qualified for her position, and suffered an adverse employment action, there remained contested issues of fact as to whether her

termination was caused by retaliatory intent. With that question unanswered, the court denied summary judgment to the employer. Regarding the employee's interference claim, the court rejected the employer's argument that, because the employee's FMLA leave had not yet begun at the time of her termination, she was no longer entitled to FMLA leave, and thus could not support a claim for interference with her FMLA rights. With that argument rejected, the court held that Plaintiff may still set forth facts that support her termination occurred due to her request for leave, and denied summary judgment.

Caloia v. Putnam Investments, LLC, 2012 WL 3600345 (Aug. 21, 2012)

The employee worked for the employer for 26 years. She worked from home during her employment until that option was eliminated in 2008. In January 2008, the employee began to experience neck pain for which she ultimately underwent surgery. Prior to the surgery, she submitted a request for FMLA leave between January and mid-February. The surgery was ultimately performed in March and she received permission to take a combination of FMLA and non-FMLA approved leave time through May. The employee alleged that when she returned to work, she was subjected to increased scrutiny by her supervisor, was not reassigned to her prior job responsibilities, and was treated differently from similarly situated employees. She was terminated for insubordination in November 2008 and alleged that the termination was actually in retaliation for exercising her FMLA leave rights.

Defendant filed for summary judgment on plaintiff's FMLA retaliation claim, arguing that plaintiff was discharged for non-discriminatory reasons, including working unauthorized overtime, failing to report the worked overtime, and working on a matter she was instructed not to work on. The district court denied the summary judgment motion. It noted in its discussion some of the facts that provided sufficient evidence of a factual question as to whether her termination was a pretext for retaliation, including what could be interpreted as increased scrutiny by her supervisor (for instance, on one occasion the supervisor noted in writing that an update given by the employee was supposed to begin at 4:00 p.m. but did not start until 4:02 p.m.); disparate treatment as compared to similarly situated employees (i.e. plaintiff was given a warning for tardiness when another employee observed as being tardy was not), and a reduction in her job duties after her return from leave.

Summarized Elsewhere:

Jezek v. Medco Health Solutions, 2012 WL 209372 (D.N.J. Jan. 24, 2012)

Womack v. Brown-Forman Corp., 2012 WL 4450892 (E.D. Tenn. Sept. 25, 2012)

Gates v. United States Postal Service, 2012 WL 4902851 (6th Cir. Oct. 16, 2012)

Burnsed v. Pasco Medical Center, LLC, 2012 WL 3264901 (M.D. Fla. Aug. 10, 2012)

Poper v. SCA Americas, Inc., 2012 WL 3288111 (E.D. Penn. Aug. 13, 2012)

1. *Prima Facie* Case

Cooper v. New York State Nurses Association, 847 F.Supp.2d 437 (E.D.N.Y. 2012)

Plaintiff, a former associate director for defendant, took FMLA leave for a two-and-a-half month period spanning late 2008 and early 2009. Plaintiff's employment was terminated approximately one-and-a-half months after she returned from her FMLA leave. Defendants asserted that plaintiff was discharged because of management concerns over plaintiff's acts of insubordination, both before and after her FMLA leave, and for lying to her supervisor. The record reflected that the individual defendants expressed frustration with plaintiff's absence during her FMLA leave, but there was no evidence that defendants were frustrated with plaintiff because she took FMLA leave.

Upon her termination, the plaintiff filed an action against the employer, plaintiff's immediate supervisor, and plaintiff's second-level supervisor alleging, *inter alia*, retaliation under the FMLA. Plaintiff and defendants cross-moved for summary judgment. Defendants challenged plaintiff's *prima facie* case under the modified *McDonnell Douglas* framework, arguing that: (1) plaintiff's medical conditions did not meet the statutory definition of a "serious health condition;" (2) plaintiff was not qualified for her position because she consistently failed to perform up to the standards set by her supervisors; and (3) despite the temporal proximity, there was no inference of retaliation because pre-leave conduct brought about her dismissal. Defendants further asserted that, even if plaintiff had established her *prima facie* case, plaintiff's insubordination constituted a legitimate, non-discriminatory reason for her discharge. Plaintiff argued that she had established a *prima facie* case for retaliation under the FMLA, and that the legitimate, non-discriminatory reason for her discharge offered by the defendants was a mere pretext for retaliation.

The court first found that, because it was undisputed that plaintiff applied for FMLA leave and that her FMLA leave request was granted, plaintiff had plainly exercised rights protected under the FMLA and defendants were estopped from asserting otherwise. The court next determined that plaintiff's sixteen years of employment with the employer prior to her discharge was sufficient to establish an inference of minimal qualification sufficient to meet the qualification prong of the *prima facie* case, and that the evidence of close temporal proximity between her FMLA leave and her discharge was sufficient to create an inference of retaliatory intent. The court further found that defendants' offered reason for plaintiff's discharge was legitimate and non-discriminatory, but that genuine issues of material fact remained as to whether defendants' reason was mere pretext such that summary judgment for either side would be inappropriate. In addition, the court dismissed plaintiff's claims for punitive damages and damages for any pain and suffering, anxiety, or emotional distress, because such damages are not permitted by the FMLA.

Pettus v. Harvey, 2012 WL 1247111 (Apr. 13, 2012)

The employee worked as a School Improvement Advisor where she received several written disciplinary actions for attendance and for failing to follow the employer's policy that all employees keep their calendar updated. The employer also received several complaints regarding the employee's performance. The employee took about three weeks of FMLA leave to care for her daughter. Upon the employee's return, the employer re-arranged the employee's

work location to limit the employee's travel day per her request. The employee continued to neglect updating her calendar per the employer's policy. The employee then injured her knee while working and took FMLA leave to recover. The employee returned to work and the employer continued to observe the employee exhibiting performance issues (namely, failing to update her calendar). Consequently, the employer decided to discharge the employee due to her poor performance. The next day, the employee submitted a request for FMLA leave and possible intermittent leave to the employer's HR department. The employer met with the employee the day after she requested FMLA leave, and informed her of its decision to terminate her employment for performance issues.

The Eastern District Court in Arkansas granted the employer's motion for summary judgment on the grounds that the employer did not discharge the employee in retaliation for taking FMLA leave. The district court found that the employer had previously granted the employee FMLA leave and, at the time of her termination, she was taking approved FMLA leave. Accordingly, the court could not find any causal connection between the employee's discharge and the employee's FMLA leave. Instead, the employer discharged the employee for failing to properly update her calendar. The employee attempted to state that she did update her calendar; however, the employee failed to put forth any evidence to support her contention. The employee also claimed that someone must have erased her updated edits to her calendar, but the district court disregarded this assertion. Thus, the employee could not make out a claim for retaliation.

McKenna v. Liberty Mut. Group Inc., 468 Fed.Appx. 413 (5th Cir. 2012)

The employee worked as a consultant where she oversaw the employer's southwest region. During the employee's first performance evaluation, the employee received the second lowest score of the five individuals evaluated. When the employee was re-evaluated the following year, she received the lowest score of the six individuals evaluated. The employee then took FMLA leave, during which she cared for her first child. Upon her return, the employer gave the employee her previous evaluations, and notified her via email of the areas that needed improvement. Later that year, the employer underwent a reduction in force, where it decided to terminate the two individuals with the lowest annual evaluations scores. Accordingly, the employer eliminated the employee's job as part of a reduction in force.

The employee filed suit, alleging retaliatory discharge under the FMLA. The district court granted the employer's motion for summary judgment and dismissed all of the employee's claims, and the employee appealed the decision as to her FMLA retaliatory discharge claim. The Fifth Circuit affirmed the district court's decision on the grounds that the employee's FMLA claim was not a motivating factor in the employer's decision to discharge the employee. According to the court, the employer did not terminate the employee until eight months after she returned from leave; thus there was not temporal proximity. Additionally, the employee's termination was part of a firm-wide reduction. Finally, the employee's receipt of two low performance evaluation scores demonstrated that there was no link between her FMLA leave and her termination.

Villard v. Whitemarsh Continuing Care Retirement CMTY., 2012 WL 5652767 (E.D. Pa. Dec. 17, 2012)

Plaintiff, a certified nurse assistant, injured her shoulder while moving a resident in April 2010. Plaintiff continued to work at her employer with restrictions. Plaintiff was cleared to work without restrictions in July 2010. In September 2010, plaintiff met with her employer regarding a complaint that she was rude to a patient. Later in September, plaintiff was discharged because she acted antagonistically towards fellow employees during meetings regarding the incident. Plaintiff alleged that she suffered retaliation for taking FMLA leave for her injury.

Defendant moved for summary judgment on Plaintiff's claims for FMLA retaliation, arguing that plaintiff failed to allege that she suffered retaliation for working a reduced schedule. The court denied the motion, finding that plaintiff alleged that she sought treatment for her injury and suffered retaliation based on needing FMLA leave. The court found that plaintiff set forth a prima facie retaliation case as she was discharged only two and a half months after she returned from her leave, she generally received meeting or exceeding expectations performance reviews, a former employee testified that another certified nurse assistant was not terminated for acting disrespectfully in front of a patient, and that the employer had a progressive discipline policy yet plaintiff was not subject to any disciplinary action prior to September 2010.

The court then considered whether the employer produced evidence of a legitimate, non-discriminatory reason for plaintiff's termination. The employer argued that plaintiff was discharged because she behaved rudely towards a resident and her fellow co-workers. The court rejected this argument. The court explained that a reasonable jury could find the employer's reason for plaintiff's termination pretextual based upon the evidence set forth above.

Suarez v. City of New York, 2012 WL 4786383 (S.D.N.Y. Sept. 26, 2012)

Plaintiff sued his former employer, a New York City governmental agency, after his discharge, alleging Title VII and FMLA retaliation claims. The employer moved for summary judgment. The court granted the employer's motion for summary judgment, holding that as the employer made the decision to terminate plaintiff's employment prior to the date plaintiff requested FMLA leave, plaintiff could not demonstrate the fourth required element of FMLA retaliation, an inference of retaliatory intent.

Lushute v. Louisiana, Dept. of Soc. Services, 479 F. Appx 553 (5th Cir. 2012)

Plaintiff, an analyst at the state social services department, alleged her employer retaliated against her for taking intermittent leave under the FMLA. Specifically, plaintiff alleged she received a poor performance rating and that her work schedule was changed as a result of her taking FMLA leave. The district court granted the defendant's motion for summary judgment, and plaintiff appealed.

The Fifth Circuit affirmed, holding that plaintiff did not make out a prima facie case of retaliation under the FMLA. Specifically, the court found that the poor performance review occurred before plaintiff's first request for FMLA leave, which negated any causal connection

between the two events. Moreover, the court found that her work schedule change was not an adverse employment action. The court noted that the change did not change her total hours or compensation. According to the court, the alternative schedule was not a right, but rather a privilege offered to the employer's employees.

Hurnevich v. ArvinMeritor, Inc., 2012 WL 4475603 (E.D. Mich. Sept. 27, 2012)

Plaintiff was a 2-year employee who had received favorable performance reviews and was assigned to a new company scheduled to be "spun off" by her employer. When she expressed concern about the move, she was offered a \$30,000 retention bonus. Her reassignment letter read: "For all compensation and benefits related matters, you will remain an employee of ArvinMeritor until the effective date of the spin." Prior to the spin off, plaintiff notified her employer that she was pregnant and needed 12 weeks' family medical leave. Later that month, an e-mail circulated among the employer's executives with a list of employees who were considered "redundant." Plaintiff's name was on the list. The following month, plaintiff was told that she might be transitioned to another department when she returned from medical leave. Plaintiff began her leave in December. In January, the employer announced that no spinoff would occur. Plaintiff was notified that there was no position for return to and told by her supervisor that it had been a bad time to be on leave. Although plaintiff had more experience, instead of removing the man who had filled her position during her leave, the employer retained him. Several months later, when plaintiff's former position reopened, a second male candidate was chosen to fill it.

Plaintiff filed suit alleging several causes of action, including a violation of her right to reinstatement under the FMLA. She argued that she had never transferred to the new company and was entitled to return to her former job or comparable position. The employer moved for summary judgment, asserting that (1) there was a reduction in force, (2) plaintiff's position was eliminated when the spin off did not occur, and (3) plaintiff did not have an absolute right to protection from discharge while on leave. The court held that a genuine issue of material fact remained as to whether there was a causal connection between plaintiff's family medical leave and termination based on the following: before she advised that she was pregnant, her employer considered her so valuable that it was willing to pay a \$30,000 retention bonus to keep her; the e-mail naming her a redundant employee was circulated shortly after she announced her pregnancy; her supervisor's statement that it had been a bad time to take leave implied that her leave contributed to the decision to terminate her; and if, as she claimed, she never transferred to the spin-off company, she could have been entitled to return to her former job or a comparable position. The court concluded that a reasonable jury could find that plaintiff made out *prima facie* cases under both FMLA entitlement and retaliation theories and denied summary judgment.

St. Hilaire v. Morgan Stanley Smith Barney, LLC, 19 WH Cases2d 597 (D. N.H. 2012)

Plaintiff brought an FMLA interference claim under a theory of "preemptive termination." Although she was terminated before being eligible for FMLA leave, plaintiff claimed that time missed from work to assist in care for her ailing husband was held against her and that she was discharged before the one-year anniversary of her hiring in order to prevent her from acquiring and exercising rights under the FMLA. Plaintiff admitted that she never had any discussions with her employer about FMLA leave, never asked about her FMLA rights, and

never suggested that she intended to invoke FMLA rights once she qualified for them. Nonetheless, she alleged that the employer discriminated against her and terminated her employment because it had reason to believe she would request FMLA leave in the future.

In analyzing plaintiff's claim, the court assumed, without deciding, that such a claim was cognizable. The court recognized a series of cases that stand for the general proposition that an employee may bring a retaliation claim under the FMLA if the employee was terminated prior to becoming eligible for FMLA leave and if the employee declared an intention to take leave more than one year after employment commenced. Even assuming that those cases accurately interpreted the anti-discrimination provisions of the FMLA, the court found that those cases were of no help to plaintiff because she never requested FMLA leave, nor did she ever inform the employer that she intended to take FMLA leave when she became eligible for it. The court therefore granted summary judgment to defendant on the FMLA discrimination claim.

Summarized Elsewhere:

Bradley v. Little Rock Wastewater Util., 2012 WL 174382 (E.D.Ark. Jan. 20, 2012)

Lamb v. Roll Coater, Inc., 2012 WL 266971 (N.D. Ind. Jan. 27, 2012)

- a. Exercise of Protected Right

Dimitrov v. Quest Diagnostic, Inc., 2012 WL 555767 (Mich. App., Feb. 21, 2012)

Plaintiff served as a pathologist for defendant. In December 2007, plaintiff requested FMLA leave for elective shoulder surgery. Plaintiff's supervisor told her she would have to wait until after the holidays to take her medical leave because another pathologist was retiring. Plaintiff reported and complained about an alleged FMLA violation to the human resources department. Plaintiff underwent surgery in January 2008 and returned in March 2008, when her supervisor allegedly retaliated against her for voicing her objections about her previous FMLA request. In June 2008, plaintiff received two separate "final warnings" for displaying unprofessional conduct. In March 2009, defendant discharged plaintiff for another loud, aggressive, and disrespectful outburst at another meeting. Plaintiff sued in Michigan state court alleging, among other things, retaliation under the FMLA.

The Michigan Court of Appeals affirmed the trial court's award of summary disposition in defendant's favor. Specifically, because plaintiff did not initially provide 30 days notice for her elective surgery, the court concluded that her requested leave was not protected under the FMLA. The court also rejected plaintiff's argument that she was retaliated against after returning from FMLA-protected leave. It explained that, although her supervisor had told her that she should not have gone over his head by complaining to corporate and that she should "watch her back," such statements were "not an explicit expression of improper motivation (i.e., based upon plaintiff taking leave under the FMLA)." Similarly, a subsequent email that plaintiff wrote complaining about being subjected to mistreatment, according to the court, does not "allege a violation of the FMLA" because she complained that her supervisor "yelled at her, treated her discourteously and was otherwise unprofessional." Finally, the court concluded that plaintiff could not show that defendant's reason for discharging her was a pretext because, the

court stated, performance reviews prior to plaintiff requesting leave showed that she had been warned to control her temper and emotional outbursts.

McGuinness v. East West Inds., 857 F. Supp. 2d 259, 19 WH Cases2d 360 (E.D.N.Y. 2012)

The employee's son suffered from a severe psychological disability that required occasional hospitalization. In 2007, the employee sought an accommodation to his work schedule so that he could care for his son. The accommodation granted to him constituted the ability to leave work approximately two hours early each day. Plaintiff eventually returned to his full schedule. Approximately two years later, the employee requested FMLA leave so that he could take care of himself following a car accident. He returned to work two months later. Following the expiration of the twelve-month period following his 2007 FMLA leave, plaintiff took paid vacation time to care for certain medical needs of his son.

Shortly before the employee's 2009 FMLA leave, his employee evaluation for the year 2008-09 indicated that he needed to pay greater attention to his duties and spend less time on his cell phone. It also noted eleven absences and a number of days he arrived late. A few months later, the employee received an "Employee Status Report," again noting his excessive cell phone use. Approximately three months later, the employer discharged him for lack of work and poor attendance. Following his discharge, the employer did not fill his position, which was eliminated. The employee filed suit against his former employer, alleging that the company had retaliated against him for exercising his rights under the FMLA, specifically a continual right of "ongoing" leave with respect to the care of his son. Defendant moved for summary judgment.

The court granted defendant's motion on the retaliation claim. It held that the intermittent FMLA leave granted to the employee expired after a twelve-month period and was not "ongoing". Because a right to "ongoing" intermittent leave does not exist under the FMLA, the court held that the employee was not engaged in any protected activity for which the employer could have retaliated against him. Thus, the employee could not establish a *prima facie* case of retaliation. Further, the court found that even if the employee could have established a *prima facie* case, the employer had presented legitimate, non-discriminatory reasons for discharging him, including his substandard performance, his extended absences, and the fact that it needed to downsize. The court found no evidence of pretext, in light of the significant length of time between the expiration of the employee's FMLA leave and his discharge as well as the legitimacy of the employer's reasons for termination.

Pagan v. Select Specialty Hospital – Youngstown, Inc., 2012 WL 2296242 (N.D. Ohio June 18, 2012)

The employee worked as a nursing assistant for defendant acute care hospital. The employer had written policies on attendance and progressive discipline. Approximately a year after she was hired, the employer issued the employee a written warning for engaging in a loud outburst with her supervisor. The employee went on an approved, two-week FMLA leave for her own serious health condition about a month later. After she returned to work, she claimed that she continued to have medical issues and asked her supervisor if she had additional leave available. It was undisputed that the supervisor incorrectly told the employee she had no more

leave available. About a month after that request, the employee announced she was pregnant, which she understood put her employer on notice that she would need more leave. The employee testified that her supervisors had a negative reaction to her pregnancy announcement. Four days after she announced her pregnancy, the employer concluded that the employee violated the attendance policy following a year end attendance audit of the nursing department. The employee was discharged for the attendance violation because she already had one written warning in her file. Sixteen other employees were disciplined as part of the audit, but the employee was the only one discharged. The employee sued the employer under the FMLA for interference with her FMLA rights and retaliation for exercising her rights under the FMLA.

The district court denied the employer's motion for summary judgment on both claims. On the retaliation claim, the district court held that the employee presented sufficient evidence that she had requested FMLA leave when she made inquiries about additional leave. In addition, the court held that the employee's pregnancy announcement could be construed as a request for leave protected by the FMLA. Turning to the causal connection requirement, the district court concluded that the timing between the employee's pregnancy announcement and her discharge four days later, coupled with (i) her supervisors' negative reaction to her pregnancy, (ii) the employer's failure to follow its own progressive discipline policy, and (iii) some evidence of a disparate application of the attendance policy, was sufficient to establish a causal connection and defeat summary judgment. The district court next addressed the interference claim. The district court ultimately concluded that the improper denial of the employee's request for additional FMLA leave prior to her pregnancy announcement was sufficient for a jury to find that she was "discouraged" from using FMLA leave and thereby the employer interfered with the exercise of the employee's rights under the FMLA. The court noted the employer's arguments that the employee could not have reasonably relied on the supervisor's statements and the employee would have been discharged anyway because of the prior written warning and attendance violations, but concluded there was still sufficient evidence of interference to deny summary judgment.

Augustus v. AHRC Nassau, 2012 WL 6138484 (E.D. N.Y. Dec. 11, 2012)

Defendant serves adults with developmental disabilities by helping them secure employment and providing related support services. Plaintiff claimed that defendant violated the FMLA by retaliating against her because of her persistent advocacy on behalf of A.M., a pregnant client and fellow employee. The court found questions for the jury and denied defendant's motion for summary judgment.

Plaintiff exercised rights protected under the FMLA when she protested what she reasonably perceived as defendant's attempt to deny A.M. her FMLA rights. Retaliatory intent could be inferred from the temporal proximity of plaintiff's discipline and discharge after her advocacy for A.M.'s rights. Plaintiff established an issue of fact that defendant's proffered reasons for these actions—plaintiff's failure to properly communicate with her supervisors and other violations of defendant's policies—were pretext for retaliation. She presented evidence that supervisors made negative comments and expressed frustration with her advocacy on behalf of A.M.'s rights, and that employees who did not advocate for FMLA rights received more favorable treatment.

Summarized Elsewhere:

Dominick v. Baton Rouge Clinic, AMC, 2012 WL 414243 (M.D. La. Feb. 7, 2012)

Lee v. U.S. Steel Corp., 450 Fed.Appx. 834 (11th Cir. 2012)

Branham v. Gannett Satellite Infor. Network, Inc., 2012 WL 1155928 (M.D. Tenn. Apr. 6, 2012)

b. Adverse Employment Action

Karr v. Dow Agrosciences LLC, 2012 WL 1365438 (Apr. 19, 2012)

As a manager, the employee began missing numerous work days as a result of mental health issues. The employer also noticed that the employee had issues with her performance and placed her on a performance improvement plan. Given the employee's position, she was required continue to work long hours in order to meet the employer's expectations. The employee stated that she did not think she could to it. The employer explained the performance improvement plan to the employee, and encouraged the employee to explore other opportunities. The employee requested information regarding her options, including FMLA leave, sick pay, retirement, and a separation package. The employee went on FMLA leave, which ran concurrently with the employer's paid medical leave. At the end of the employee's FMLA leave, the employee continued to remain on the employer's paid medical leave. The employer informed the employee of her options to return to work or continue on long term disability leave. Once the employee had exhausted all of her medical leave, the employee was still unable to return to work and voluntarily retired. The employee requested severance, however, the employer confirmed that the employee was not eligible for severance.

The Southern District Court in Indiana granted the employer's motion for summary judgment on the grounds that the employee could not establish a retaliation claim under the FMLA where the employer did not take any materially adverse action against the employee. The court found that in order for the employee to establish a retaliation claim under the FMLA, the employee must have suffered from a materially adverse action. The employee, however, was not eligible for severance because she voluntarily elected to take an early retirement. Accordingly, the employer took no materially adverse action by denying the employee severance. Thus, the employee's retaliation claim under the FMLA was unsustainable.

Pozsgai v. Ravenna City Schools Board of Education, 2012 WL 1110013 (N.D. Ohio March 30, 2012)

Plaintiff asserted a claim for FMLA retaliation after resigning her employment. Before considering whether plaintiff could make out a prima facie case of FMLA retaliation, the district court considered whether she was even an eligible employee under the FMLA. Defendants challenged that plaintiff worked the requisite number of hours to be eligible under the FMLA. In examining how many hours the plaintiff worked, the district court noted that "if the employer does not maintain an accurate record of hours works by an employee . . . the employer has the

burden of showing that the employee has not worked the requisite hours." The court found that the employer's records were not accurate and failed to show plaintiff had not worked the requisite hours.

The district court then considered whether plaintiff could make out a prima facie case of FMLA retaliation. Defendants challenged that they knew plaintiff was exercising her right to take FMLA leave. In granting summary judgment in favor of defendants, the district court found that plaintiff admitted that she never told defendants that any of her absences were FMLA qualifying. The district court noted that any duty on behalf of an employer to inquire further as to whether an employee's leave is encompassed by the FMLA, is only triggered once the employee notifies the employer of the need for potentially qualifying FMLA leave. In rejecting plaintiff's argument that once an employee tells an employer that he or she has a serious health condition, that the employer is on notice in perpetuity, the court stated that an employee has an obligation to "provide reasonably adequate notice to apprise the employer that absences occurring subsequent to established FMLA covered absences, are related to a serious health condition."

The district court also held that plaintiff lacked evidence that she suffered an adverse employment action. The court found that the following actions were not sufficient to constitute adverse employment actions: additional duties; schedule change; employer's refusal to permit employee to attend conference; negative evaluation; employer's threat to discharge; and a proposed change in assignment that is never implemented. In granting summary judgment for all defendants on the FMLA claim, the district court also recognized that "the FMLA does not impose personal liability against employees or officials of public agencies."

Ham-Jones v. United Airlines, Inc., 2012 WL 4358004 (E.D. Mo. Sept. 24, 2012)

Plaintiff, an airline employee, brought an FMLA retaliation claim against her former employer after resigning in the wake of an internal investigation. In 2008, plaintiff took FMLA leave for two months, and upon her return to work was given an accommodation by the employer which allowed her to work solely indoors. Later that same year, another airline employee at the same airport was caught violating company rules regarding providing airline perks to family and friends, and that employee indicated other employees also broke the rules. The company conducted a comprehensive investigation and recommended that seven employees, including plaintiff, be discharged. Before the company had the chance to discharge her, plaintiff resigned. In her resignation letter, plaintiff stated her decision to resign was based on the difficulties she had in performing her job functions as a result of her illness and medication.

Plaintiff brought suit against the airline, alleging she was discharged in retaliation for exercising her FMLA rights. Although she was not discharged, plaintiff argued the employer took other adverse employment actions against her when (1) the airline accused her of violating rules and recommended she be discharged; (2) the airline allegedly forced her to resign; and (3) the airline put her under scrutiny when she returned from her FMLA leave. The court found that none of these actions were materially adverse to the employee. First, an internal investigation is only a materially adverse action if discipline results. Here, plaintiff resigned, without even going through the review process she was offered. Second, a resignation is only forced if it meets the elements of constructive discharge: that a reasonable person would find the working conditions

intolerable and that the employer intended to force the employee to resign. Here, no one from the employer advised plaintiff to resign and she wrote in her resignation letter that she chose to resign due to trouble performing her job. Thus, the court found no evidence that the airline intended to force her to resign. Third, while the airline did discipline and counsel plaintiff at various points during her employment, even if this occurred after plaintiff took FMLA leave, the employee did not demonstrate the discipline was a materially adverse employment action or that, even if it were, that it was causally related to her FMLA claim. Therefore, the court granted summary judgment to the employer.

Bushfield v. Donahoe, 2012 WL 6086848 (D. Idaho Dec. 6, 2012)

Plaintiff worked for the United States Postal Service. In connection with his employment, plaintiff completed an employment application and medical questionnaire, which provided that any false answers could result in immediate dismissal. Plaintiff did not disclose that he had been suffering from post traumatic stress disorder (PTSD). His nondisclosure came to light when plaintiff submitted a request for FMLA leave in connection with PTSD and his leave request was approved. Within days of being approved for FMLA leave, his pre-employment representations were investigated. The investigation included requesting the plaintiff's complete medical file, requiring the plaintiff endure multiple interviews answering personal questions about his PTSD by non-health professional supervisors, placing the plaintiff on extended, albeit paid, leave and preventing him from coming to work for more than a month. After returning to work plaintiff believed he was being harassed about his prior FMLA leave and he resigned.

The court denied the employer's motion for summary judgment, finding that the investigation conducted by the employer was sufficient evidence to support the plaintiff's FMLA interference and retaliation claims. The court found the investigation conducted by the employer was intrusive, pervasive, and went beyond a mere investigation into honesty. Further, the plaintiff was subject to a forty-five day mandatory leave for a disciplinary reason while the investigation was carried out. The court concluded that the investigation "could be compared to a pit bull with its teeth sunk into a plush dog toy."

The employer also argued that the plaintiff's claim could not survive because the Ninth Circuit had not yet recognized the right of an employee to obtain relief under the FMLA for constructive discharge. The court found that other courts have allowed claims to survive involving constructive discharge. The court found it could not conclude as a matter of law that there was not enough evidence support constructive discharge. This evidence of the investigation created a question of fact whether the conditions were so intolerable such that a reasonable person would resign.

Peterson v. Long Island RR Co., 2012 WL 2319238 (E.D.N.Y. June 19, 2012)

The employee worked for the unionized employer as an electrician. He was granted intermittent FMLA leave to care for his wife, who suffered from hypertension. Near the end of his FMLA leave, the employee testified that he was subjected to three incidents of harassment ending with his suspension from service. The first incident involved a conversation in which the employee's supervisor asked him what he had been doing when he returned from paid vacation

leave. In the second incident, the supervisor was on site conducting a routine site visit. When he inquired about the employee's absence, a lower level foreman improperly advised the supervisor the employee left sick when he was really on FMLA leave taking care of his wife. The supervisor disciplined the foreman when he learned the employee was on FMLA leave. The employee later admitted that he improperly accepted sick pay for this absence. In the third incident, the supervisor, who was again on site for a routine visit, noticed the employee was not around and asked some co-workers if he was working that day. When the employee learned about this, he instigated a verbal and physical confrontation with the supervisor in which the supervisor allegedly said "you people abuse your FMLA." The employee was suspended pending a disciplinary review. Several disciplinary proceedings and appeals followed the third incident. The employee was offered and rejected a 30-day suspension with back pay during this process, and was ultimately suspended by the disciplinary tribunal without pay for five and a half months and reinstated. The employee then twice-failed to show up for a return-to-work physical and was discharged. Disciplinary proceedings were again instituted at the conclusion of which the reviewing officer determined the appropriate discipline was dismissal.

The district court granted the employer's motion for summary judgment on the employee's retaliation claims under the FMLA. The court concluded that no reasonable jury could find the three incidents constituted an adverse employment action. The Court reasoned that while the FMLA prohibits employers from discouraging or interfering with employees' FMLA leave or retaliating against them for taking FMLA leave, it does not prohibit them from monitoring employees' attendance or investigating whether employees have engaged in misconduct. Second, the court held that the suspension and disciplined qualified as adverse employment actions. However, the employee presented no evidence that he was treated differently than similarly situated employees who were not on FMLA leave. Finally, the court rejected the employee's claim that he was constructively discharged. The employee claimed he did not return to work and was forced to resign because the employer would not change his work location and he feared continued harassment from the supervisor, but the court found no evidence of such a request.

***Carroll v. Sanderson Farms, Inc.*, 2012 WL 3866886, 19 WH Cases2d 1408 (S.D. Tex. Sep 5, 2012)**

Plaintiff, the highest ranking human resources officer at the employer, took FMLA leave on two occasions during the summer of 2009. Plaintiff's supervisor allegedly made several angry remarks regarding plaintiff's need for the leave. When plaintiff returned to work following her second leave period, she was discharged that same day. The employer claimed that it had received a series of complaints from employees that plaintiff was "rude, unapproachable, and disrespectful toward them." Plaintiff's supervisor asserted that he told plaintiff the complaints were serious and warned her that if her relationship with the employees did not improve, she might be terminated. Subsequently, during plaintiff's second stint of FMLA leave, the employer conducted "Staying Union Free" training in response to a union organizing effort. During the training sessions, several hourly employees again stated that they did not like or trust plaintiff and "were uncomfortable going to her with workplace concerns." The employer claimed that these complaints led to plaintiff's termination for unsatisfactory work performance upon her return from leave.

Citing her discharge on the day she returned from protected leave, plaintiff asserted both retaliation and interference claims under the FMLA against her former employer. She also alleged that the employer interfered with her attempt to obtain subsequent employment, as further retaliation for her taking FMLA leave. In ruling on the employer's motion for summary judgment, the district court held that plaintiff presented sufficient evidence to create a genuine issue for trial on the issue of retaliatory discharge under the FMLA. Although finding that the employer had presented evidence of a legitimate, non-retaliatory reason for the discharge and that the plaintiff had failed to show that the reason (complaints by hourly employees) was pretext for retaliation, the court nevertheless concluded that a jury could conclude that plaintiff's FMLA leave was a motivating factor for the discharge. In particular, the court pointed to small number of overall negative employee comments, the lack of documentation in plaintiff's personnel file, and the fact that plaintiff was never given an opportunity to respond to the complaints that arose during the union avoidance training. Because plaintiff was reinstated (albeit only for a few hours), the court granted summary judgment as to the FMLA interference claim in favor of defendant. Finally, based on Fifth Circuit precedent, the court granted summary judgment as to alleged the post-termination retaliation because the plaintiff did not to include those allegations in any EEOC charge and, therefore, failed to exhaust her administrative remedies.

Hamedl v. Weiland, 2012 WL 3903499 (E.D. N.Y. Sep 06, 2012)

Due to injuries to his back, neck and foot, the employee requested and received permission to work the midnight to 8:00 a.m. shift. This schedule permitted him to shorten his commute, preventing him from remaining sedentary for extended periods. The midnight shift was much sought after among employees covered by the applicable union contract because there was a premium wage paid by the employer. Subsequently, while the employee was taking leave due to an unrelated injury, it was discovered that his seniority had been calculated incorrectly, and he was moved back to the day shift. However, the employee was permitted to work a modified day shift to avoid traffic during his commute. The employee also requested an ergonomic chair for his work area. This request was eventually granted, and the chair was delivered approximately seven months after the request was made.

The employee later filed suit, alleging FMLA retaliation and the district court granted the employer's motion for summary judgment. According to the court, the employee had shown neither an adverse action nor any circumstances raising a reasonable inference of retaliatory intent. Citing Second Circuit precedent, the court noted that, for purposes of the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to dissuade a reasonable worker from exercising his legal rights. Addressing the employee's three alleged adverse actions, the court held that: (1) there was no factual support for the claim that the employer recalculated the employee's seniority date during or after his leave; (2) the employee's disappointment at being moved to the modified day shift was insufficient to render it an adverse action; and (3) the alleged late delivery of the ergonomic chair was likewise not materially adverse to the employee. In addition, the court held that nothing in the record constituted "circumstances giving rise to an inference of retaliatory intent."

Fleck v. Wilmac Corp., 2012 WL 1033472 (E.D. Pa. Mar. 27, 2012)

Plaintiff, a physical therapist, injured her ankle prior to beginning employment with defendant employer. In accepting employment with the employer, plaintiff acknowledged that she could satisfy the physical requirements of the job. She then had to undergo additional treatment on her ankle, for which she sought FMLA leave. Her leave was granted for twelve weeks. Near the end of her FMLA leave, plaintiff advised her employer, via a letter from her doctor, that she would be able to return to work at the end of her FMLA leave but could only work four hours per day. One week before the end of her FMLA leave, plaintiff received a call from her employer advising her that her employment was being terminated because she had exhausted her FMLA leave and the employer could not accommodate her restrictions. Plaintiff filed suit against both the employer and the employer's human resources representative, alleging various causes of action including a retaliation claim under the FMLA. Following discovery, defendants moved for summary judgment.

The district court denied summary judgment with respect to plaintiff's FMLA claim. It found first that plaintiff had presented the required elements of a *prima facie* case because she had shown that her employment was terminated while she was still on FMLA leave and that the employer considered her FMLA leave when making the determination to terminate her employment. It rejected, however, plaintiff's claim that a disciplinary write-up received from her employer prior to her taking FMLA leave was an action that would have "dissuaded" a reasonable employee from pursuing her right to leave under the FMLA. The district court also concluded that, although the employer had presented a legitimate and nondiscriminatory reason for its action, there was a genuine issue of material fact as to whether this reason was pretextual. Plaintiff was discharged while she was still out on FMLA leave, and there was evidence to suggest that the accommodation that plaintiff requested had been made available to at least one other employee. Finally, the district court declined to rule on whether individual liability under the FMLA could be assessed against the human resources director individually, because there was insufficient evidence to determine whether the director had "exercised control" over plaintiff's FMLA leave.

***Khami v. Ortho-McNeil-Janssen Pharmaceutical, Inc., et al*, 2012 WL 414812 (E.D. Mich. Feb. 8, 2012).**

Plaintiff asserted a claim against her former employer for retaliation in violation of the FMLA. During her tenure as a sales representative, she took two periods of protected medical leave. Plaintiff argued that, because she took medical leave, she received negative performance reviews as a result of her lower sales numbers; was not allowed to attend a meeting with a client in Arizona; was demoted; was terminated; was not rehired to another one of defendant's sales divisions when her division's sales force was laid off; was refused jobs in defendant's larger family of companies; was subject to heightened scrutiny and isolation; was refused a specific vacation day; was required to fill out an action plan and attend e-learning courses; and defendant failed to appropriately cover her sales territory while she was on leave. Defendant moved for summary judgment.

The court granted in part and denied in part the motion for summary judgment. The court found triable issues of fact regarding plaintiff's most recent negative performance review because the review did affect defendant's decision to not re-hire her and the court could not

conclude as a matter of law that the evaluation criteria were applied uniformly. However, the court found no triable issues of fact regarding the earlier performance reviews, because they did not adversely impact plaintiff's wages or salary and, thus, were not adverse employment actions under the law of retaliation. The court also found that plaintiff created a triable issue of fact that she was not permitted to go to Arizona because she had been out on leave.

The court granted summary judgment on the remaining claims. First, the court held that the plaintiff did not provide evidence connecting her demotion to any protected activity. Second, the court held that plaintiff's termination was not retaliatory, as defendant had a legitimate non-discriminatory reason to disband plaintiff's entire sales force. Third, the court held that defendant's refusal to give plaintiff another position within their family of companies was not retaliatory, as plaintiff provided no evidence that this was prompted by her medical leaves. Fourth, although the court did note that the heightened scrutiny may be an adverse employment action, it found that plaintiff offered no evidence connecting her heightened scrutiny to her FMLA leave, as she had performance and interpersonal issues before her leave. Fifth, the court found that plaintiff could not dispute that the company vacation policy provided a legitimate, nondiscriminatory business reason for plaintiff's denial of the vacation day. Sixth, the court held that the action plan and e-learning courses were not an adverse employment action, and that plaintiff failed to establish a causal connection between her leave and the action plan and courses. Finally, the court found that the neglect of plaintiff's sales territory was attributed to a general company policy, and not retaliatory.

Summarized Elsewhere:

Cashman v. CNA Financial Corp., et al., 2012 WL 113667 (E.D. Pa. Jan. 13, 2012)

Crawford v. JP Morgan Chase & Co., 2012 WL 1185983 (S.D. Ohio Apr. 9, 2012)

Chappell v. The Bilco Company, 675 F.3d 1110, 18 WH Cases2d 1641 (8th Cir. 2012)

Baldwin v. Board of Trustees of University of Illinois, 2012 WL 3292831 (N.D. Ill. Aug. 8, 2012)

Worst v. Glynn County School District, 2012 WL 1068135 (S.D. Ga. March 29, 2012)

Cox-Frietch v. Ohio Bureau of Workers' Compensation, 2012 WL 6051972 (6th Cir. Dec. 6, 2012)

O'Sullivan v. Siemens Indus., Inc., 19 WH Cases2d 1121, 2012 WL 4355528 (E.D. Mich. Sept. 24, 2012),

Dove v. Community Education Centers Inc., 2012 WL 5403508 (E.D. Pa. Nov. 5, 2012)

c. Causal Connection

Arora v. Dental Health Group, P.A., 2012 WL 4856944 (S.D. Fla. Aug. 8, 2012)

Plaintiff informed defendant's office manager that she was pregnant and would be taking FMLA leave. Shortly after plaintiff requested FMLA leave, defendant discovered that plaintiff had made fraudulent entries in patients' charts that resulted in patients being billed for services that had not been performed. Defendant then decided to discharge plaintiff and plaintiff filed suit alleging FMLA interference and retaliation.

Defendant filed a motion for summary judgment as to plaintiff's FMLA retaliation claim. The court held that plaintiff failed to establish a causal connection between her request for FMLA leave and her discharge because the office manager was not involved in the decision to discharge plaintiff and there was no evidence that the decision makers had knowledge of the leave request. In so holding, the court rejected plaintiff's argument that the decision makers likely knew she was pregnant at the time she was terminated. The court also found that the close proximity between the discharge and the expected leave date did not establish a causal connection because there was undisputed evidence that the decision makers were not aware of plaintiff's upcoming FMLA leave.

Gambill, et al. v. Duke Energy Corp., 456 Fed. Appx. 578 (6th Cir. 2012)

Plaintiff, an attorney in the litigation section of defendant's legal department, was laid off in 2006 during a reduction in force as a result of a post-merger reorganization. Plaintiff claimed that the reason he was laid off was due, in part, to his use of FMLA leave two years prior. In 2004, plaintiff had taken approximately three weeks of FMLA leave for back surgery and also took an undisclosed amount of time to care for his mentally retarded brother and his father with Alzheimer's. Plaintiff offered to return earlier from the back surgery but was told by his supervisor "you can't come back to work, you're falling apart." When plaintiff did return, he felt that the supervisor's behavior toward him had changed. The supervisor dumped work on him, showed a heightened interest over his whereabouts during work, and started closing her door when meeting with other attorneys. The merged company reduced the combined legal department by 20 attorneys through voluntary resignations, early retirements and lay offs. Plaintiff was one of seven laid off employees.

The Sixth Circuit affirmed dismissal of plaintiff's FMLA retaliation claim on the grounds that he failed to show a causal connection between his use of FMLA leave and his lay off. The court held that a subjective belief regarding the supervisor's behavior and the stray comment regarding his initial offer to return from leave early is not sufficient evidence to establish a claim of discrimination. Additionally, the fact that the adverse employment action occurred two years after the leave was taken "eviscerates the purported temporal connection..." as defendant had two years to retaliate and did not.

DeGraw v. Exide Technologies, 462 Fed. Appx. 800 (10th Cir. 2012)

Plaintiff worked as a material handler and had a history of back problems that predated his employment. On three occasions, he took FMLA leave due to his back. Following his release to return to work in July 2006, plaintiff informed his supervisor that mandatory overtime was aggravating his back pain. Plaintiff was then approved to take additional FMLA leave. Several months later, plaintiff was released to work by one of his doctors, but the company's

doctor would not release him to return as a material handler. The company then discharged plaintiff because it had no other position for him. Plaintiff brought suit, claiming workers' compensation retaliation and FMLA claims of retaliation and interference. The company moved for summary judgment.

The district court held that plaintiff could not establish a prima facie case of retaliation because there was no causal connection between his discharge and request for leave. The court found that, even though plaintiff's discharge was related to his medical condition, and there were conflicting medical opinions as to whether he could perform the duties of his position, plaintiff did not establish pretext for retaliation. The district court likewise dismissed the FMLA interference claim because plaintiff had exhausted his FMLA leave entitlement weeks before he was discharged.

Wehrley v. American Family Mutual Ins. Co., 2012 WL 415421 (D. Colo. Feb. 9, 2012)

Plaintiff worked as a field adjuster, which required him to work in high, precarious places; to be able to lift up to 50 pounds; and to climb or balance. Plaintiff sustained an injury when he fell off a ladder and was put on work restrictions that included no climbing ladders or lifting over ten pounds. Plaintiff's supervisor initially allowed him to work from home, working on non-field claims, until he gained sufficient mobility to work on field claims that did not include roof inspections. The company later reassigned plaintiff to performing roof inspections after most of his work restrictions were lifted. The same day plaintiff was scheduled to do his first roof claim since his injury, plaintiff went to a physician who restricted him from climbing ladders and roofs. Plaintiff then spent several months attempting to schedule knee surgery and to have it approved by the employer's workers' compensation carrier. Because he did not get his surgery scheduled, he did not apply for FMLA leave. On August 22, 2008, the employer informed plaintiff that if he did not return to roof inspections, his job was in jeopardy. A week later, he was discharged. During the meeting to discharge him, the employer observed that plaintiff had not performed roof inspections since June 2007. Plaintiff filed suit, alleging violation of the ADA and FMLA as well as public policy, and the employer filed a motion for summary judgment.

After determining that plaintiff was asserting only a retaliation claim under the FMLA, the court granted the employer's motion for summary judgment. Plaintiff based his claim on his having expressed the intent to exercise his FMLA rights. However, the district court held that, under Tenth Circuit precedent, taking FMLA leave is a prerequisite to bringing a retaliation claim. Here, because plaintiff did not take any FMLA leave, he could not bring a claim for retaliation. The district court went on to hold that even if he could have brought a retaliation claim, there was no evidence of a causal connection between his intent to take FMLA leave and his discharge. The evidence showed a year-long attempt by the employer to aid plaintiff in his desire to return to full duty, and he was discharged only after the employer concluded he could not do the job. In addition, the employer indicated it would rehire plaintiff for a position that did not require climbing ladders.

Williams v. Crown Liquors of Broward, Inc., 851 F.Supp.2d 1332 (S.D. Fla. 2012)

Soon after the employee informed the employer that she was pregnant, her physician directed her to work from home due to pregnancy complications. The employee met with the company's owners, submitted her physician's note, and offered to recruit a temporary replacement. The employee requested to be kept on payroll in return for performing various duties from home. The company accepted this request and agreed to pay the employee her "normal salary through delivery." At a meeting soon thereafter, the parties came to an understanding that the employee would remain employed through her delivery, and any replacement was to be considered temporary. This understanding was never memorialized. The employee subsequently submitted the completed FMLA paperwork for a 12-week period, which actually expired prior to the employee's projected delivery date. However, the employee believed that she was entitled to additional time off pursuant to the company's internal FMLA policy and her accrued vacation time. Soon after, the employee's health declined and she was no longer able to perform the tasks she had promised the employer she would perform from home. The employee was subsequently discharged.

The court denied the company's motion for summary judgment regarding the employee's retaliation claim under the FMLA, finding that the employee presented sufficient evidence to create an issue of fact as to whether her discharge was because of her FMLA request. Alternatively, the company asserted that the employee could not establish a *prima facie* case of discrimination because the company acted properly regarding her FMLA leave. The court held that the timing of the FMLA request along with the company's decision to discharge the employee "reasonably suggests a causal relationship between these events." The employee's claim was further substantiated by the fact that the parties discussed the possibility of the employee's discharge and hiring a replacement at the time she made her FMLA request.

The court also denied the company's motion for summary judgment of the employee's interference claim under the FMLA for the company's failure to timely notify the employee of her right to take FMLA leave. The company did not dispute that it failed to provide timely notification, however, it contended that this notification requirement is not a substantive FMLA right and that it may be exempt from the requirement due to "extenuating circumstances". The court found that since the record suggests that the company violated the FMLA with respect to the employee, an issue of fact remained regarding whether the employee was entitled to a benefit that was denied.

Naber v. Dover Healthcare Associates Inc., 473 Fed. Appx. 157 (3d Cir. April 2, 2012)

A former employee brought an action against defendant, alleging retaliation under the FMLA. Defendant approved plaintiff's request for intermittent FMLA leave. Two weeks later, defendant discharged plaintiff for falsifying records; plaintiff claimed that she was terminated because of her request for FMLA leave.

The Third Circuit affirmed the district court's order granting summary judgment in favor of defendant. In so holding, the court found that plaintiff failed to make out a *prima facie* case of FMLA retaliation because she did not submit sufficient evidence of a causal connection between the protected activity and her discharge. The Third Circuit found that the following actions were not enough to establish a causal connection: a supervisor's isolated statement that plaintiff was

not on "light duty" after plaintiff failed to perform a job duty; a reprimand for violating the dress code that predated her invocation of FMLA rights; plaintiff's claim that the employer's administrator was upset that the medical report stated plaintiff was stressed at work, and plaintiff's claim that the administrator tried to get those words removed from the report. The Third Circuit further found that plaintiff failed to show any evidence that the administrator sought to prevent plaintiff from taking FMLA leave.

The Third Circuit also found that plaintiff's FMLA claim failed because defendant articulated a legitimate, non-discriminatory reason for discharging plaintiff, and plaintiff failed to offer sufficient evidence to prove such reasoning was pretextual. The court stated that, to establish pretext, a plaintiff must show the employer's decision was more than just wrong or mistaken because the allegation is that discriminatory animus was a motivating factor in the termination decision. Because plaintiff could not do so, the Third Circuit affirmed the district court's order granting summary judgment in favor of defendant.

Johnson v. Roehl Properties of Indiana LLC, 2012 WL 1144027 (N.D. In. April 4, 2012)

The employee sued the employer, a trucking company, for interference and retaliation in violation of FMLA. The employee worked as a truck driver recruiter for the employer in Michigan primarily, but also in part of Indiana and in Chicago. The employee left in February 2009 to undergo heart surgery. During his absence, the employer decided to eliminate its recruiting in Michigan, which had seen a decline in trucking needs following the economic downturn in 2008. As a result, the employee was let go. The court granted the employer's motion for summary judgment as to the interference claim, finding that the interference claim was, in fact, a retaliation claim.

The court also granted the employer's motion for summary judgment on the retaliation claim. While the employee's termination followed soon after his leave, other circumstances undermined any causal link between the two events, and the employee could not establish his claim by direct evidence. In support, the court relied on the fact that the employer had taken cost reduction steps earlier, in response to the economic issues in 2008, when it eliminated its apprenticeship program directed at recruiting former military members. The employee had been heavily involved in that program as well. In addition, the employee could not prevail on the indirect evidence method because, ultimately, he could not establish that the elimination of the military apprenticeship program and the Michigan recruiting were undertaken, and not restarted by the time of trial in 2012, in order to avoid giving leave to the employee.

Talbot v. New Seasons Market, LLC, 2012 WL 6738271 (D.Or. Dec. 27, 2012)

Plaintiff worked for defendant grocery store as a receiving clerk. Beginning in 2007, plaintiff was frequently absent for back pain caused by an ovarian cyst. Plaintiff kept her condition private until August 2009, when she applied for and was granted intermittent FMLA leave.

In 2009, plaintiff learned about and became interested in a special wine, so she asked the store's wine steward to order this wine for plaintiff to taste and potentially purchase. When the case of wine arrived, on a Friday, the steward placed it on plaintiff's desk and asked her to tell

him how much of the wine she would purchase. Plaintiff took the entire case of wine home over the weekend to try it, but did not pay for it. After trying the wine and liking it, plaintiff decided to purchase five bottles which she kept at home, and returned the remaining seven bottles to the store. Plaintiff did not immediately pay for the five bottles she had kept, allegedly because she was too busy. The record suggests that plaintiff intended to pay for the five bottles she had kept, and in fact attempted to do so. Defendant investigated the matter and discharged plaintiff for taking the case of wine home over the weekend without paying for it.

Plaintiff sued defendant claiming that her discharge violated the FMLA, asserting an interference claim. The court granted summary judgment for the defendant, concluding that there was no evidence upon which to even infer a connection between plaintiff's request for and use of intermittent FMLA leave, and her discharge.

Carita v. Mon Cheri Bridals, LLC, 2012 WL 2401985 (D. N.J., June 25, 2012)

Plaintiff, a minority shareholder and employee of defendant, brought suit alleging retaliation under FMLA after applying for leave for her own health condition. Plaintiff alleged that after taking FMLA leave her superior changed plaintiff's duties, resulting in a decrease in responsibilities and compensation. Plaintiff further argued that the changes amounted to a "constructive discharge." In granting defendant's motion for summary judgment, the court reasoned that plaintiff did not dispute defendant's evidence that the adverse employment action occurred prior to her request for FMLA leave. By the same token, the court analyzed that no reasonable juror could find that the changes implemented prior to plaintiff's request for FMLA leave could not be construed as resulting from her FMLA leave. Accordingly, the court granted summary judgment in favor of defendant.

Blosser v. AK Steel Corp., 2012 WL 3112307 (S.D. Ohio Jul 31, 2012)

Plaintiff was hired as a Senior Engineer in July 2007 to work on the employer's blast furnace and other projects. His performance was rated "poor" by his supervisors, and one supervisor even refused to have plaintiff work on any of his projects. Plaintiff was repeatedly counseled and admitted he felt confused by his assignments and did not have the requisite IT knowledge for the job. Despite being behind on jobs, he left early afternoon on most Fridays. In August 2008, plaintiff took leave for the removal of a tumor. He was released by his doctor on November 9, but did not inform the employer. He finally returned on December 1, with no restrictions, and his performance continued to be substandard. Plaintiff blamed his poor performance on his having a brain tumor despite the fact that his performance continued to be lacking after the tumor's removal.

Because of the recession in 2008, the employer notified workers of cost-saving measures including possible lay-offs. In January 2009, each department was required to reduce staff by 15%. Because plaintiff had the least seniority in his department and due to his poor performance and not possessing any unique skills, plaintiff was selected, among others, to be laid-off. He then sued claiming his lay off was retaliation for his taking leave. Because the termination was part of a lay-off, plaintiff had to produce additional direct or statistical evidence to indicate he was singled out for impermissible reasons. The court held that there no evidence of causal

connection finding that the passage four months was insufficient to show causation based upon temporal proximity. In addition, the court found plaintiff's argument, that a supervisor referring to plaintiff as "the same ol AI" was direct proof of retaliation, nonsensical. Last, the court noted that plaintiff's performance had been an issue long before he took leave. The employer's motion for summary judgment was granted.

White v. Telcom Credit Union, 874 F. Supp.2d 690 (E.D. Mich. 2012)

The employee, a call center worker, injured her ankle in a car accident. She took a 5-month disability leave of absence after the injury. When she returned to work, she still experienced problems with her ankle. The employer was aware of these problems. The employee also testified that the human resources manager questioned her from time to time about the ankle injury and her need for disabled parking. The employee's ankle problems increased and she testified that she discussed the possibility of surgery with her doctor, who did not recall but did not dispute the conversation. The employee told her supervisor about the possibility of surgery and asked about the availability of another disability leave. The supervisor allegedly told her that any leave for surgery (which had not been scheduled) would have to be an FMLA leave, but failed to provide paperwork. Five days after that conversation, the supervisor requested HR to issue the employee a disciplinary warning for an outburst in the call center in which the employee questioned the supervisor about an upcoming mandatory meeting. The extent of the outburst was disputed by six co-workers. HR issued the warning and held a meeting to present it to the employee. The facts of the meeting were disputed, with both parties essentially claiming the other acted unprofessionally and inappropriate. Following the meeting, the supervisor and HR Manager recommended discharging the employee based on the disciplinary warning and the employee's conduct in the subsequent meeting. They sought approval from both the HR Department Manager and the CEO. Neither talked to the employee but concurred in the decision. The employee was terminated the next day and filed suit claiming the employer interfered with her FMLA rights and discharged her in retaliation for exercising her FMLA rights.

The district court denied the employer's motion for summary judgment on both claims. The district court concluded there was a factual dispute as to whether the employer interfered with the employee's FMLA rights by (i) refusing to clarify whether she could take a disability leave, as opposed to unpaid FMLA leave for the anticipated ankle surgery, and (ii) issuing the disciplinary warning and terminating the employee's employment. The court rejected the employer's proffered reason for the discharge, citing the contradictory testimony of the co-workers, the disputed testimony concerning the disciplinary meeting, and the departure from the standard progressive discipline. As to the retaliation claim, the court held that the disputed testimony could allow a jury to infer that the real reason for the discipline and termination was the employee's attempt to exercise her FMLA rights in connection with the anticipated ankle surgery. Following recent Sixth Circuit precedent, the district court applied the "honest belief rule." Citing the mere five-day gap between the discussion regarding the ankle surgery and the disciplinary warning, the disputed testimony concerning the outburst in the call center, and the HR Department Manager's and CEO's lack of investigation, the court concluded that there were issues of fact whether the employer had an "honest belief" that the employee was insubordinate and terminated for this conduct and not her anticipated FMLA leave.

Mann v. Navicor Group, LLC, 2012 WL 2926275 (6th Cir. 2012)

Plaintiff, an art director, alleged both retaliation and interference claims under the FMLA, in addition to other claims. As early as July 2007, defendant received complaints regarding plaintiff's performance. Plaintiff was reassigned to a new team, and reported to a new manager. In late 2007, defendant's employees, including plaintiff, complained to management regarding their manager. They alleged that the manager had a short temper, a negative attitude, and made sarcastic and degrading remarks. In January 2008, Defendant reprimanded the manager, and concluded that the manager's conduct was not gender specific. In late June or early July 2008, Plaintiff requested leave for eleven weeks to care for her mother. Defendant became aware of plaintiff's request for leave on the same day it was preparing to discharge her for performance reasons. Defendant increased plaintiff's severance pay offer from two weeks to eleven weeks. Plaintiff subsequently filed suit, alleging both retaliation and interference claims. The district court granted the defendant's motion for summary judgment, and plaintiff appealed.

The Sixth Circuit affirmed. The court held that because there was no evidence that indicated defendant was aware of plaintiff's intent to request FMLA leave when defendant made the decision to discharge plaintiff, there was no causal connection between her protected FMLA activity and the adverse employment action. The court also held that plaintiff's interference claim likewise failed because defendant's decision to discharge plaintiff was unrelated to her request for FMLA leave. Specifically, the court found that there was no evidence that defendant was aware of her intent to request leave when defendant discharged plaintiff.

Cullison v. Dauphin County, 2012 WL 3026784 (M.D. Pa. July 24, 2012)

The employee was unable to perform job-related tasks because of a medical condition and missed a significant number of working days in March and April of 2008. The employer's policy required employees to use all accrued vacation, sick, and personal leave before beginning FMLA leave, but the employee did not exhaust accrued leave during his absence. The employee claimed that from the time he returned to work in April 2008 until February 2009, he was subjected to a pattern of antagonism including harassing comments and an attempted disciplinary write-up. In May of 2009, the employee was dismissed for providing false information regarding a car accident involving the employer's vehicle. The employee alleged that the employer improperly failed to advise him of FMLA rights and terminated him in retaliation for taking FMLA-qualifying leave.

The court dismissed both FMLA claims on the employer's motion for summary judgment. The court reasoned that because the employee was never entitled to FMLA leave, based on the employer's valid policy, the employer did not violate any FMLA notice rights. With respect to the retaliation claim, the court first noted that the employee could not establish a causal link between protected conduct and adverse action based upon temporal proximity. Instead, the court focused on whether the pattern of antagonism following the employee's FMLA-qualifying leave created a causal link. The court determined that no reasonable jury could find the allegedly antagonistic events retaliatory because they were isolated, unrelated to leave, or made by people not involved in employment decisions.

Kim v. Goldberg, Weprin, Finkel Goldstein, LLP, 862 F. Supp. 2d 311 (S.D. N.Y. 2012)

Plaintiff worked as an associate for defendant, a law firm. In late 2009, she requested and was granted 12 weeks of FMLA leave to give birth and to care for her newborn. In February 2010, after she returned from her leave, plaintiff requested to work part-time in order to care for her child at home. Defendant denied her request because firm policy did not permit attorneys to work from home or part time. In April 2010, plaintiff was discharged due to budgetary reasons and because her performance was deemed average. Plaintiff sued, alleging that her former employer interfered with her FMLA rights by denying her request to work a reduced schedule, retaliating against her, and discriminated against her under New York State law. Defendant moved for summary judgment on all claims.

As to plaintiff's FMLA interference claim, the parties disputed whether plaintiff was entitled to intermittent leave in the first place. Defendant claimed that, to take intermittent leave to give birth to or care for a baby, there must be an agreement between the employee and employer. The evidence showed that the parties never agreed to let plaintiff take intermittent leave; in fact, they refused her request. Thus, plaintiff's interference claim failed as a matter of law. Plaintiff also could not show retaliation for requesting intermittent leave in February 2010 because she could not establish she was entitled to intermittent leave. Although plaintiff was able to establish the first three requirements of a prima facie retaliation claim for her 2009 maternity leave, she was not able to show a causal link between her termination and her maternity leave. A close, temporal relationship between exercising a protected right and an adverse employment action can show retaliation by the employer. Although the Second Circuit declined to delineate the limits of this temporal relationship, district courts in the circuit held that two to three months between the protected activity and the adverse employment action cautioned against an inference of causation. Thus, the four-month gap between plaintiff's maternity leave and her termination was too long to support a causal connection based on temporal proximity.

Even if plaintiff had established a prima facie case, defendants successfully rebutted the presumption by showing that plaintiff was dismissed along with several other associates due to budgetary concerns. The court found that even if plaintiff had presented evidence to contradict the employer's proffered reason for termination, a court must still examine the entire record and determine retaliation claims based on fact-specific inquiries. Because plaintiff did not raise a genuine issue of material fact regarding defendants' motives for dismissing her, summary judgment was proper as to both her retaliation and interference claims. Finally, her state law claims were dismissed without prejudice because her federal claims were dismissed.

Fields v. Fairfield County Board of Developmental Disabilities, 2012 WL 6051965 (6th Cir. Dec. 6, 2012)

The court affirmed the district court's grant of summary judgment to the employer as to plaintiff's claim of FMLA retaliation. Plaintiff did not establish a causal connection between her FMLA leave complaints and the non-renewal of her contract. Although her sick leave usage was mentioned in her performance evaluation, she stubbornly misunderstood policies explained to her on a number of occasions and created problems by her insistence on providing this misinformation to other employees or placed it in their files. In addition, after she sought and

obtained the necessary medical documentation for proper certification, the hours contained in the leave notice were properly designated as FMLA leave.

Williams v. Crown Liquors of Broward, Inc., 851 F.Supp.2d 1332 (S.D. Fla. 2012)

Soon after the employee informed the employer that she was pregnant, her physician directed her to work from home due to pregnancy complications. The employee met with the company's owners, submitted her physician's note, and offered to recruit a temporary replacement. The employee requested to be kept on payroll in return for performing various duties from home. The company accepted this request and agreed to pay the employee her "normal salary through delivery." At a meeting soon thereafter, the parties came to an understanding that the employee would remain employed through her delivery, and any replacement was to be considered temporary. This understanding was never memorialized. The employee subsequently submitted the completed FMLA paperwork for a 12-week period, which actually expired prior to the employee's projected delivery date. However, the employee believed that she was entitled to additional time off pursuant to the company's internal FMLA policy and her accrued vacation time. Soon after, the employee's health declined and she was no longer able to perform the tasks she had promised the employer she would perform from home. The employee was subsequently discharged.

The court denied the company's motion for summary judgment regarding the employee's retaliation claim under the FMLA, finding that the employee presented sufficient evidence to create an issue of fact as to whether her discharge was because of her FMLA request. Alternatively, the company asserted that the employee could not establish a *prima facie* case of discrimination because the company acted properly regarding her FMLA leave. The court held that the timing of the FMLA request along with the company's decision to discharge the employee "reasonably suggests a causal relationship between these events." The employee's claim was further substantiated by the fact that the parties discussed the possibility of the employee's discharge and hiring a replacement at the time she made her FMLA request.

The court also denied the company's motion for summary judgment of the employee's interference claim under the FMLA for the company's failure to timely notify the employee of her right to take FMLA leave. The company did not dispute that it failed to provide timely notification, however, it contended that this notification requirement is not a substantive FMLA right and that it may be exempt from the requirement due to "extenuating circumstances". The court found that since the record suggests that the company violated the FMLA with respect to the employee, an issue of fact remained regarding whether the employee was entitled to a benefit that was denied.

Amsel v. Texas Water Dev. Board, 464 F. Appx. 395 (5th Cir. 2012)

Plaintiff, an employee with a long history of medical issues and resulting work accommodations, applied for FMLA leave in May 2006. He used his FMLA leave intermittently over the next year, ultimately exhausting that leave in April 2007. After his FMLA leave had been exhausted, plaintiff again applied for FMLA leave, but was determined to be ineligible because he had not worked 1250 hours in the previous calendar year. Instead, the employer

awarded plaintiff 720 hours of sick leave. In June 2007, plaintiff's position was eliminated due to a budget cut. It was one of two positions that were eliminated, the other being a vacant position. Plaintiff sued alleging FMLA retaliation, among other claims, and the district court granted the employer's motion for summary judgment on all counts. Plaintiff appealed.

The Fifth Circuit affirmed the district court's decision. With respect to plaintiff's FMLA retaliation claim, it found that plaintiff could sue for FMLA retaliation, even though he was not eligible for leave at the time of his discharge, because his retaliation claim could be based on his previous exercise of his FMLA rights. However, plaintiff did not present a *prima facie* case of causation that sufficiently linked his discharge to his taking FMLA leave – the elimination of his position occurred more than two months after he returned from FMLA leave, and no additional circumstances suggested any link between the two events. The Fifth Circuit also rejected plaintiff's argument that the causal link could be supplied by speculation that the employer's decision was motivated by its belief that plaintiff would continue to exercise his right to FMLA leave.

Franklin v. Pepco Holdings, Inc., 2012 WL 2870266 (D.D.C. July 13, 2012)

Plaintiff, who worked for defendant as a legal assistant, regularly used sick leave to visit her doctor for treatment for a fibroid condition. In May 2008, plaintiff's supervisor began questioning her use of sick leave. In April 2009, plaintiff requested and was granted intermittent FMLA leave for her condition. Later that year, plaintiff's supervisor gave her a negative performance review which noted her number of absences. The supervisor also put together a calendar of the days the plaintiff missed worked, color-coded by cause, including FMLA leave. In 2010, plaintiff went on short-term disability leave for stress, which plaintiff attributed to her supervisor. When she was ready to return to work, her doctor sent a note to defendant, recommending that plaintiff work in a different department, with a different supervisor. Defendant read this note to mean that plaintiff was unable to continue in the same department, and required plaintiff to apply for jobs in other departments in order to return to work. Plaintiff applied, but was not hired for jobs in other departments, and, as a result, defendant terminated her employment.

Plaintiff brought suit alleging wrongful discharge and retaliation in violation of the FMLA. The employer moved to dismiss the claim and the court denied the motion. The court concluded that plaintiff stated a plausible claim that there was a causal connection between her taking of FMLA leave and her poor performance reviews and termination. In particular, the court pointed to the fact that plaintiff's supervisor created a calendar of plaintiff's absences, even ones for which plaintiff had used protected FMLA leave. The court also noted that plaintiff's doctor recommended that she work in a different department, but did not say that she was required to do so. Further, while defendant argued that a six-month gap between plaintiff's FMLA leave and her termination was too long to create a causal connection, the court noted that other evidence supported a causal connection.

Summarized Elsewhere:

Cox-Frietch v. Ohio Bureau of Worker’s Compensation, 2012 WL 508977 (S.D. Ohio Feb. 15, 2012), *aff’d*, No. 12-3305, 2012 WL 6051972 (6th Cir. Dec. 6, 2012)

Reynolds v. Stovall, 2012 WL 1202026 (W.D. Ark. Apr. 10, 2012)

Farver v. Coventry Health Ctr., 2012 WL 1191849, (M.D. Pa. March 2, 2012)

Pagan v. Select Specialty Hospital – Youngstown, Inc., 2012 WL 2296242 (N.D. Ohio June 18, 2012)

i. Temporal Proximity

Sisk v. Picture People, Inc., 669 F.3d 896 (8th Cir. 2012)

Plaintiff, a photography studio manager, sued defendant for retaliation under the FMLA after her employment ended. Plaintiff had experienced severe pain in her hip, called her assistant manager, left work, and went to the hospital but was not admitted. After nearly 11 weeks of FMLA leave, plaintiff’s physician cleared her to work without restrictions. Within a few days back at work, plaintiff displayed a physical inability and refusal to perform her job. She met with her supervisors to discuss it and, although the parties disagreed whether plaintiff resigned or was discharged, nobody said anything about her use of FMLA leave. The district court entered judgment as a matter of law in favor of defendant at the close of the plaintiff’s case-in-chief at trial, concluding that, although plaintiff’s evidence “could be sufficient to establish a prima facie case” of retaliation, she had to show “more than a prima facie case” at trial.

The Eight Circuit affirmed, but for different reasons. The Court explained that because defendant never proffered a non-retaliatory reason for the alleged discharge, “the relevant inquiry is the sufficiency of the plaintiff’s prima facie case.” Thus, while the district court, at that point in the trial, should have focused only on whether plaintiff established a prima facie case, according to the Court, plaintiff did not show a causal link sufficient for a prima facie case of retaliation. Specifically, “the only evidence of a causal link is the temporal proximity between her FMLA leave and the alleged termination.” Focusing on when defendant first *knew* of plaintiff’s use (or planned use) of FMLA leave – rather than the date she returned to work – the Court concluded that the two-month span between defendant learning of plaintiff’s leave and the end of her employment was, alone, insufficient to carry her burden to show causation as part of her prima facie case.

Brown v. City of Jacksonville, 2012 WL 604218 (E.D. Ark., Feb. 24, 2012)

Plaintiff, a Purchasing Manager for defendant, used eleven weeks and one day of FMLA leave between August and October 2008 to have a total hip replacement to alleviate chronic joint problems. When she returned, the inefficiencies she displayed at work prior to her leave continued. Defendant discharged her eight months later in June 2009 for “failure in performance of duties” and “failure in personal conduct.” Plaintiff sued alleging, among other things, FMLA retaliation and interference.

The district court granted defendant's motion for summary judgment. Noting the difference between a "retaliation" claim and an "interference" claim under the FMLA – with the former requiring "proof of retaliatory intent" – the court explained that plaintiff's claim was "one of retaliation, not interference." It then concluded that the plaintiff failed to establish a prima facie case of retaliation because the eight-month time lapse between the plaintiff's return to work from FMLA leave and her discharge "diluted any inference of causal connection." The court also noted that defendant was "counseling Plaintiff regarding her performance problems prior to the start of her FMLA leave," further "disprove[ing] any discriminatory intent."

Turner v. City of Paris, Kentucky, 2012 WL 6706164 (E.D. Ky. Dec. 26, 2012)

Plaintiff began FMLA leave in September 2010 to care for his wife, who had suffered a head injury. In March 2011, the employer terminated plaintiff's employment after he sustained a back injury that subjected him to lifting restrictions, and after the employer was unable to identify a reasonable accommodation for the restrictions. Plaintiff argued that the employer retaliated against him for taking FMLA leave to take care of his wife, asserting that the five months between his protected leave and his discharge was sufficiently close in temporal proximity to establish an inference of causation between the two. The district court granted summary judgment for the employer on the ground that five months was not "very close in time" and therefore that the employee failed to demonstrate causation between his protected leave and his discharge.

St. Cyr v. Brandywine Senior Living, LLC, 2012 WL 2344858 (D. N.J. June 20, 2012)

The employee worked for the employer as a Certified Nursing Assistant at one of its assisted living facilities serving residents with Alzheimer's disease and dementia. The employee was discharged two days before she was scheduled to begin an FMLA leave to have knee surgery. She was discharged for being in the resident sitting room watching BET, which the facility designated an age-inappropriate channel for the Unit, when she should have been watching residents, two of whom were wandering around the Unit. At the time of her discharge, the employee was working pursuant to a "Reinstatement Agreement," following a previous discharge for insubordination and unsafe practices. She was also on a final written warning for treating her supervisor in a disrespectful manner. The employer cited both factors as the reason for escalating to discharge following the final incident. The employee's former supervisor testified that she did not believe the final incident was the type of conduct for which an employee should be terminated. The employee's current supervisor also testified that she was unaware of any other employee disciplined for watching an age-inappropriate show on television.

The employee filed suit asserting both FMLA interference and retaliation claims arising out of her discharge. The employer moved for summary judgment arguing that it did not act in an antagonist manner in response to the employee's request for FMLA leave and pointed out that the request was in fact granted. The district court denied the employer's motion for summary judgment on both FMLA claims. The court reasoned that while timing, standing alone, may not be enough to defeat summary judgment when the temporal relationship is not unusually suggestive or is too attenuated to create a genuine issue of material fact, this case was different. Here, the mere two days between the discharge and the date the FMLA leave was to begin was

unduly suggestive, and whether the employer was unlawfully motivated to terminate the employee was a question of fact inappropriate for resolution on summary judgment.

Adcock, et al. v. Domtar Industries, Inc., 2012 WL 4955209 (W.D.Ark. Oct. 16, 2012)

Defendant discharged the three plaintiffs for excessive absences. Each plaintiff claimed that her absences were due to health issues and that at least some of the absences were covered by the FMLA. Plaintiffs were not on FMLA leave when they were discharged in May 2009.

The district court determined that plaintiffs failed to establish a causal connection between their FMLA leave and defendant's decision to discharge them. The substantial lapse of time between taking FMLA leave - two years for two of the plaintiffs and eighteen months for the third plaintiff - coupled with the fact that each plaintiff had been counseled regarding her excessive absenteeism on multiple occasions, even prior to taking FMLA leave, precluded a finding of a causal connection between plaintiffs' FMLA leave and subsequent terminations. The court therefore granted defendant's motion for summary judgment.

Koller v. Riley Ripper Hollin & Colagreco, 850 F. Supp. 2d 502 (E.D. Pa. 2012)

A discharged attorney alleged that his former employer violated his FMLA rights by terminating his employment several weeks after he underwent knee surgery. After his surgery, plaintiff took two weeks off to recover. When he returned to work, he attended physical therapy appointments twice a week in the morning, which caused him to arrive at the office at approximately 10 a.m. Defendant refused to accommodate plaintiff's tardiness and discharged him one week after the therapy sessions began.

The court found that plaintiff satisfied the notice-pleading standard in asserting his claim of interference with his FMLA rights because he showed that he was entitled to benefits under the FMLA and that defendant illegitimately prevented him from obtaining those benefits when it refused to accommodate his tardiness related to his physical therapy sessions. The court further found that plaintiff sufficiently pleaded facts that could ultimately entitle him to relief in asserting his claim of retaliation by defendant for exercising his FMLA rights. There was no dispute that the plaintiff took FMLA leave for his knee injury. There was also no dispute that plaintiff's termination constituted an adverse employment action. Regarding the third requirement, the court found that plaintiff sufficiently pleaded facts regarding temporal proximity, which ultimately could establish the requisite causal link between the adverse decision and his leave. Accordingly, the court denied the defendant's motion to dismiss.

Ignatenkov v. U.S. Food Service, Inc., 2012 WL 2930864 (SD Ohio July 18, 2012)

The employee worked in the company warehouse selecting and packing pallets of product for customer delivery or pickup. Part of the employee's duties involved the use of a pallet jack, a forklift-like device that lets the driver remove items from shelves and stack and move pallets of product. Approximately seven weeks before his termination, the employee developed pneumonia and went out on a two-week FMLA leave. He returned to work at the

same job and the same rate of pay and indicated that no one at the company discouraged him from taking FMLA leave or commented adversely upon the fact that he had taken leave.

About six weeks after returning from FMLA leave, the employee was involved in an altercation with another employee over the operation of their pallet jacks. The company investigated and determined that the employee had engaged in bullying and unprofessional behavior and ultimately terminated him. He sued, alleging Title VII national origin discrimination and retaliation, and FMLA interference and retaliation. The company moved for summary judgment on all counts.

With respect to the FMLA retaliation claim, the court determined that the six-week period between the time the employee returned from the FMLA leave and the time of his termination was not, by itself, sufficient to show a causal link between his FMLA leave and his discharge. The court specifically noted that there was not a single bit of evidence indicating anyone disapproved of the employee taking FMLA leave, nor had there been any other ramifications to his FMLA absence. Moreover, the court noted there was no indication that the employee had raised his FMLA claim prior to his suspension and termination, nor was there any indication that the company's reason for terminating him – the altercation with a co-worker – was a pretext. The court granted summary judgment to the employer on all counts.

***Nilles v. Givaudan Flavors Corp.*, 2012 WL 1537613, 19 WH Cases2d 39 (S.D. Ohio May 1, 2012)**

After plaintiff was discharged by defendant, he filed state and federal disability and gender discrimination claims, and claims for FMLA interference and retaliation. The FMLA retaliation claim was dismissed, and defendant moved for summary judgment on all remaining claims. The court found that the employer was on notice of plaintiff's need for FMLA-qualifying leave, but determined that plaintiff could not establish the requisite causal connection. The record showed that plaintiff's supervisors discussed terminating him long before he ever took leave. Moreover, any temporal connection between plaintiff's use of FMLA leave and the decision to terminate was too tenuous; six months passed between plaintiff's leave and his termination. Plaintiff failed to establish temporal proximity "or other indicia of retaliatory conduct" to show prima facie retaliation by defendant. Thus, the court granted the employer's motion for summary judgment as to the FMLA retaliation claim. Likewise, the court dismissed the plaintiff's remaining discrimination claims.

***Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958 (8th Cir. 2012)**

The employee worked as a production supervisor in the employer's glass beer bottling facility. The employee requested and was approved to take medical leave from July to September 2007. In January 2008, the employee notified her supervisor that she needed to take medical leave for her husband's upcoming surgery. The employee did not provide a date, but noted her need for leave would be "soon." The employee did not notify any other member of management of her need for medical leave. Two days later, the employee was terminated. The employer claimed it terminated the employee because (1) she marked on a check sheet that a piece of equipment was operating properly when it was not, (2) she assigned an employee a task that a machine could have performed, and (3) she hand pressure-tested bottles. The employee filed suit

alleging, among other things, that she was retaliated against because she requested FMLA leave. Following a trial, a jury returned a verdict in employee's favor and awarded her \$206,500 in damages and an additional \$206,500 in liquidated damages. The employer appealed that decision.

The employer argued there was insufficient evidence to return a verdict in the employee's favor, but the Eighth Circuit held the employee presented sufficient evidence to allow a jury to find a causal connection existed between the notification of her need to take FMLA leave and her discharge. In particular, the timing of the employee's termination, less than forty-eight hours after she notified the employer of her need for medical leave, could alone constitute a sufficient causal connection. The court noted, however, that plaintiff's evidence was not limited to temporal proximity. The employee also presented evidence that other supervisors had committed the same errors she had, but they had not been terminated or otherwise subject to significant adverse employment actions. The court also concluded the award of liquidated damages was appropriate under the cat's paw theory of liability, reasoning that if an employer is found liable for employment discrimination under cat's paw, the supervisor's conduct should also be imputed to the employer for purposes of awarding liquidated damages.

Calero v. Cardone Industries, Inc., 2012 WL 2547356 (E.D. Pa. June 29, 2012)

Plaintiff requested and was granted FMLA leave during his tenure with the employer. On one occasion, his supervisor questioned plaintiff about his absences, to which the plaintiff replied that he was caring for his ailing father. According to plaintiff, the supervisor remarked, "we all have issues . . . you can't miss any more time." A month later, plaintiff requested and was approved for one year of intermittent FMLA leave. The following month, plaintiff was terminated for falsifying time, a violation of company policy. Plaintiff filed suit alleging the employer interfered with his FMLA rights and retaliated against him when they terminated his employment soon after he requested intermittent leave to care for his ailing father.

The district court, in granting the employer's motion for summary judgment on both the FMLA retaliation and interference claims, determined that plaintiff was unable to establish a prima facie case of retaliation and failed to present any evidence establishing that the employer had prevented him from exercising his rights under the FMLA. With respect to the retaliation claim, the court examined the issue of causation and whether or not the employee had sufficiently established a causal connection between the leave request and the employee's termination. The court cautioned that while timing of termination is relevant, timing alone is insufficient to establish the causation prong in a claim for retaliation. The court also stated that while a pattern of antagonism can be evidence of causation, the pattern must be a "constant barrage of written and verbal warnings . . . and disciplinary actions," and the single comment by plaintiff's supervisor, while inappropriate, was more akin to a stray remark, unconnected with and remote from the decision-making process and did not evidence a causal connection between the termination and the FMLA activity. The court also rejected plaintiff's argument that his supervisor acted as a "cat's paw" finding that the decision maker did not rely upon the supervisor in making the termination decision.

In examining the interference claim, the court determined that while termination can be the basis for an FMLA interference claim, the FMLA does not protect employees for falsifying time records when the discipline is wholly unrelated to the protected FMLA activity. Moreover, there was no evidence that plaintiff was discouraged from requesting leave. Plaintiff sought and received FMLA leave not from the person who made the stray remark, but rather the sole employee in charge of approving FMLA requests.

Summarized Elsewhere:

Verges v. Honda Manufacturing of Alabama, LLC, 2012 WL 3260367 (N.D. Ala. Aug. 8, 2012)

Arora v. Dental Health Group, P.A., 2012 WL 4856944 (S.D. Fla. Aug. 8, 2012)

Cooper v. New York State Nurses Association, 847 F.Supp.2d 437 (E.D.N.Y. 2012)

Ellison v. Oaks 422 LLC, 2012 WL 876723 (E.D. Pa. March 15, 2012)

Edwards v. Southcrest, L.L.C., 2012 WL 826963 (N.D. Ok. March 9, 2012)

Farver v. Coventry Health Ctr., 2012 WL 1191849, (M.D. Pa. March 2, 2012)

Wright v. Sandestin Investments, LLC, 2012 WL 6194872 (N.D. Fla. Dec. 12, 2012)

Penaloza v. Target Corp., 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)

Wells v. Cincinnati Children's Hosp. Med. Ctr., 860 F. Supp. 2d 469 (S.D. Ohio)

Cullison v. Dauphin County, PA, 2012 WL 3027776 (M.D. Pa. May 18, 2012)

Delp v. Rolling Fields, Inc., 2012 WL 3144050 (W.D. Pa. Aug. 1, 2012)

Bertrand v. City of Lake Charles, 2012 WL 1596706, 19 WH Cases2d 497 (W.D. La May 3, 2012)

Schrack v. R+L Carriers, Inc., 2012 WL 230965 (S.D. Ohio June 18, 2012)

Juarez v. Verizon Services Corp., --- F.Supp.2d ----, 2012 WL 3764878 (M.D. Fla. 2012)

Wright v. Sandestin Investments, LLC, 2012 WL 6194872 (N.D. Fla. Dec. 12, 2012)

Wirey v. Richland Community College, 2012 WL 6681214 (C.D. Ill., Dec. 21, 2012)

Penaloza v. Target Corp., 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)

ii. Statements

Rabanus v. Bank of America, N.A., 2012 WL 1656237 (E.D. Mich. May 10, 2012)

Plaintiff was a manager who took FMLA leave. Before he returned, two of his superiors prepared a “final written warning” that noted failures of his staff while he was on leave. Plaintiff appealed the warning, but the company upheld it. The company decided to discharge plaintiff after denying his appeal, but plaintiff resigned before it could do so.

Plaintiff alleged that the employer retaliated against him for taking FMLA leave by taking two adverse employment actions: the warning, and his resignation. The district court denied the employer’s motion for summary judgment. Based on the language of the warning, the court held that it “could be inferred as a criticism” of plaintiff for taking leave, and that plaintiff was disciplined for matters that occurred while he was on leave. The court also found that there was a genuine issue of material fact as to whether plaintiff was constructively discharged because his superiors threatened to fire him on multiple occasions, even though they had not told him officially that he was going to be let go. Under these circumstances, the court also found that there was a causal connection between the retaliation, and sufficient evidence for plaintiff to show that the employer’s proffered reason for his discharge (that he failed to properly train his employees and comply with guidelines) was pretext. In the alternative, the court also found that the warning and statements by management were direct evidence of FMLA retaliation because they “could reflect a cumulative managerial attitude among [the employer’s] managers that have influenced their decisionmaking or attitude as to employees seeking leave under the FMLA.”

Summarized Elsewhere:

Gambill, et al. v. Duke Energy Corp., 456 Fed. Appx. 578 (6th Cir. 2012)

2. Articulation of a Legitimate, Nondiscriminatory Reason

Smith v. Southwestern Bell Telephone Co., 456 Fed.Appx. 489 (5th Cir. 2012)

Plaintiff was employed by defendant as a customer service representative. As part of her training, plaintiff was told that when a customer became rude or difficult she was to maintain a proper tone and to transfer the call to a specialist or manager if a customer became too difficult. During a call with a customer, plaintiff argued with the customer and stated that the customer was crazy. Plaintiff was terminated following this incident. Plaintiff brought suit alleging she was terminated in retaliation for taking FMLA leave. During the course of her employment, plaintiff took intermittent FMLA leave for an undisclosed medical condition. In her suit, plaintiff alleged that her supervisor ridiculed her for taking FMLA leave and told her she would only be allowed to apply for a promotion if she did not take FMLA leave for three months.

The district court granted defendant’s motion for summary judgment on the plaintiff’s claim, and the plaintiff appealed. In its motion, defendant contended that plaintiff mishandling the customer call constitute a legitimate, nondiscriminatory reason for plaintiff’s discharge. The Fifth Circuit Court of Appeals affirmed the district court’s judgment, finding that plaintiff failed to submit sufficient evidence to rebut defendant’s legitimate, non-discriminatory reason for her

discharge. The court noted that plaintiff improperly relied on her own self-serving affidavit to rebut defendant's argument.

Ramey v. Vacumet Corp., 2012 WL 252403 (E.D. Tenn. Jan. 26, 2012)

Plaintiff, leader of the United Steelworkers Local Union, was discharged for alleged rules violations. Plaintiff had two scheduled vacation days on June 4 and 5; his regular days off were June 9 and 10; and he was off for union business June 12. Plaintiff called off sick June 3, 7, 8, and 11. During this time, plaintiff twice attended church, located 55 miles from home; was observed on the 7th by a coworker at a restaurant having lunch while caring for his girlfriend's sons, after which the employee performed work at his rental property. After seeing plaintiff moving debris in a wheelbarrow at the property, the coworker obtained a video camera and returned with the employee's supervisor to record the employee's actions. Plaintiff realized he was being videotaped a short time later. That same evening, plaintiff visited a walk-in clinic. The following day, plaintiff requested FMLA leave. Plaintiff then visited his family doctor on June 11, complaining that his stomach hurt and he had diarrhea. Upon his return to work, the supervisor asked plaintiff about his activities at his rental property and plaintiff responded by stating that his activities were none of defendant's business. Defendant suspended plaintiff and requested medical documentation. Plaintiff returned medical documentation on June 18 that included certification from his family doctor that he was unable to work from June 6 to June 11 due to sinusitis and bronchitis. Defendant denied the employee's FMLA leave request on June 25 and ultimately discharged him for violation of work rules governing insubordination and honesty & integrity.

Plaintiff filed FMLA-based claims for interference and retaliation and defendant filed a motion for summary judgment, which the district court denied. In defending the retaliation claim, defendant relied on the honest belief rule. The court employed the Sixth Circuit's modified honest belief rule, which requires an employer to have made a reasonably informed and considered decision based on the particularized facts that were before it at the time. Plaintiff argued that he had come under increased scrutiny because of his union activities, and that his discharge based on a brief observation was unreasonable. The court held that defendant's basis for discharge – "the 10 to 15 second observation [at the rental property], circumstantial evidence involving the timing of doctor visits, and an accused employee's reluctance to give up his perceived rights by answering certain questions" – was not adequate, as a matter of law, to constitute a reasonably informed and considered decision to discharge. The court determined a genuine issue of material fact existed as to defendant's reason for discharging plaintiff. As to the interference claim, the court determined that whether or not plaintiff was insubordinate or dishonest was an issue of fact. Lastly, the court could not determine whether plaintiff would have been discharged regardless of the request for leave.

Sickels v. Cent. Nine Career Ctr., 2012 WL 266945 (S.D. Ind. Jan. 30, 2012)

Plaintiff had a part-time contract with defendant beginning in August 2007 to work as a law enforcement instructor. Plaintiff's employment continued for four semesters, spanning almost two years. During these four semesters, performance reviews negatively assessed plaintiff's teaching/learning environment and documented several episodes of poor judgment,

lack of movement about the classroom, and poor student behavior during class. Plaintiff never disputed the reviews. Plaintiff was hospitalized in February 2009 for approximately one month due to coronary artery disease. Although no FMLA paperwork was issued or completed for the absence, plaintiff received paid leave until his paid time expired in mid-March 2009. Upon the advice of defendant's director, the governing board then opted not to renew plaintiff's contract.

The court granted defendant's motion for summary judgment on plaintiff's FMLA retaliation claim, citing plaintiff's lack of facts to support either direct or indirect evidence of FMLA retaliation. Although the non-renewal of his contract occurred approximately a month after his return from an FMLA-protected leave, the court concluded that the record reflected ongoing poor judgment and below-average teaching performance, with no evidence to support plaintiff's inference that he was discharged for having taken this leave. Additionally, the court cited the non-renewal of another employee's contract at the same time for performance issues; that employee had not requested FMLA leave.

Lamb v. Roll Coater, Inc., 2012 WL 266971 (N.D. Ind. Jan. 27, 2012)

Plaintiff failed a drug test and, as a result, defendant discharged him. Plaintiff grieved his discharge and was reinstated pursuant to a last chance agreement, which subjected plaintiff to random drug testing for a period of eighteen months. Under the agreement, plaintiff would be discharged as a result of a positive drug test. Plaintiff tested positive for marijuana in drug tests conducted in April, May and June, two to four months after his initial discharge. Plaintiff requested FMLA leave paperwork after failing the June drug test. Defendant discharged plaintiff July 10, and plaintiff then returned the FMLA paperwork after he had been discharged.

The court granted defendant's motion for summary judgment on plaintiff's retaliation claim. The court held that plaintiff could not make out a *prima facie* case under the direct method because, although he was discharged after he requested leave, the discharge took place after three failed drug tests while on a last chance agreement from a prior failed drug test. Furthermore, all previous FMLA requests made by plaintiff were granted by defendant. The court held that plaintiff could not establish a *prima facie* case under the indirect method either because plaintiff could not show that he met the defendant's legitimate employment expectations, or that he was treated less favorably than similarly-situated employees. Finally, the court stated that even had plaintiff established a *prima facie* case, he presented no evidence that his discharge for four failed drug tests was pretext for retaliation. The court affirmed defendant's right to discharge for lawful reasons regardless of FMLA requests.

De La Cruz v. Children's Trust of Miami-Dade County, 843 F.Supp.2d 1273 (S.D. Fla. 2012)

Plaintiff suffered from chronic migraines beginning in 2005. He was granted FMLA leave in 2006 and 2007. Plaintiff asserted that his supervisor discriminated against him by mocking his accent and by issuing adverse employment evaluations of him. In 2006 and 2007, the plaintiff filed written complaints about his supervisor's treatment. In 2009, due to a significant budget reduction, the employer implemented a reduction in force ("RIF"), laying off nine employees and eliminating three departments, including the department in which plaintiff worked. Employees in the eliminated departments were discharged without consideration of

their seniority or performance evaluations. Plaintiff argued that his discharge was discriminatory and constituted retaliation against him for exercising his FMLA rights. Plaintiff also contended that his FMLA rights were interfered with when the employer sought medical documentation of his medical condition.

In deciding the employer's motion for summary judgment, the United States District Court for the Southern District of Florida held that there was no evidence to establish plaintiff's discharge was retaliatory. The court found that the RIF was a legitimate nondiscriminatory reason for the discharge, and the employer's decision not to consider seniority and evaluations of employees who were being discharged was insufficient evidence of pretext. The court also noted that the RIF did not turn on the allegedly-discriminatory evaluations and there was no evidence that the decision-maker felt discriminatory animus towards plaintiff. The court reasoned that the plaintiff's FMLA requests were two to three years prior to the discharge. The court also held that all of plaintiff's FMLA requests were granted, and the employer's request for medical documentation did not constitute interference. Accordingly, the court granted the employer's motion for summary judgment.

Lujan v. Exide Technologies, 2012 WL 380270 (D.Kan. Feb 6, 2012)

The employee injured his shoulder on the job and the injury made it impossible for him to meet his job's lift requirements. He was placed on restricted duty and, while getting treatment for his shoulder, exhausted his FMLA leave. After the employee's doctor placed permanent restrictions on him and after concluding he could not perform any other job, the employer discharged him. The employee brought claims for FMLA retaliation and interference.

The United States District Court for the District of Kansas granted the employer's motion for summary judgment. The court concluded that the employee could not establish a *prima facie* case of retaliation because there was no causal connection between his FMLA leave and his discharge. Alternatively, the court concluded that the employee could not present evidence that the employer's nondiscriminatory reason, that the employee could not perform any of the employer's jobs, was pretextual. As to the interference claim, the employee argued that because the employer failed to tell him his FMLA leave was running out, he had not exhausted his FMLA leave. The court disagreed, concluding that he could not show that he would have acted any differently had he been so notified. The court also concluded that his discharge was unrelated to his taking of FMLA leave and that, even if it was not, the employee was not covered by the FMLA because he had not worked the minimum hours required by the statute.

Lewandowski v. Columbia College Chicago, 2012 WL 669060 (N.D. Ill., Feb. 28, 2012)

Plaintiff was the Assistant to the Dean of Fine and Performing Arts and, in October 2006, had complained that the dean had made unwelcomed sexual advances. The college transferred her to another position in February 2007. After a replacement Dean was hired, plaintiff transferred back to her original position in August 2007. "Things did not proceed smoothly in the new position" because the new Dean was not pleased with the plaintiff's performance. On September 25, 2007, plaintiff requested FMLA leave for knee surgery, which was approved. Before the FMLA leave was to begin, the Dean asked plaintiff to perform various tasks. Plaintiff

admitted to not following the Dean's instructions, and the Dean was again not pleased. The day before plaintiff's scheduled leave was to commence, the Dean discharged her because "she could not trust [plaintiff]."

Plaintiff sued alleging, among other things, FMLA retaliation and interference. The district court granted the college's motion for summary judgment, rejecting plaintiff's argument that her discharge was "suspiciously close" to her request for FMLA leave and the date that the leave was scheduled to commence. The standards for both a retaliation and interference claims under the FMLA, the court explained, "require [plaintiff] to show that she was performing her job satisfactorily and was thus entitled to FMLA benefits." Noting that plaintiff never addressed whether she was meeting the employer's legitimate performance expectations, the court also rejected plaintiff's argument that the reason offered for her discharge was "inherently suspicious" because it was subjective in nature. According to the court, however, her "personal, subjective beliefs about the reasons for her termination are not sufficient to establish pretext" and the alleged "suspicious" temporal proximity was too speculative to conclude that the Dean's decision was "meant to prevent her from taking FMLA leave."

Gebhart v. Exide Technologies, 2012 WL 1059865 (D. Kan. March 28, 2012)

When the employee was hired, he signed the employer's handbook, which contained the company's FMLA policy and its "Common Dischargeable Type Offenses". During his employment, the employee experienced pain to his right wrist and exercised his right to use workers' compensation leave to undergo several surgeries. About a month after he returned to work, the employee was involved in an incident where he was responsible for throwing a pen that hit a co-worker in the head. The employer conducted an investigation into the incident and discharged the employee. The employee then sued the employer for FMLA retaliation.

The court granted summary judgment in favor of the employer, finding that the employee failed to show a *prima facie* case. The court found that the FMLA leave occurred well before his discharge. Further, even if the employee did state a claim, the employer had a legitimate non-discriminatory reason for terminating the employee.

Miller v. State of Nebraska Dept. of Economic Development, 467 Fed.Appx. 536 (8th Cir. 2012)

The employee worked for the employer when his father was diagnosed with prostate cancer and stage IV terminal lung cancer. For two years, the employee regularly obtained leave from work to attend his father's medical appointments. The employee and his father disagreed on whether the employee's father should seek hospice care. Consequently, the employee stopped attending his father's appointments. The employee subsequently missed twenty-three days of work within two months, frequently with little or no explanation. Based on the employer's attendance policy, the employer discharged the employee for attendance violations.

The Eight Circuit affirmed the dismissal of the employee's FMLA interference and retaliation claims on the grounds cited by the district court. The court agreed that that no reasonable jury could find that the employee's father was unable to care for his own needs or that

the employee used his absences to provide his father with the necessary care. The court noted that the employee's father was active during the relevant time frame; he traveled, danced, and cared for himself. Additionally, the employee failed to raise a jury question as to whether he used his absences from work to provide his father with the necessary care. Specifically, even if the employee took FMLA leave to care for his father, the court affirmed that during the relevant time period, the employee's father was traveling alone, without the employee. Accordingly, an employer could not have interfered or retaliated with the employee's FMLA leave where the employee was granted FMLA leave and, following his return from the FMLA leave, exhibited attendance issues. The court found that the employee's absences were not proper FMLA leave. Finally, the court found that the employee's contention that he was assisting his father with hospice arrangements failed where his father opposed hospice care. Accordingly, the court rejected the employee's argument and affirmed the district court's dismissal.

Dressler v. New York City Department of Education, 2012 WL 1038600 (S.D. N.Y. March 29, 2012)

The employee took a leave of absence under the FMLA for his general anxiety disorder. After the employee returned from his leave, he was given an unsatisfactory rating due to excessive absences. However, once the employee provided the proper FMLA paperwork to the employer, the rating was reversed and the employer gave the employee a letter apologizing for the administrative error. The employee then received a satisfactory review the next year, but was given an unsatisfactory review the year after.

The employee initiated an action in state court alleging FMLA retaliation, among other claims. The employer removed the action to the District Court, which subsequently denied the employer's motion for summary judgment on the retaliation claim. The parties disputed whether the employee suffered an adverse employment action when the employee was initially given an unsatisfactory rating immediately following his FMLA leave. Although the unsatisfactory rating was reversed and the employer furnished the employee with an apology letter, the court found that the employer's retaliatory state of mind when it first penalized the employee for excessive absences could have been the same state of mind that motivated the second unsatisfactory review. Although the employer provided a legitimate non-discriminatory reason for its later acts, the court held that evidence that causes a factfinder to doubt the employer's motives may also cause a factfinder to doubt the employer's legitimate nondiscriminatory reason and the employer's state of mind, which goes to the issue of pretext. Accordingly, the court denied the employer's summary judgment motion of the retaliation claim under the FMLA.

Murphy v. Samson Res. Co, 2012 WL 1207210 (N.D. Okla. Apr. 10, 2012)

Plaintiff was employed as an account assistant for several years. She suffered from migraines, which caused her to miss work. Her managers would frequently allow her to make up for missed time by working late or on the weekends. However, in April 2008 her PTO balance was negative, and her supervisor warned her that continued unscheduled absences could lead to disciplinary action. At some point, her supervisors began restricting her ability to make up for missed time, and as a result, plaintiff applied for a position in a different department. However, the record showed that even after she submitted her internal job application, she was allowed to

make up for missed time. Her supervisors did not support her internal job application, because of concerns regarding her work performance and her attendance issues. After submitting her internal application, plaintiff submitted an FMLA request to HR. The request was approved.

Following her FMLA request, plaintiff had a performance review, during which she was criticized for making a number of administrative accounting errors. In September 2008, she requested short term disability leave, which ran concurrently with her FMLA leave. The STD policy requires a doctor's certification to extend leave. Several months into her leave, her doctor's certification expired, and she failed to submit a new certification for more than ten days. At that point, she was discharged. Plaintiff filed suit against her former employer, alleging retaliation under the FMLA, among a variety of other claims. The employer moved for summary judgment.

The court granted the employer's motion. It held that plaintiff could establish a *prima facie* case of retaliation, given the temporal proximity between her discharge and negative performance evaluation. However, the employer had presented a legitimate, nondiscriminatory reason for plaintiff's termination - her unsatisfactory work performance. Further, the company's STD policy required a doctor's certification to extend leave, and she failed to comply with that requirement. Plaintiff could not establish pretext because the record clearly established that she had made a number of mistakes in her work, and although plaintiff characterized the mistakes as insignificant, it is the manager's perception of the performance, not the employee's subjective belief, that matters. Further, even though some of the complaints about her performance could have been related to her migraines, "an employer is not required to excuse an employee's unsatisfactory performance merely because it potentially relates to an employee's disability."

Peterson v. Exide Techs., 477 Fed. Appx. 474, 19 WH Cases2d 19 (10th Cir. Apr. 10, 2012)

Plaintiff was employed as a material handler in defendant's battery manufacturing and distributing plant when he was involved in an accident involving a forklift he was driving. As a result of injuries he suffered in the accident, plaintiff was placed on FMLA leave for ten days. His immediate supervisor conducted an investigation of the accident and determined the plaintiff was "going rather fast" at the time of the accident. Defendant's human resources manager then reviewed plaintiff's personnel file, which contained three written warnings from previous years related to various safety violations and a previous forklift accident. Additionally, the month before his termination, plaintiff had received a disciplinary write up noting that his areas for improvement included following safety rules and driving under control and maintaining a safe speed. As a result of the accident and his history of safety violations, the company terminated him. Plaintiff filed suit against his employer, alleging retaliation, interference, and "failure to restore" under the FMLA.

The court granted defendant's motion for summary judgment on all claims. It found that plaintiff's "failure to restore" claim was not a separate cause of action, but was rather a form of interference claim. It also held that plaintiff's remaining retaliation and interference claims failed because the employer had a legitimate nondiscriminatory reason for terminating him - his history of safety violations and his conduct leading to the accident - and plaintiff could not establish pretext. The court further held that the employer had shown that plaintiff would have been dismissed regardless of his FMLA leave - the requisite showing to defeat his interference claim -

because his safety violations and accident were sufficient reasons for his termination standing alone.

Cleveland v. Mueller Copper Tube Co., Inc., 2012 WL 1192125 (N.D. Miss. Apr. 10, 2012)

Plaintiff was employed at a copper tubing plant in a variety of positions. In 2003, she injured her back in a lift truck accident and was ultimately placed on permanent work restrictions, related to lifting and twisting, due to her injuries. Several years later, while working a light duty position, she injured her ankle and was off work on worker's compensation/FMLA leave for several months. While she was out on leave, the company had a reduction in force which completely eliminated the shift she had worked on. After plaintiff learned of the layoff, she applied for a block-crane operator position, which is classified as a medium work position.

When plaintiff returned to work, she was informed that the company would not allow her to bid on the position because of her permanent restrictions. She met with human resources and the plant manager, who requested that she undergo a functional capacity exam (FCE) to determine if she could physically handle the work. She refused, was not awarded the position and was laid off shortly after she returned from leave. The company's termination letter informed her that it was laying her off because it could not accommodate her permanent restrictions. The only jobs that were available were medium work positions that she could not do, despite her protestations otherwise. Approximately 9 months later, plaintiff re-applied for a medium work position and underwent an FCE. The FCE examiner concluded that she could perform the work despite her restrictions, and the company rehired her. Plaintiff filed claims under the ADA and the FMLA, alleging the company had retaliated against her for taking FMLA leave. The employer filed a motion for summary judgment.

The court granted summary judgment on the FMLA retaliation claim. It found that, although plaintiff could establish a *prima facie* case of retaliation in light of the temporal proximity between her return from FMLA leave and termination, the company had a legitimate, non-discriminatory reason for discharging her -- her failure to undergo an FCE or obtain a doctor's certification that she could perform the work without violating her medical restrictions. In so holding, the court found that the company did not have to rely on plaintiff's subjective belief that she could perform the work.

Moore v. Washington Hospital Center, 2012 WL 2915165 (D. Md., July 16, 2012)

Plaintiff sued her former employer alleging that she was wrongfully discharged in violation of the FMLA because she exercised her rights under the Act. Defendant filed a motion to dismiss or for summary judgment. The undisputed facts showed that plaintiff was approved for FMLA leave from June 1 to June 15 and from June 25 to June 29, 2009. On June 30, plaintiff reported to work and presented a letter from her doctor. Pursuant to the employer's policy, plaintiff was examined by a nurse in the Occupational Health department, diagnosed with bronchitis and not cleared to return to work. Plaintiff applied for and was approved for short term disability benefits and FMLA leave from June 30 through July 12. On August 12, plaintiff contacted a representative in the employer's Occupational Health department to inquire about short term disability benefits and was told that her approved leave had expired. The next day, plaintiff called a nurse in the Work Life Services department and told her that she reported to

work on July 13, but was told by her direct supervisor that she could not return because her FMLA leave did not expire until the end of July. Plaintiff was told that it was her responsibility to coordinate FMLA leave directly with the WLS department and that she had been absent without leave for one month. Thereafter, the employer mailed plaintiff a letter advising her of the following: that her leave of absence had expired; that she was required to be cleared through the Occupational Health department; that she had to bring a return to work clearance form from her doctor before she would be permitted to work; that if she was planning on extending her leave, she had to provide appropriate verification from her physician by August 20; and that she would be considered to have abandoned her employment if she did not respond by August 20. Plaintiff was further directed to contact the department if she had any questions. Plaintiff never contacted the WLS department so the employer discharged her.

The employer contended that plaintiff's complaint was time-barred. Plaintiff's discharge occurred on August 28, 2009 and she filed her complaint on September 20, 2011. Plaintiff did not specifically allege a willful violation in her complaint, but she did allege that she was "wrongfully terminated because she exercised her rights." The court noted that a number of courts have presumed willfulness in retaliation cases. The court therefore determined that plaintiff's complaint was not subject to dismissal on the basis that it was time-barred. As an alternative, the employer moved for summary judgment, arguing that plaintiff failed to establish a prima facie case of retaliation under the FMLA. The employer proffered extensive evidence that plaintiff was not discharged for taking or requesting leave under the FMLA, but for failing to return to work weeks after her approved leave had expired. Plaintiff provided no evidence that the employer's proffered justification was pretextual. Therefore, the court found that the employer was entitled to summary judgment.

Silver v. Philadelphia Gas Works, 2012 WL 5961756 (E.D.Pa. Nov. 28, 2012)

Plaintiff was employed by defendant as a telephone customer service representative. In 2008, the employee began having recurring disciplinary issues, including poor customer service, failure to abide by company policy relating to exhausted paid sick leave, failure to pass drug tests, and tardiness. The employee was disciplined, including multiple suspensions and eventually discharged, although the employee was reinstated twice back pay, full seniority, and lost overtime. The employee had filed multiple complaints against the company and his supervisor, alleging discrimination and retaliation for, *inter alia*, use of FMLA leave, to which the employer responded by conducting an investigation each time. The employer did not find any evidence that the complaints were valid, but transferred the employee so that the employee would have a different supervisor. Despite this transfer, the employee continued to have punctuality issues. In February 2011, the employee requested and received intermittent FMLA leave to care for his father, but exhausted his leave by June 2011. The employer warned the employee that any future absences would result in disciplinary action. The employee filed another complaint alleging, *inter alia*, FMLA retaliation.

In July 2011, the employee received a six day suspension for failing to call in sick. He was instructed to return to work on August 1, 2011. The employee indicated that he was not able to return on that date because he had a child support hearing in family court that day. The employer requested documentation to support his allegation. The employee failed to provide

adequate documentation. In response, the employer informed the employee that he would be required to report to work on August 1, 2011. The employee reported to work, but reported to the medical office several hours later to say that he was ill. The medical office sent the employee home, and the employee stated that he would be going to a doctor appointment at 11:45 AM. Suspicious of the employee's behavior, the employer assigned a security guard to go to family court to determine if the employee had lied. The security guard reported that he had found the employee at family court and that the employee had become agitated when the security guard confronted him. Based upon that report, the employer discharged the employee for "sick fraud" and refusal to work in violation of its Corporate Discipline Policy.

The employer and employee filed cross motions for summary judgment. The district court granted the employer's motion for summary judgment, at the same time denying the employee's. Using the burden-shifting framework, the court granted the employer's motion for summary judgment on the grounds that the employer had satisfied its burden to show a nondiscriminatory reason by establishing sufficient facts that the employee had committed sick fraud, and that the employee had failed to satisfy his burden to show any evidence that the employer's decision was derived from discrimination or retaliation.

Ritenour v. Tenn. Dep't of Human Services, 2012 WL 3806023 (6th Cir. Aug. 29, 2012)

The employer's handbook had a strict absentee policy. Employees absent for more than three consecutive days without notice or approval were deemed to have abandoned their jobs. The handbook also instructed employees to notify their supervisors in the event of any absence, and warned the employees that if they were not at work they had to be on authorized leave. The employee had exhausted her available paid leave but wanted to use unpaid leave in order to care for her son, who had bipolar disorder. She initially approached the employer's human resources personnel, who informed her that she did not qualify for unpaid leave because she was an interim employee, and then instructed her to submit her request for leave to her supervisor. The employee did not. Instead, she simply stopped coming to work for several consecutive days. She also failed to call in and notify her supervisor that she would be absent. On the fourth day, the employer discharged her on grounds of job abandonment. The employee filed a lawsuit claiming interference with her FMLA benefits and retaliation under the FMLA.

The district court dismissed the plaintiff's claim on a motion for summary judgment because there was no dispute that she failed to follow the employer's absentee policies by failing to call in and notify her supervisor during her absence. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision. It found that the employer had proffered a legitimate reason for discharging the employee, namely her failure to comply with its absentee policy. Because the employer applied the policy uniformly to all employees, there was no evidence of pretext or selective enforcement and therefore, summary judgment was appropriate.

Roe v. Target Corp., 2012 WL 3257891 (S.D. Ind. Aug. 8, 2012)

After receiving a final warning for performance issues, plaintiff took leave under the FMLA. Upon his return, plaintiff was counseled twice by his supervisors about two absences he had after returning to work. Further, plaintiff's performance issues continued and he was

counseled about his low production figures, absences and the fact he was working under corrective action warnings. Plaintiff complained he was being “picked” on. The following day after complaining, and thirty days after returning from his FMLA leave, plaintiff was discharged because of his problems with “teamwork”, “quality” “reliability” and “productivity.” Plaintiff subsequently filed suit alleging he was the victim of discrimination due to his age, his sex, his race, his national origin, and was retaliated against for his complaints regarding illegal discrimination and/or his use of leave under the FMLA.

The district court dismissed plaintiff’s FMLA retaliation claim. First, the court held the thirty day period between plaintiff’s FMLA leave and termination was insufficient by itself to establish a material question of fact as to whether his termination was retaliatory and noted “suspicious timing alone is rarely enough.” Second, plaintiff’s supervisors’ criticism of his absences after returning from leave was “entirely different” from criticism for use of FMLA leave. Defendant’s attendance system did not take into consideration FMLA leave and there was no relation between the attendance criticisms and plaintiff’s leave. Ultimately, plaintiff did not proffer a convincing mosaic of circumstantial evidence of retaliation and did not identify any proper comparators in support of his prima facie cause under the indirect method of proof, and his FMLA retaliation claim could not survive summary judgment.

Seeger v. Cincinnati Bell Telephone Co., 681 F.3d 274 (6th Cir. 2012).

After plaintiff suffered from a herniated lumbar disc, the employer granted him a leave of absence which was approved as FMLA leave, and paid disability leave under the employee’s collective bargaining agreement. While he was on leave, other coworkers saw plaintiff at an Oktoberfest celebration. “Based on perceived inconsistencies” between plaintiff’s reported medical condition and his appearance at Oktoberfest, the employer suspended and then discharged plaintiff for “disability fraud,” a violation of the collective bargaining agreement. Plaintiff filed suit alleging a violation of his rights under the FMLA. The district court granted summary judgment in the employer’s favor on the grounds that plaintiff failed to refute the employer’s evidence that it had an honest belief in the nondiscriminatory basis for plaintiff’s discharge.

On appeal, the Sixth Circuit first upheld the district court’s decision to evaluate plaintiff’s claim as retaliation rather than interference, reasoning that even though plaintiff “was denied some paid leave,” he received all the FMLA leave to which he was entitled, so the interference framework would have been inappropriate.

Furthermore, the Sixth Circuit agreed with the district court that a causal connection existed between the employee’s FMLA leave and termination, where the employee was terminated just three weeks after reinstatement and two months after requesting FMLA leave. However, the court also found that the disability fraud was a legitimate, nondiscriminatory reason for discharging plaintiff, who allegedly was over-reporting his symptoms to receive paid leave and avoid a requirement that he perform reasonable light-duty work, if possible. Plaintiff failed to refute the employer’s proffered reason for termination because the employer demonstrated that after a thorough investigation, it formed an honest belief that plaintiff misrepresented his medical condition.

Shelton v. Bridgestone Metalpha, U.S.A, Inc., 2012 WL 1609670 (M.D. Tenn. May 8, 2012)

Plaintiff took FMLA leave and also exhausted all her “points” permitted under the employer’s attendance system. Plaintiff was discharged, and brought suit against the employer alleging retaliation in violation of her rights under the FMLA. The district court granted summary judgment in favor of the employer, finding there was no causal connection between the discharge and the protected leave. Rather, the facts showed that plaintiff’s employment was terminated for a legitimate, nondiscriminatory reason: because she exhausted her FMLA leave and accrued all the attendance points permitted under the employer’s policy.

Carroll v. Ceridian Benefits Services, 2012 WL 5431007 (M.D. Fla. Nov. 7, 2012)

Plaintiff was hired in April 2008 as a major accounts representative (“MAR”) who sold benefit administration solutions to employers in several states. On March 20, 2009, plaintiff was placed on a performance improvement plan (“PIP”) due to unacceptable sales performance. Pursuant to the PIP, plaintiff needed to have a total of \$116,700 in sales to new customers by June 30, 2009. Prior to the expiration of his PIP, plaintiff requested FMLA leave to spend time with his daughter who was born almost a year earlier on July 17, 2008. Defendant granted his request for FMLA leave for July 15 and 16, 2009. Plaintiff returned to work from FMLA leave on July 21, 2009 and was informed of his discharge. He filed a complaint alleging, *inter alia*, that defendant interfered with his FMLA rights and retaliated against him because he took FMLA leave. The employer filed a motion for summary judgment. The court granted summary judgment to the employer on plaintiff’s FMLA claims.

As to the interference claim, plaintiff contended that he received paperwork indicating that he had been discharged on July 10, 2009, while he was on FMLA leave. The court rejected that argument because defendant had demonstrated, and an e-mail from plaintiff showed, that the July 10 reference was a mistake and his actual termination date was July 20. In any event, plaintiff had been given all of the leave to which he was entitled. The court also found that the fact that the decision to discharge plaintiff was made while he was FMLA leave was not problematic because plaintiff failed to show that defendant’s proffered reason for terminating his employment (*i.e.*, his lack of sales) was pretextual. As to the retaliation claim, the court also found that plaintiff’s retaliation claim failed because he failed to rebut the employer’s legitimate, non-retaliatory reasons for plaintiff’s discharge.

Krumheuer v. GAB Robins North America, Inc., 484 Fed. Appx. 1, 19 WH Cases2d 285 (6th Cir. 2012)

Plaintiff, who had received numerous warnings about performance issues, was terminated fourteen days after requesting FMLA leave for a heart condition. Plaintiff claimed that his termination was in retaliation for requesting FMLA leave. However, the trial court granted summary judgment to the employer, and the Sixth Circuit Court of Appeals affirmed. The court found that there was no causal connection between plaintiff’s medical leave request under the FMLA and his discharge. Plaintiff was terminated pursuant to a nationwide staff reduction, and he would have been released even if he had not taken medical leave. Additionally, plaintiff would have been terminated due to performance issues regardless of whether he had exercised

his FMLA rights. The court therefore found that defendant had provided legitimate nondiscriminatory reasons for plaintiff's termination, and that plaintiff was unable to rebut them as being pretextual.

Weade v. School Board of Hillsborough County, Florida, 2012 WL 2226445 (M.D. Fla June 15, 2012)

The employee suffered from prostate cancer, which required him to take a leave of absence under the FLA. During the leave, he was required to have his teaching certification completed in order for his contract to be renewed. The employee was reinstated to his position at the same pay and benefits after his leave, but then discharged when he did not complete the exams. The court analyzed the facts under both a retaliation and an interference analysis and concluded that the employee could not prevail because he had not successfully completed the necessary certifications.

Schrack v. R+L Carriers, Inc., 2012 WL 230965 (S.D. Ohio June 18, 2012)

Approximately one year after plaintiff began working for defendant, plaintiff began experiencing fatigue and grogginess when at work. Plaintiff was later issued a verbal warning after falling asleep in a meeting. A few days after this warning, a co-worker found plaintiff asleep in the home of one of defendant's owners, who asked the company to upgrade their security equipment. The following day, plaintiff was found sleeping in his van outside of the owner's home. Plaintiff was discharged, but later reinstated and given FMLA to treat his narcolepsy. Shortly after he returned from leave, plaintiff was discharged. Plaintiff filed suit, alleging FMLA interference and retaliation. Defendant moved for summary judgment, contending that plaintiff's discharge was part of a reduction in force.

The court found for defendant on the interference claim because plaintiff was given the FMLA leave he had requested. As to plaintiff's retaliation claim, the employee relied on the temporal proximity between his return to work after FMLA leave and his termination. There was a genuine issue of material fact presented by the acute temporal proximity between the FMLA leave and his medical clearance and the lack of an objective plan for the reduction in force. Summary judgment was denied on the retaliation under the FMLA and disability counts as a result.

Cummings v. BNSF Rwy. Co., 2012 WL 3059417 (D. Kan. Jul. 26, 2012)

Plaintiff worked as an "Off In-force Reduction clerk," a job that required her to fill in for absent employees in various positions across three different shifts. Throughout her employment, plaintiff had requested and received FMLA leave on multiple occasions, both for her own serious health conditions and to care for various family members with serious health conditions. Over time, the company manager responsible for ensuring that shifts were fully staffed developed the opinion that plaintiff was using an approved intermittent FMLA leave to "job shop." Specifically, he felt plaintiff had a habit of calling in to check on vacancies and then deciding to use FMLA leave or sick time if she didn't like the shifts available. In April 2009, plaintiff began receiving discipline for "misrepresentation of facts" when she attempted to take FMLA leave

over a two-day period. (She had been disciplined for the same violation several years earlier). After plaintiff turned down two shifts – one for a dentist appointment nor covered by her FMLA leave and another she claimed was covered – her supervisor recommended plaintiff for termination. The defendant followed the supervisor’s recommendation and terminated the plaintiff. Plaintiff filed suit against her former employer, alleging retaliation in violation of the FMLA. Defendant moved for summary judgment.

The district court analyzed the plaintiff’s claim using the *McDonnell-Douglas* burden-shifting framework and concluded that, under this standard, some of the plaintiff’s retaliation claims survived summary judgment. Defendant did not challenge the plaintiff’s ability to establish a *prima facie* case. Instead, defendant argued it had a legitimate, non-retaliatory business reason for terminating plaintiff, namely her “job-shopping” behavior. However, the court found that the supervisor’s bias towards plaintiff, together with surrounding circumstances, could permit a reasonable jury to find for plaintiff. Specifically, plaintiff was qualified to take intermittent FMLA leave, she had “job-shopped” in similar fashion before without consequences, there were no distinguishing features around this incident of job-shopping, and the sole arbiter in her termination investigation was the supervisor who had demonstrated bias against the plaintiff.

Hollstein v. Caleel & Hayden, LLC, 2012 WL 4050302, 116 FEP Cases 1037 (D. Colo. 2012)

The employee, an inside sales representative, alleged that her former employer violated the FMLA when it failed to restore her to her position following leave for the birth of a child, among other claims. Prior to her leave, the employee was required to travel one week per quarter to service accounts. While on leave, the employer increased the travel requirement for all inside sales representatives to one week of travel per month. The court granted the employer’s motion for summary judgment on the FMLA interference claim, noting that the employee would have been subject to the policy even absent her leave. In addition, the court refused to consider the employee’s allegation that her pay was reduced in connection with her leave because the employee failed to include the allegation in her EEOC charge or in her complaint and raised the issue for the first time in her response to the employer’s motion for summary judgment.

Pulczynski v. Trinity Structural Towers, Inc., 691 F.3d 996, 19 WH Cases2d 1017 (8th Cir. 2012)

The employee’s son suffered from cerebral palsy and severe asthma. The employer notified the employee of his FMLA rights and requested documentation based on the employee’s request for “occasional” leave. The employee did not timely provide certification paperwork, but was granted the leave requested. The employee, a plant supervisor, was expected to work occasional overtime on the weekends, but told a coworker he was planning a trip to the casino on a day he had requested off to care for his son under the FMLA. The employee’s coworkers also accused him of discouraged others from working overtime, so he would not be required to supervise the same. Following an internal investigation into his absence on the day of his casino trip, the employee was terminated for attempting to slow production (i.e. discouraging overtime). The employee sued under the ADA and FMLA and the employer filed motion for summary

judgment, claiming that it had an “honest belief” that the employee had engaged in grave misconduct. The district court granted the employer’s motion, finding that the employee did not present evidence of discriminatory intent, nor did he state a claim for interference. The Eighth Circuit affirmed.

The Court recognized that interference claims not require a showing of discriminatory intent, but that the district court was correct not to consider such claims as the employee’s failure to specifically plead them in his Second Amended Complaint resulted in waiver. The employee argued that one or more of his absences was misclassified in technical violation of the statute. However, the Court found that, even if the employee could show that he was denied a statutory right, he did not show that he was prejudiced by the misclassification or that he otherwise was entitled a lost benefit or equitable relief. The employee also claimed that his suspension and investigation were actions that would have deterred an employee of “ordinary firmness” from taking FMLA leave. The Court rejected this argument as a misstatement of the law, holding that the employee did not present sufficient evidence that he was denied an entitlement under the FMLA.

Finally, Court followed the *McDonnell Douglas* framework in holding that (1) the employee’s suspension (with pay) did not qualify as an adverse employment action and (2) the employee could not show that his exercise of FMLA rights played a part in the employer’s decision to terminate him. The Court found that the employer presented evidence sufficient to support its honest belief that the employee had engaged in misconduct by discouraging overtime and attempting to slow production. The Court declined to enter the realm of business judgment and adopted its analysis of the employee’s ADA claims in finding that the employer presented uncontroverted evidence sufficient to meet its burden of producing a legitimate non-discriminatory reason for its adverse employment action and that the employee could not raise a triable issue of material fact as to the question of pretext.

***Turevsky v. FixtureOne Corp.*, 2012 WL 5199368 (E.D. Pa., Oct. 19, 2012)**

In June 2007, the employee notified the employer that she was pregnant. In September, the employer’s CEO complained that the employee had mixed up deposits causing checks to bounce, and suggested to the Director of Operations that the company discuss the employee’s continued employment. In the beginning of October, the CEO suggested to the CFO that the employee should be terminated after she left sensitive documents on a copy machine. On October 30, the employee informed the employer that she would begin maternity leave in 30 days, and on November 11, she indicated via email that she would begin leave on December 7. After receiving the email, the CEO emailed the CFO about the employee stating, “I was going to suggest that Rimma be laid off this week as she is not needed any longer to do payroll,” and asked whether this would be legal. The employer terminated the employee on November 16.

The plaintiff alleged the employer interfered with her FMLA rights by (1) terminating her, and (2) failing to notify her of her FMLA rights and eligibility within five days of learning of her need for leave. The court denied the employee’s motion for summary judgment. As for the termination claim, the court rejected the employee’s argument that she only needed to prove an entitlement to, and denial of, FMLA benefits, and that evidence of a legitimate business

purpose was irrelevant to her FMLA interference claim. The court held the employer could defeat the employee's claim if it could demonstrate the termination was for reasons unrelated to her exercise of her FMLA rights. The court also found the record contained evidence of legitimate reasons for termination, including "seasonal layoffs, lack of work, poor performance and back injury" which created a question of fact regarding motive.

The court also denied the plaintiff's motion based on the employer's failure to notify her of FMLA rights and eligibility. Although there was no dispute that the plaintiff had not been notified of her FMLA rights or eligibility within five days of requesting leave, Third Circuit precedent required her to prove that the employer's failure rendered her unable to exercise her FMLA rights in a meaningful way, thereby causing injury. Because the employee presented no such evidence, the court denied her motion.

Morgan v. Orange County, 2012 WL 1859666 (11th Cir. May 23, 2012)

Plaintiff brought suit against defendant alleging that he was retaliated against for taking FMLA leave. The employee was absent from work for five consecutive days. During his absence, he called one of his supervisors and advised him that he would be absent for an FMLA-related illness. This was a violation of the employer's policy requiring employee to call in absences to his immediate supervisor. In addition, the employer later learned that he was on a cruise during his absence from work. The employer conducted an investigation with respect to the employee's absence and concluded that the employee violated the call-in policy and that he committed "fraud and dishonesty." He was therefore terminated.

The Eleventh Circuit affirmed a grant of summary judgment on the employee's retaliation claim in favor of the employer. In doing so, it assumed that the employee established a prima facie case, but ruled that the employer adduced two legitimate, non-discriminatory reasons for discharging him – his violation of the call-in policy and the employee's commission of fraud with respect to the cruise he took. In response, the employee did not offer any evidence challenging the reasons. In particular, the employee conceded that he violated the call-in policy and also did not allege that the employer lacked good faith in believing that he was dishonest. Because the employee could not adduce any reasons demonstrating why the employer's reasons for terminating him were pretextual, the Court affirmed the grant of summary judgment for the employer.

Thomsen v. Stantec, 2012 WL 1863986 (2d Cir. May 23, 2012)

Plaintiff, an electric engineer, took FMLA leave granted to him by defendant. Six weeks after coming back from leave, he was terminated. The employee sued the employer for interference and retaliation under the FMLA. The employer moved for summary judgment on both claims, and the Second Circuit affirmed the grant of summary judgment for the employer. As to the interference claim, the Court explained that the employer granted leave every time the employee requested it, even when the employee was not eligible to take FMLA leave. Therefore, summary judgment was appropriately granted on the employee's interference claim.

The Court also affirmed the entry of summary judgment on the employee's retaliation

claim. It assumed that, even if the employee established a prima facie case of retaliation, he could not rebut the legitimate, non-discriminatory reasons the employer gave for his termination. The employer's reasons for terminating the employee were based on work performance issues and an economic slowdown. The Court noted that the employee could not prove pretext on the work performance reason because the employee himself did not "actually dispute the specific instances of errors in his performance." The Court also rejected the employee's argument that the employer's hiring of another individual after terminating him was inconsistent with a slowdown. It reasoned that the individual held a different position (electrical designer) than the employee held, and that the employee did not have the qualifications to work at that position. Additionally, that position was advertised before the slowdown occurred. Finally, the Court observed that several others in the employee's practice group took FMLA leave and were not terminated.

Tetreault v. Advanced Federal Services Corp., 2012 WL 4479977 (E.D. Va. Sept. 28, 2012)

The employee requested and was granted twelve weeks of FMLA leave for "general medical needs." The employer notified the employee several times during her leave that if she did not return to work at the expiration of her FMLA leave, her employment would be terminated. The employee did not return to work when her FMLA leave expired and, as a result, her employment was terminated. The employee filed suit against the employer, claiming discrimination based on her age, disability, and usage of FMLA leave. The employer filed a motion for summary judgment on all of the plaintiff's claims.

In granting the employer's motion for summary judgment, the district court stated that in light of the lack of any direct evidence, the burden-shifting framework established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applied to all of the employee's discrimination claims. At the outset, and with respect to the employee's discrimination claims in general, the district court found that the employer terminated the employee for a legitimate, non-discriminatory reason—that is, because she failed to return to work upon the expiration of her FMLA leave. Without addressing whether the employee established a *prima facie* case of discrimination, the district court found that the employee failed to establish that the employer's legitimate reason for her discharge was pretext for discrimination.

With respect to the employee's specific claim that she was discriminated against because of her usage of FMLA leave, the district court determined that the decision to terminate the employee was not causally related to her usage of FMLA leave but, instead, was due to her failure to return to work following the expiration of her FMLA leave. Accordingly, the district court held that the employee failed to establish the elements of her claim of discrimination based on her usage of FMLA leave.

Perez-Denison v. Kaiser Found. Health Plan of the Nw., 2012 WL 1185995 (D. Or. Apr. 9, 2012)

Plaintiff brought an action against her former employer alleging interference under the FMLA. In 2008, plaintiff committed various policy violations that resulted in formal discipline. After one of these violations, but before she formally was disciplined, plaintiff requested FMLA

leave for stress and was granted 432 hours of leave to be taken within the next twelve months. Upon returning to work after taking some of this leave, plaintiff received a final warning for her pre-leave violation. Shortly thereafter, plaintiff erred again, and defendant decided to terminate her, effective May 5, 2008. On May 5, plaintiff took a day of medical leave. Plaintiff claimed that she took the day of leave prior to learning that she was terminated, and that her termination was a punishment for taking leave.

The court granted defendant's motion for summary judgment, dismissing the FMLA claim. The court found that defendant presented evidence showing a long history of objective complaints and discipline against plaintiff, and showed that it made the decision to terminate her before she sought FMLA leave on May 5. Furthermore, the court stated that it was "inescapable" that each of plaintiff's requests for leave was immediately preceded by another employee discovering one of her many errors. Because of this questionable connection, and because defendants showed that the decision to terminate plaintiff was made before and independently of plaintiff's request for leave, the court found no violation of plaintiff's FMLA rights.

Summarized Elsewhere:

***Sisk v. Picture People, Inc.*, 669 F.3d 896 (8th Cir. 2012)**

***Brown v. City of Jacksonville*, 2012 WL 604218 (E.D. Ark., Feb. 24, 2012)**

***Dorsey v. Jacobson Holman, PLLC*, 476 Fed. Appx. 861 (D.C. Cir. Apr. 9, 2012)**

***Hobbs v. Ketera Technologies, Inc.*, 2012 WL 1081476 (N.D. Tex. March 30, 2012)**

***Abdulkaki v. Regent Care Center of San Antonio II Limited Partnership*, 2012 WL 1076206 (W.D. Tex. March 29, 2012)**

***Williams v. Crown Liquors of Broward, Inc.*, 851 F.Supp.2d 1332 (S.D. Fla. 2012)**

***McGuinness v. East West Inds.*, 857 F. Supp. 2d 259, 19 WH Cases2d 360 (E.D.N.Y. 2012)**

***Richey v. AutoNation, Inc.*, 149 Cal. Rptr. 3d 280 (Cal. Ct. App. 2012)**

***Tomici v. New York City Dept. of Education*, 2012 WL 6608510 (E.D.N.Y. 2012)**

***Villard v. Whitemarsh Continuing Cate Retirement CMTY.*, 2012 WL 5652767 (E.D. Pa. Dec. 17, 2012)**

***Jaszczyszyn v. Advantage Health Physician Network*, 19 WH Cases2d 1549 (6th Cir. Nov. 7, 2012)**

***Tomici v. New York City Dept. of Education*, 2012 WL 6608510 (E.D.N.Y. 2012)**

Pagan v. Select Specialty Hospital – Youngstown, Inc., 2012 WL 2296242 (N.D. Ohio June 18, 2012)

Kim v. Goldberg, Weprin, Finkel Goldstein, LLP, 862 F. Supp. 2d 311 (S.D. N.Y. 2012)

Nicholl-Kerner v. Lawrenceville Urology, 2012 WL 1898615 (D. N.J. May 23, 2012)

Murphy v. The Ohio State Univ., 2012 WL 4499027 (S.D. Ohio Sept. 28, 2012)

Wilder v. Talbot County, 2012 WL 1901335 (D. Md. May 23, 2012)

3. Pretext

Madry v. Gibraltar Nat'l Corp. 2012 WL 404968 (E.D. Mich. Feb. 8, 2012)

Plaintiff had worked for the company as an Accounts Receivable clerk since 2004. In 2008, she requested time off for her pregnancy, which was granted. In September 2008, the company transferred another employee, who had been rehired in 1996 as a customer service manager and dispatcher, to the position of Accounts Receivable clerk. Plaintiff trained this employee prior to going out on leave in October 2008 for the birth of her child. When plaintiff sought to return to work in February 2009, she was informed that she was being laid off. At the time of plaintiff's layoff, the other employee was given the position of Accounts Receivable clerk. Plaintiff alleged violation of the FMLA, and the company moved for summary judgment.

In applying the burden-shifting analysis, the court determined that plaintiff had established a prima facie case of interference and that the employer had met its burden of showing a legitimate reason for denying reinstatement; that plaintiff would have been laid off had she not taken leave. The district court then addressed, and rejected, each of plaintiff's allegations of pretext. First, the district court held that while there was temporal proximity between plaintiff's use of leave and her lay off, the court found that such would always be the case in a denial of reinstatement and, therefore, temporal proximity alone would not raise an issue of fact as to pretext. The court next addressed plaintiff's contention that she should have been retained and her co-worker laid off. The court noted that the position assumed by the co-worker was, in fact, different than plaintiff's because it included liens and collections duties that plaintiff did not perform. Indeed, plaintiff's claim that she could have learned how to perform those duties demonstrated that the position was different than her former job. Furthermore, because the co-worker had greater seniority, she had priority under the company's layoff policy.

Byrd v. New Prime, Inc., 2012 WL 651436 (W.D.Mo., Feb. 27, 2012)

Plaintiff, a truck driver, reported to his supervisor that he needed time off from work to get a checkup. Defendant asked him to provide an FMLA certification form, and the next day plaintiff sought treatment from his physician because he wasn't sleeping and wasn't eating. Plaintiff's physician diagnosed him with "bipolar disorder," prescribed medication, and ten days later, released him to return to work. Defendant's physician reviewed plaintiff's medical records and determined that he was not qualified to operate a commercial vehicle given his condition. As a result, defendant discharged plaintiff. Plaintiff then received a medical certificate to drive

from another physician. After defendant refused to rehire him, plaintiff filed suit alleging, among other things, retaliation and interference under the FMLA.

Although the court stated that it “tends to disagree” with defendant’s argument that the plaintiff did not suffer from a serious health condition and that he could not show that he ever successfully requested FMLA leave, it granted defendant’s motion for summary judgment. Specifically, the court concluded that plaintiff could not show that defendant’s reason for discharging him – being medically unqualified under U.S. Department of Transportation rules to operate a vehicle in interstate commerce based on his medical records – was pretext for unlawful retaliation. The fact that defendant had reported to “HireRight” – a national motor carrier database – that plaintiff had “resigned/quit” was insufficient to conclude that defendant’s proffered reason was necessarily false, as plaintiff could not show whether “disqualification for medical reason” was an option on the form to inform HireRight of the reason for his departure. Further, plaintiff’s disagreement with defendant’s physician’s conclusions about his condition did not prove pretext because the “proper inquiry...is not whether [the defendant’s physician] was correct about [the plaintiff’s] ability to drive, but whether [the defendant] honestly believe[d] [its physician] was correct.”

Plaintiff’s interference claim, based upon defendant’s decision to discharge him while on FMLA leave, suffered the same fate because, according to the court, the record showed that defendant would have discharged plaintiff based on its physician’s opinion even if he had not taken leave.

Linzy v. Sara Lee Corp., 19 WH Cases2d 117 (N.D. Miss., Apr. 10, 2012)

Plaintiff was employed in the sanitation department of a Sara Lee plant. One day, plaintiff was assigned to clean a machine called a batch blender. While cleaning the machine with a water hose, he inadvertently caught his finger on the machine's blade, severing his finger above the first phalange. Plaintiff headed directly towards his supervisor's office, but upon realizing the extent of his injury, he "freaked out" and immediately left the plant and drove himself to the ER. Once at the hospital, his girlfriend called his supervisor and informed him of what had occurred. A company employee went to the ER to find out what was going on. As a result of the injury, plaintiff's middle finger on his right hand was amputated down to the first phalange. The employer performed an investigation of the incident and determined that plaintiff had failed to follow a particular safety protocol called the "lock-out tag-out procedure." Seven days later, plaintiff received a phone call from the employer’s human resources manager, informing him that he was discharged for leaving the plant without notifying his supervisors. Plaintiff testified that he was not told that he was being discharged for failure to follow a safety protocol.

Plaintiff filed suit against his former employer, alleging retaliation under the FMLA. The employer moved for summary judgment. The court denied the motion, finding that plaintiff had a qualifying condition under the FMLA under the "continuing treatment" alternative. He received treatment for his finger for over three months, was prescribed medication and scheduled for return visits to the post-surgery clinic following his initial visit. The court also found that he could overcome summary judgment on the issue of notice, finding that there was a triable issue of fact regarding whether the notice plaintiff gave was reasonable under the circumstances, given

that the need for leave was unforeseeable. Finally, the court found that plaintiff had established enough evidence of pretext to survive summary judgment. Although the employer had a legitimate nondiscriminatory reason for his termination - failure to follow safety protocol - plaintiff had presented evidence of pretext. This included the employer's inconsistent reason proffered to explain his discharge (i.e., his departure from the plant without notifying his supervisors vs. violation of the protocol), and the fact that a reasonable jury could conclude that plaintiff was justified in leaving the plant without notifying management. Finally, plaintiff testified that he was actually instructed not to perform the particular safety protocol at issue on the type of machine he was cleaning at the time of the accident.

While just a footnote, the court discusses the issue of whether the "mixed-motives" analysis still applies under the FMLA in light of the Supreme Court's decision in *Gross v. FBL Fin. Servs., Inc.*, 557 US 167 (2009), in which the Supreme Court held that the analysis does not apply to ADEA claims. The court declined to decide the issue, but noted (apparently in an approving manner) that several district courts in the Fifth Circuit had continued to apply the analysis, and the Sixth Circuit had expressly held that the mixed motives analysis still applied.

Hobbs v. Ketera Technologies, Inc., 2012 WL 1081476 (N.D. Tex. March 30, 2012)

Plaintiff took maternity leave under the FMLA and was discharged shortly after returning to work. Plaintiff brought claims of interference and retaliation under the FMLA against her former employer. The employer filed a motion for summary judgment. With respect to the interference claim, the district court found that plaintiff was permitted to take all of the maternity leave she requested. Therefore, the district court held that there was no evidence to support plaintiff's contention that the employer denied or interfered with her exercise of rights under the FMLA. Accordingly, the district court found the employer was entitled to a judgment as a matter of law on the interference claim.

With respect to plaintiff's retaliation claim, the court granted defendant's motion for summary judgment, finding that there was no retaliation because the supervisor who made the termination decision wanted to do so for her attitude and miscommunications long before the employee inquired about FMLA leave. Moreover, there was evidence that the employer was experiencing financial difficulty due to salaries exceeding sales. The district court recognized that such evidence undermined plaintiff's temporal proximity argument as temporal proximity alone is insufficient at the pretext stage. Accordingly, the district court concluded that the employer put forth a legitimate reason for the discharge, and that plaintiff failed to show that the reason was pretextual.

Varise v. H & E Healthcare, L.L.C., 2012 WL 5997202 (M.D. La. Nov. 30, 2012)

Plaintiff was hired as a certified nursing assistant and later accepted a position as an accounts manager / administrative assistant. While in this new position, plaintiff was approved for FMLA leave for a hysterectomy. The employer requested that plaintiff return early from leave. A few days before the scheduled early return date, the employer notified plaintiff that her position had been eliminated, but that plaintiff could return to her prior position of a certified nursing assistant (but on a night shift). Plaintiff could not accept the position because of severe

leg and back injuries and because the night shift conflicted with personal family matters. As such, plaintiff's employment was terminated.

Plaintiff filed a lawsuit alleging interference and retaliation. The court denied the employer's motion for summary judgment. As to the retaliation claim, the court rejected the employer's contention that plaintiff was asserting a mixed motives claim and thus summary judgment should be entered because plaintiff's position would have been eliminated regardless of any purported anti-FMLA motivation. The court found that plaintiff was alleging that the elimination of her position was pretextual and thus was not claiming there was a mixed motive. In regard to the evidence of pretext, plaintiff identified other suspect terminations of employees who exercised FMLA rights, presented the testimony of a human resources official who stated that in her opinion the termination of plaintiff was in violation of the FMLA, and argued that the employer requesting that plaintiff return to work before her scheduled return showed the necessity of the position.

As to the interference claim, the employer argued that the claim failed as a matter of law because an employer is not required to restore an employee to a position when the position has been eliminated. The court commented that the evidence to support an interference claim many times is the same evidence to support a retaliation claim, which causes some courts to doubt the validity of the interference claim. Putting that aside, the court found that regardless of the evidence, the fact remained that plaintiff's position was eliminated and thus restoration to that position was impossible. Accordingly, there could be no claim for FMLA interference as a matter of law.

Rohrer v. People's Community Health Centers, Inc., 2012 WL 2450163 (D. Md. June 27, 2012)

Plaintiff, a licensed clinical social worker, was promoted to a director position a month after she was hired by defendant. Plaintiff later developed chronic recurrent depression related to her work, which required her to apply for a leave under the FMLA. After returning from her leave, she found out that defendant hired another person to perform her duties, and defendant treated her differently. Plaintiff claimed that defendant began treating her as if she were not "mentally competent" and that her new supervisor made it clear that she did not want plaintiff on staff. Defendant also began criticizing plaintiff's caseload, even though her caseload was approximately double allowed under applicable requirements. About a year and a half after returning from leave, defendant discharged plaintiff citing that "budget crisis" required a workforce reduction.

Plaintiff brought an FMLA retaliation claim against defendant. In denying in part defendant's motion to dismiss, the court reasoned that FMLA's claims arising under the retaliation theory are analogous to Title VII's and most be analyzed under the *McDonnell Douglas*' burden-shifting framework. The court determined that plaintiff had established a prima facie case of discrimination and alleged sufficient facts as to pretext, because plaintiff demonstrated that defendant hired several social workers immediately after her discharge.

Pagan-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 19 WH Cases2d 993 (1st Cir. 2012)

The employee was working as the Assistant Manager of the employer's drug store when he was hospitalized with chest pains. Already suffering from Type II diabetes, he was found to have high blood sugar and high blood pressure. The employee asked his wife to contact the store manager to tell him about the hospitalization; she did so that morning and called the store several more times with updates on the employee's condition. The employee remained in contact during his seven day hospitalization, informing co-workers, including another assistant manager, of his cardiac catheterization. On the day of his discharge from the hospital, the employee went to the store and delivered a medical authorization to take another week off to recuperate from his procedure, a fact verified by the store's surveillance video. Meanwhile, the store manager, who testified that he never received any information concerning the employee's absence, sent a letter providing the employee 48 hours to contact management regarding his eligibility for disability leave. The letter was not delivered, however, until after the stated deadline had passed. Nevertheless, the store manager proceeded to terminate the employee's job on the grounds that he had abandoned his position. Although the store manager subsequently reconsidered the termination decision – after learning that the employee had documentation of his hospitalization and doctor-ordered rest, the decision was sustained on the grounds that the employee had been dishonest during the investigation of his situation.

Following a jury verdict in favor of the employee on his claim for retaliation under the FMLA, the trial court: (1) denied the employer's Rule 50 motion for judgment as a matter of law; (2) denied of the employer's Rule 59(e) motion to amend the judgment to eliminate or reduce the overtime pay included in the damages award; and (3) denied of the employee's request for additional liquidated damages. The First Circuit affirmed the trial court's actions, finding that the employee had introduced sufficient evidence for the jury to find that the employer's stated reasons for the discharge were a pretext for retaliation. The court cited the extensive evidence that the employee put the employer on notice of his condition, the mailing of the store manager's letter after the deadline to respond, and the close temporal proximity of the leave and the discharge as evidence support a pretext determination. As to the employer's second reason – that the employee had been dishonest – the court found the factual support for the reason unconvincing, and noted that the shifting explanations themselves permitted the jury to conclude that the employer's reasons were pretextual.

As to the employer's Rule 59(e) motion, the court determined as a matter of first impression that overtime pay is available in an award of backpay under the FMLA. In addition, the court affirmed the trial court's use of the employee's year-to-date average overtime worked as a means of determining the amount of overtime pay to award (a sample consisting of approximately five months), rejecting the employer's contention that a look-back period of twelve months was more appropriate. Finally, the First Circuit affirmed the trial court's decision not to award additional liquidated damages based upon a finding that the store manager had made a "rookie mistake," having been in the position for just a month at the time, that the store manager had consulted with counsel and had reconsidered the employee's termination, and that the employee had received pay for the two weeks he was out.

Carroll v. Sanderson Farms, Inc., 2012 WL 3866886, 19 WH Cases2d 1408 (S.D. Tex. Sep 5, 2012)

Plaintiff, the highest ranking human resources officer at the employer, took FMLA leave on two occasions during the summer of 2009. Plaintiff's supervisor allegedly made several angry remarks regarding plaintiff's need for the leave. When plaintiff returned to work following her second leave period, she was discharged that same day. The employer claimed that it had received a series of complaints from employees that plaintiff was "rude, unapproachable, and disrespectful toward them." Plaintiff's supervisor asserted that he told plaintiff the complaints were serious and warned her that if her relationship with the employees did not improve, she might be terminated. Subsequently, during plaintiff's second stint of FMLA leave, the employer conducted "Staying Union Free" training in response to a union organizing effort. During the training sessions, several hourly employees again stated that they did not like or trust plaintiff and "were uncomfortable going to her with workplace concerns." The employer claimed that these complaints led to plaintiff's termination for unsatisfactory work performance upon her return from leave.

Citing her discharge on the day she returned from protected leave, plaintiff asserted both retaliation and interference claims under the FMLA against her former employer. She also alleged that the employer interfered with her attempt to obtain subsequent employment, as further retaliation for her taking FMLA leave. In ruling on the employer's motion for summary judgment, the district court held that plaintiff presented sufficient evidence to create a genuine issue for trial on the issue of retaliatory discharge under the FMLA. Although finding that the employer had presented evidence of a legitimate, non-retaliatory reason for the discharge and that the plaintiff had failed to show that the reason (complaints by hourly employees) was pretext for retaliation, the court nevertheless concluded that a jury could conclude that plaintiff's FMLA leave was a motivating factor for the discharge. In particular, the court pointed to small number of overall negative employee comments, the lack of documentation in plaintiff's personnel file, and the fact that plaintiff was never given an opportunity to respond to the complaints that arose during the union avoidance training. Because plaintiff was reinstated (albeit only for a few hours), the court granted summary judgment as to the FMLA interference claim in favor of defendant. Finally, based on Fifth Circuit precedent, the court granted summary judgment as to alleged the post-termination retaliation because the plaintiff did not to include those allegations in any EEOC charge and, therefore, failed to exhaust her administrative remedies.

Laws v. HealthSouth Northern Kentucky Rehabilitation Hospital Limited Partnership, 2012 WL 6176797 (6th Cir. Dec. 11, 2012)

Plaintiff claimed that she had direct evidence that defendant retaliated against her for using FMLA leave. The direct evidence consisted of a memo by the human resources director recommending termination which mentioned "disciplinary issues in the past including attendance." Attached to the memo was a copy of all past disciplinary actions taken against her, including the discipline the year before for FMLA-approved absences. In affirming the district court's grant of summary judgment to defendant on plaintiff's FMLA retaliation claim, the court held that this memo was not direct evidence of retaliation. Although a jury could infer from the memo that the wrongful discipline for taking FMLA leave played a part in the termination

decision, “no such inference is required.” A majority of the court also held that plaintiff failed to prove FMLA retaliation by circumstantial evidence. It held that defendant’s stated reasons for termination, insubordination and patient mistreatment, were not pretext. Without authorization, plaintiff, an LPN, had written on a patient’s chart that his pain medication should be discontinued. When the medication was stopped without a doctor’s order, it caused him to suffer intense pain.

Holfelder v. Inservco, Inc., 2012 WL 3960449, 19 WH Cases 2d 1159 (N.D.Ohio 2012)

The employee, a machine operator, filed suit against his former employer alleging age discrimination, wrongful termination under state law, and interference and retaliation under the FMLA. The employer terminated the employee, citing nine unexcused absences. The employee argued that the employer knew of the employee’s debilitating migraines and his step-daughter’s health condition, which required emergency hospitalizations, yet failed to provide leave under the Act.

The employer filed a motion for summary judgment. The court granted the employer’s motion as to the retaliation claim, finding that the employee failed to demonstrate that the employer’s proffered reason for the employee’s discharge, nine unexcused absences unattributable to his daughter’s serious health condition, was pretext. The court, however, denied the motion with respect to the interference claim, finding that a genuine issue of material fact existed as to whether the “care” the employee provided his step-daughter qualified for leave, whether the employee gave notice of his need for leave, and whether the employer had knowledge that the employee’s leave was for a qualifying reason.

Sarker v. Trump Entertainment Resorts, Inc., 19 WH Cases 2d 1363, 2012 WL 4609485 (Oct. 1, 2012, D. N.J.)

Following his termination for unexcused absences, plaintiff brought an action under the FMLA alleging interference and retaliation claims. Defendant moved for summary judgment, which the court denied. Plaintiff went to Bangladesh to care for a relative and, while there, he allegedly became sick. He sent a Health Care Provider Certification, which asserted he had enteric fever and thus required leave for his own serious health condition. Defendant contended the certification was fraudulent and that his leave was unprotected by the Act, thus entitling it to summary judgment. With little discussion, the court held the determination of document fraud required credibility resolution for which summary judgment was improper.

Emch v. Superior Air-Ground Ambulance Serv. Of Mich., Inc., 2012 WL 4090794 (E.D. Mich. Sept. 17, 2012)

Plaintiff, a Type I diabetic, began working for defendant as an Emergency Medical Technician (EMT) in 2005. Plaintiff claimed that in 2008 he began experiencing problems managing his disease due to his inability to eat at regular intervals while at work, as his schedule required him to take meals only during unscheduled periods of downtime that might not coincide with his need for food. Accordingly, plaintiff asked for an ADA accommodation of fifteen minute breaks every four hours during his shifts and to take intermittent leave under the FMLA.

Defendant certified plaintiff for intermittent FMLA leave in March 2009 but could not provide the requested accommodation, as to do so would have impacted the company's ability to respond to patient calls with the timeframes set forth in its contractual obligations. However, defendant offered plaintiff several alternative accommodations, including adjustments to his shift. Defendant also reminded plaintiff that he was free to eat at hospital cafeterias or drive-through windows between calls and could pack a lunch cooler with meals and snacks to eat in the ambulance. Over the next year and a half, plaintiff became increasingly belligerent and insubordinate in his refusal to comply with the variety of accommodations provided to him, primarily because he was dissatisfied with his revised schedule, which reduced his compensation, and because he preferred longer meal times and "hot meals" (although neither were medically prescribed).

Eventually, defendant disciplined plaintiff for his failure to comply with the accommodations provided to him and with his insubordinate and unprofessional interactions with his supervisors and dispatchers regarding his meal break issue. Moreover, plaintiff subsequently provided a physician's certification that he may need as much as "1-2 days" of intermittent leave "up to 4 times per week," well in excess of the once-every-six-month certification he originally had provided (and arguably authorized an impossible eight days of leave per week). Shortly thereafter, plaintiff left work approximately two hours before his shift ended due to the ill effects of not eating, despite the fact that he had been offered a 25-minute break just before leaving and had just been at two different medical facilities where he could have eaten. Based on his continued defiance and obstinance in complying with his meal break accommodation, defendant discharged plaintiff.

Plaintiff then filed suit alleging, among other things, that defendant had interfered with his right to take FMLA leave and retaliated against him for doing so. In granting summary judgment to defendant on both the interference and retaliation claim, the district court concluded that while plaintiff arguably could establish a *prima facie* case with respect to both claims, he could not demonstrate pretext in the legitimate, non-discriminatory reasons provided by defendant, as demonstrated by its extensive efforts to work with plaintiff to provide him both an ADA accommodation and FMLA intermittent leave, and given plaintiff's repeatedly recalcitrant responses to those efforts.

Rogers v. Or. Trail Elec. Consumers Cooperation, Inc., 2012 WL 1635127 (D. Or. May 12, 2012).

Plaintiff filed suit against his former employer alleging, among other things, that FMLA interference and retaliation led to his resignation. When plaintiff returned from medical leave after having hip surgery, he was urged to retire and repeatedly asked by his managers about his health. Then, within two-and-a-half months of his return from leave, he was disciplined three times and demoted from his superintendent position to a job that paid \$20,000 less annually. The supervisor claimed plaintiff was demoted in part because he was "old school" and could not keep up technology-wise. Shortly thereafter, defendant offered plaintiff a buy-out to retire, and urged him to take the money because he "might be more crippled" by the time he did want to retire. Plaintiff rejected the buy-out offer and went on medical leave for two years until he resigned. Plaintiff then filed suit against defendant, and defendant sought summary judgment.

Plaintiff's primary argument supporting his FMLA interference claim was that his demotion occurred in such close temporal proximity to his protected leave that it necessarily raised an inference of causation. However, the court rejected plaintiff's arguments and ruled for defendant. It found that the two-and-a-half month temporal proximity was not sufficient to show causation, as "timing alone will not show causation in all cases" (internal quotation marks omitted). Instead, the court found that defendant sufficiently rebutted the proximity argument by showing twenty-eight other employees who took leaves of absence and were never fired or demoted as a result. In particular, the court noted that plaintiff was replaced as superintendent by a person who had also recently taken a protected leave of absence.

Wright v. City of Topeka, Kansas, 2012 WL 3600167 (D.Kan. August 21, 2012)

Plaintiff began work for defendant as Program Administrator in the Housing and Neighborhood Development Department in 2005. In 2007, her position was reclassified due to increased duties and supervisory responsibilities. This happened again in January 2010. Each time, plaintiff received a salary increase. In March 2010, plaintiff asked about whether FMLA leave would cover voluntary donation of a kidney. She then made an FMLA leave request for such a procedure. Although there were initially some problems with the submitted medical certificate, defendant ultimately approved her leave to take place from September 20 and November 10. Plaintiff actually returned to work as of October 25 and resumed work in the same position as when she went out on the leave. Just after plaintiff began the leave, the Deputy Director of her department retired. Although plaintiff acknowledged she had no right to move into that position, she nevertheless believed that she would do so based on conversations she had with the Deputy Director prior to his retirement and her medical leave. She further alleged that she was treated differently by the Director after returning from her leave. Ultimately, the position was advertised outside of the City and several candidates were interviewed by two panels of interviewers. Plaintiff was one of those individuals interviewed, but she was not offered the position. She alleged that, among other things, she was not awarded the position in retaliation for taking FMLA leave. Defendant moved for summary judgment.

One issue argued by defendant is that the failure to hire plaintiff for the advertised position did not constitute an adverse job action, as required under an FMLA retaliation claim. To the contrary, the court held that such a failure to promote is, as a matter of law, an adverse employment action. The court held, though, that plaintiff could not meet her burden of showing a causal connection between the failure to promote and her use of FMLA leave. It examined the temporal connection and found the time period between the two events, which was more than three months, too remote in time. It further found that the evidence did not support such a nexus, based on the fact that defendant waited until plaintiff returned from leave to begin the search process, used panels to interview and make recommendations, and kept the Director out of the final decision as to hire. Thus, plaintiff was not entitled to the presumption that taking FMLA leave caused defendant to hire another person.

The court also addressed plaintiff's argument that defendant engaged in a pattern of discriminatory behavior, which plaintiff based on what she alleged was a change in behavior by the Director toward her after her leave and a failure by defendant to follow its own hiring policies. As to the first argument, the court found that plaintiff failed to offer evidence as to

how other employees were treated by the Director and therefore concluded that any change in behavior was not sufficient to amount to a pattern of discriminatory behavior. The court also rejected the policy argument, stating that the referenced policy was not a guarantee of promotion. Finding that plaintiff failed to offer sufficient evidence of pretext, the court granted summary judgment to the employer on the FMLA retaliation claim.

Hartman v. University of Maryland at Baltimore, 19 WH Cases2d 898 (D. Md. Aug. 14, 2012)

The employee, a payroll supervisor, alleged that her employer discriminatorily discharged her on the basis of having taken FMLA-protected leave. The employee had been employed by the employer in a number of payroll positions since her initial hire in 1987. In late January 2008, the employee was promoted to the payroll supervisor position, where she remained until her termination in November 2008. Two days after her promotion, the employee submitted a request for intermittent leave under the FMLA, and was approved for intermittent leave for the 2008 calendar year. In early February, the employee took FMLA leave to undergo surgery. The employee alleged that because of this leave, she was unable to receive additional training and guidance that her new position required. Over the course of the next nine months, the employee's supervisor regularly criticized the employee's performance. The employee took leave several more times before her termination in late 2008.

The court denied the employer's motion for summary judgment, finding a material dispute of fact regarding whether the employee's discharge was FMLA-related. The court based this holding on several statements made by the employee's supervisor. Specifically, the supervisor complained to the employer's human resources department that the employee missed too much work. In addition, the supervisor directly complained to the employee regarding two absences from work that were not FMLA-related. The court found that these specific statements and the supervisor's general complaints to human resources could encompass the employee's protected FMLA leave, and that the employee's discharge could be based on her protected leave.

Smith v. City of Niles, 2012 WL 5862088 (6th Cir. Nov. 19, 2012)

The Sixth Circuit affirmed the decision of the district court in favor of the employer. Plaintiff claimed that his employer interfered with his right to FMLA by failing to promote him when his supervisor retired and by eventually firing him. Plaintiff was an engineering assistant in the records division for defendant for approximately 12 years when he sustained a back injury in a car accident in 2001. Plaintiff's doctor told the employer that, for 3 to 4 years, plaintiff would have "1-2 day intermittent episodes of incapacity" and, even while at work, he would be unable to bend, lift more than thirty pounds or walk more than thirty minutes. The employer kept plaintiff in his position as an engineering assistant and reassigned some of plaintiff's more physical work to other employees. Plaintiff's supervisor retired in 2008 and, rather than promote plaintiff or hire a replacement for him, the employer eliminated the position and distributed the work to other employees. In 2010, the employer eliminated plaintiff's department which consisted of plaintiff and one other employee.

Plaintiff claimed that his employer's six requests for Certifications between 2002 and 2009 amounted to "certification harassment." The Court concluded that the employer's requests "all fit comfortably within the regulatory boundaries" since all but two did not come within six

months of a previous request and the two that did were justified by changed circumstances. Plaintiff also claimed that his manager failed to respect his work restrictions by requiring him to pick up the department's mail, which weighed more than 30 pounds, from the post office. The Court rejected this claim finding that "any such problem was one of [plaintiff's] own making" because his manager told him he could separate the mail into smaller loads and take two trips. Plaintiff also alleged that he was retaliated against when his employer declined to promote him after his supervisor retired. The Court found that plaintiff's retaliatory refusal to promote claim failed because he was unable to show pretext. Plaintiff's retaliatory discharge claim also failed because the other employee who was discharged had taken no FMLA leave.

Summarized Elsewhere:

Romans v. Michigan Department of Human Services, 668 F.3d 826 (6th Cir. 2012)

De La Cruz v. Children's Trust of Miami-Dade County, 843 F.Supp.2d 1273 (S.D. Fla. 2012)

Lujan v. Exide Technologies, 2012 WL 380270 (D.Kan. Feb 6, 2012)

Dimitrov v. Quest Diagnostic, Inc., 2012 WL 555767 (Mich. App., Feb. 21, 2012)

McClelland v. CommunityCare HMO, Inc., 2012 WL 681455 (N.D. Okla., Feb. 29, 2012)

Sabourin v. University of Utah, 676 F.3d 950, 18 WH Cases2d 1633 (10th Cir. 2012)

Williams v. Crown Liquors of Broward, Inc., 851 F.Supp.2d 1332 (S.D. Fla. 2012)

Dressler v. New York City Department of Education, 2012 WL 1038600 (S.D. N.Y. March 29, 2012)

Naber v. Dover Healthcare Associates Inc., 473 Fed. Appx. 157 (3d Cir. April 2, 2012)

Johnson v. Roehl Properties of Indiana LLC, 2012 WL 1144027 (N.D. In. April 4, 2012)

Peterson v. Exide Techs., 477 Fed. Appx. 474, 19 WH Cases2d 19 (10th Cir. Apr. 10, 2012)

Penaloza v. Target Corp., 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)

Lichtenstein v. Univ. of Pittsburgh, 691 F.3d 294, 19 WH Cases2d 776 (3d Cir. 2012)

Pagel v. TIN, Inc., 695 F.3d 622 (7th Cir. 2012)

Muhammad-Smith v. Psychiatric Solutions, Inc., 2012 WL 2533965 (N.D. Ohio June 29, 2012)

Pagan v. Select Specialty Hospital – Youngstown, Inc., 2012 WL 2296242 (N.D. Ohio June 18, 2012)

White v. Telcom Credit Union, 874 F. Supp.2d 690 (E.D. Mich. 2012)

Carroll v. Ceridian Benefits Services, 2012 WL 5431007 (M.D. Fla. Nov. 7, 2012)

Spring v. Sealed Air Corp., 483 F. Appx 765 (3d Cir. 2012)

Wright v. Stark Truss Co., 2012 WL 3039092 (D. S.C. July 24, 2012)

Kurtzman v. University of Cincinnati, et al., 2012 WL 1805486 (S.D. Ohio May 17, 2012)

Cummings v. BNSF Rwy. Co., 2012 WL 3059417 (D. Kan. Jul. 26, 2012)

Nicholl-Kerner v. Lawrenceville Urology, 2012 WL 1898615 (D. N.J. May 23, 2012)

Wilder v. Talbot County, 2012 WL 1901335 (D. Md. May 23, 2012)

Peru v. T-Mobile USA, Inc., 2012 WL 4097279 (D. Col. Sept. 17, 2012)

Melilli v. Southeastern Penn. Transp. Auth., 2012 WL 4473132 (E.D. Pa. Sept. 28, 2012)

Morgan v. Orange County, 2012 WL 1859666 (11th Cir. May 23, 2012)

Thomsen v. Stantec, 2012 WL 1863986 (2d Cir. May 23, 2012)

Penaloza v. Target Corp., 2012 WL 6721011 (M.D. Fla. Dec. 27, 2012)

Greer v. Cleveland Clinic Health System-East Region, 2012 WL 5359255 (6th Cir. Oct. 31, 2012)

a. Timing

Roll v. Bowling Green Metalforming, LLC, 18 WH Cases2d 1149 (6th Cir. 2012)

Plaintiff claimed that his discharge on the day he returned from FMLA leave amounted to retaliation under the Act. Plaintiff had taken a full twelve weeks of FMLA leave as well as an additional five weeks of family and medical leave permitted by defendant for a personal injury. While plaintiff was on leave, defendant underwent a substantial reduction in force (“RIF”), including laying off sixty percent of plaintiff’s department. Plaintiff was selected for layoff, but defendant decided not to discharge plaintiff during his leave so that he could receive the full benefit of his leave, including his salary continuation and medical benefits. The district court granted summary judgment in favor of defendant, holding that, although plaintiff had stated a prima facie case of retaliation, plaintiff had not produced evidence sufficient to allow a reasonable jury to conclude that defendant’s proffered reason for his discharge was pretextual.

On appeal, the Sixth Circuit held that the temporal proximity between plaintiff’s leave and the adverse employment action was insufficient on its own to demonstrate pretext. As a result, the court affirmed the district court’s grant of summary judgment.

Edwards v. Southcrest, L.L.C., 2012 WL 826963 (N.D. Okla. March 9, 2012)

Plaintiff, who suffered from rheumatoid arthritis, worked as a licensed radiology technician. Over time, she received a number of disciplinary notices for failing to clock in and out for lunch breaks, including a written warning on December 5, 2008. One week later, the employer drafted a disciplinary notice stating that plaintiff had yet again violated the employer's clock in, clock out policy. However, the notice was not forwarded to the employer's human resources department until December 15, 2008. On the morning of December 15, plaintiff arrived at work and worked for over two hours before asking to visit an employee health nurse. Upon doing so, plaintiff returned to work and presented her FMLA paperwork to a lead technician. Neither plaintiff's supervisor nor the lead technician informed plaintiff that her employment was about to be terminated.

Plaintiff then left for the day and took her FMLA paperwork to her rheumatologist. Later that day, plaintiff's supervisor forwarded the disciplinary notice to human resources and requested permission to discharge plaintiff. HR gave approval the next day, at which time plaintiff was discharged.

Plaintiff filed suit, alleging both interference and retaliation claims under the FMLA. The court found that the combination of the supervisor's failure to immediately forward the disciplinary notice to HR, coupled with the fact that no one informed plaintiff that she was going to be let go when she arrived at work on December 15, created an "extremely close temporal proximity" that it could not overlook – although it did also note that it was a close call as to whether plaintiff could establish the necessary causal connection for both causes of action. For those reasons, defendant's motion for summary judgment was denied.

Farver v. Coventry Health Ctr., 2012 WL 1191849, (M.D. Pa. March 2, 2012)

Plaintiff was employed by defendant as an Information Administrator. Shortly after receiving a promotion, plaintiff's supervisor and another manager verbally counseled her for committing a series of financial and processing errors. At that time, plaintiff was warned that additional errors could result in her discharge.

The following month, plaintiff's husband was injured in an accident and she requested to work from home, which defendant permitted. A few weeks later, however, defendant reversed its decision, and plaintiff was informed that she would need to use FMLA leave if she was unable to report to work. Plaintiff alleged that she promptly requested to take FMLA leave in order to care for her husband. This same day, the employer learned that plaintiff had committed yet another processing error several weeks earlier. Accordingly, plaintiff's supervisor and another manager recommended to human resources that plaintiff's employment be terminated. Their recommendation, which was premised solely on the most recent error discovered, was accepted by the HR Director, who did not know about plaintiff's FMLA leave inquiry.

After plaintiff was discharged, she brought both FMLA retaliation and interference claims against defendant. As to the retaliation claim, the court noted that plaintiff alleged that she was discharged within two or three days of requesting FMLA leave. Given the close

temporal proximity between her request and discharge, combined with a contemporaneous favorable performance evaluation, the court found that plaintiff established causation sufficient both to establish a prima facie case of retaliation and to preclude summary judgment.

As to the interference claim, plaintiff alleged that the employer interfered both with her initial request to work from home, which should have been protected under the FMLA, and with her subsequent request shortly before she was discharged. The employer's argument that no causal connection existed was rejected for the reasons set forth above. The employer's other argument, that the HR Director didn't know about the plaintiff's FMLA request, was undercut by the fact that her supervisors, who recommended the discharge, were aware of it.

Worst v. Glynn County School District, 2012 WL 1068135 (S.D. Ga. March 29, 2012)

The employee informed the employer that she would be taking a leave of absence for six weeks for a medical procedure. Prior to her leave, the employer met with the employee and expressed concerns about the employee's performance, warning her that it would be implementing a Professional Development Plan ("PDP") upon her return. One week after the employee returned to work, the employee was formally placed on the PDP. She was told that the PDP needed to be satisfactorily completed in order to continue her employment. Feeling that she was being harassed, the employee sought a transfer. However, she was told that she her only options were to (1) return to work and satisfactorily complete the PDP for continued employment; (2) apply for more FMLA leave and complete the PDP upon her return; or (3) officially resign. The employee resigned. Following her resignation, the employee attempted to regain employment, however she was told that she would need to apply through the ordinary application process.

The employee sued her employer for failing to provide her with notice of her FMLA rights, as well as interference and retaliation for exercising her right to take FMLA leave. Both parties filed cross motions for summary judgment. The employer contended that the interference and retaliation claims fail as a matter of law. The court granted the employer's motion for summary judgment as to the interference claim because the employee did not show that she was denied an FMLA benefit since she was granted and took the leave.

The court denied the employer's motion with regard to the retaliation claim, however, finding that the implementation of the PDP as a condition of employment, which occurred very close in time to her FMLA request, was an adverse action. Thus, whether the employee's decision to take the FMLA-protected leave was the real cause of her being placed on the PDP is an issue of fact that remained outstanding. The court identified as important considerations both the temporal proximity of the PDP implementation and the employee's FMLA request, as well as the documented discussions of the PDP in conjunction with the employee's medical leave.

Monroe v. Sisters of Saint Francis Health Services, Inc., 2012 WL 2849455 (N.D. Ind., July 11, 2012)

Plaintiff's first request for leave was approved retroactively to the first day he missed work and his leave was later extended. Upon his return, plaintiff requested intermittent FMLA leave for physical therapy. Plaintiff alleged that he was instructed to not schedule his physical

therapy or doctor appointments during the day. He was permitted leave for physical therapy and doctor appointments on five separate occasions. Prior to taking leave, he had never been admonished for any deficiencies in his work performance and had received the highest marks on his performance reviews, which reflected excellence in a number of categories. Two weeks after returning from leave, he received a notice for unsatisfactory work performance. Thereafter, he engaged in a series of behaviors that violated defendant's policies, He began his second leave of absence in late January and did not return to work until April. While out on leave, it was discovered that plaintiff's files were missing progress notes. Defendant launched an investigation into the status of progress notes for all staff, the results of which revealed that 299 patient progress notes were missing from plaintiff's files. Two other employees were also found to not be in compliance. However, those employees had ended their employment with defendant. On the day he returned to work, plaintiff received a notice of discharge for professional incompetence and sleeping or appearing to be sleeping during the work shift. Plaintiff sued the employer, alleging interference with his FMLA rights and retaliation for taking FMLA leave and the employer moved for summary judgment on these claims.

The court granted the employer's motion for summary judgment. The court rejected plaintiff's argument that his rights were interfered with because he was not immediately informed about his rights under the FMLA on the date of his injury. The employer was entitled to gather information to determine whether plaintiff's request for leave qualified under the FMLA. The court found that the employer acted promptly upon learning that plaintiff had an FMLA qualifying injury and executed the requisite documents within the five days provided by the regulations.

The court also rejected plaintiff's argument that his uncharacteristic behavior of sleeping at work should have constituted notice of his need for FMLA leave because there was nothing in the record to suggest that he was unable to request leave and could not have given the employer notice. Plaintiff's claims that he was chastised and discouraged from attending physical therapy during the work day were also rejected because he was never denied leave to attend physical therapy or threatened with adverse employment actions. The court did not find the timing of the disciplinary actions taken against plaintiff suspicious. The unequivocal evidence showed that every employee who appeared to be sleeping on the job was discharged. While his injury distinguished him from the other employees, plaintiff failed to point to one similarly situated employee who was treated more favorably. There was also no evidence that plaintiff was performing in accordance with the defendant's legitimate expectations.

Gerdin v. CEVA Freight, LLC, --- F. Supp.2d ---, 2012 WL 5464966 (S.D. Tex. Nov. 8, 2012)

Prior to taking FMLA-covered maternity leave, the plaintiff trained another employee to perform some of her job duties, so the coworker could perform those duties while the plaintiff was on leave. On March 15, 2010, the plaintiff began her leave and returned to work on May 24, 2010. Upon her return, the plaintiff's job title remained the same, but she only retained one of her prior job duties. While she was on leave, the plaintiff's job duties were reassigned to two other employees, who retained those duties after she returned to work. The plaintiff was terminated on June 9, 2010. The employer's articulated reason for terminating her was that the plaintiff had been transferred to another department prior to her maternity leave, and her job was

eliminated on June 9, 2010 as a result of a reduction in force caused by the outsourcing of her entire department.

The plaintiff claimed that her employer discriminated against her and interfered with her rights under the FMLA by failing to return her job duties when she returned from FMLA leave, and by discharging her three weeks later. The employer moved for summary judgment, arguing that the plaintiff failed to state a *prima facie* case of interference with FMLA rights or retaliation for having exercised FMLA rights, and because plaintiff was discharged as part of a reduction in force. The court denied summary judgment.

With respect to the plaintiff's FMLA interference claim, the court held there were genuine issues of material fact for trial because there was evidence the plaintiff's job duties still existed within the company during and after her maternity leave, but they were given to other employees and not returned to plaintiff upon her return to work. With respect to the plaintiff's FMLA retaliation claim, the court found that there were genuine issues of material fact as to whether the defendant's articulated reason for the plaintiff's termination was pretextual. The court held that although temporal proximity alone, and failure to follow internal procedures alone, are generally not enough to survive summary judgment, in this case, the plaintiff presented evidence of temporal proximity coupled with other evidence that the employer's proffered reason was not true. In particular, the plaintiff presented evidence that: (1) she was terminated only three weeks after she returned from leave; (2) her supervisor made comments both before and after her leave expressing displeasure with her having to take time off of work and expressing concerns that "having kids" might interfere with her ability to work full time; (3) there was a contradiction between the defendant's evidence of when the reduction in force at issue actually occurred and when the plaintiff was discharged; (4) the plaintiff's position was the only position eliminated in June 2010; and (5) the defendant did not follow its internal procedures for reductions in force when it terminated the plaintiff.

Gonzalez v. Carestream Health, Inc., 2012 WL 4210293 (W.D.N.Y. Sept. 19, 2012)

Plaintiff was a project manager for Kodak, which became Carestream in May 2007. Due to a medical condition, plaintiff was out of work for four weeks in September and October 2009. Upon his return, he was admonished by his supervisor for failing to complete a task that, he alleged, he did not and could not complete due to his FMLA leave. Several months later, plaintiff was denied a bonus and received a poor performance evaluation, both of which, according to plaintiff, were the result of incomplete tasks resulting from his earlier FMLA leave. Eventually, plaintiff was placed on a performance improvement plan and two months later was discharged. Plaintiff filed suit alleging, among other things, that defendant had discharged him in retaliation for taking FMLA leave. In response, defendant filed a motion to dismiss and, because they were specifically cited in plaintiff's complaint, attached a number of documents demonstrating the extensive performance issues plaintiff had experienced.

Upon reviewing the documents and the bare allegations set forth in plaintiff's complaint, the district court concluded that plaintiff had failed to plausibly allege that his discharge was due to retaliation for having taken FMLA leave. Noting that it appeared plaintiff was relying on temporal proximity to establish his FMLA claim, the court concluded that the eight-month gap

between his return from leave and his discharge was too attenuated to allow for the conclusion that a causal connection existed between the events. Accordingly, the court dismissed plaintiff's FMLA retaliation claim for failure to state a claim upon which relief could be granted.

Summarized Elsewhere:

Simonetti v. Broadridge Financial Solutions, Inc., 2012 WL 32931 (D.N.J., Jan. 5, 2012)

Verges v. Honda Manufacturing of Alabama, LLC, 2012 WL 3260367 (N.D. Ala. Aug. 8, 2012)

Donald v. Sybra, Inc., 667 F.3d 757, 18 WH Cases2d 993 (6th Cir. 2012)

Lewandowski v. Columbia College Chicago, 2012 WL 669060 (N.D. Ill., Feb. 28, 2012)

Hobbs v. Ketera Technologies, Inc., 2012 WL 1081476 (N.D. Tex. March 30, 2012)

Roark v. LaGrange, 2012 WL 1080368 (N.D. Ill. March 30, 2012)

Baker v. Enterprise Leasing Co. of Indianapolis, Inc., 2012 WL 4358740 (S.D. Ind. Sept. 21, 2012)

Roe v. Target Corp., 2012 WL 3257891 (S.D. Ind. Aug. 8, 2012)

Law v. Hunt County, Texas, et al., 19 WH Cases2d 482 (N.D. Tex. 2012)

Ignatenkov v. U.S. Food Service, Inc., 2012 WL 2930864 (SD Ohio July 18, 2012)

b. Statements and Stray Remarks

Selshut v. Northwest Home Care, Inc., 2012 WL 1144916 (N.D. Ill. Apr. 5, 2012)

The employee filed an interference claim against the employer after she was denied reinstatement following FMLA leave to care for a newborn. She sought summary judgment based on a letter that defendant's lawyer sent to her lawyer, which she argued was a judicial admission as to when and why she was fired. The district court denied her motion. The employee worked for the employer home health care entity in various positions. After she advised her employer of her pregnancy in July and her plan for FMLA leave was approved, the employer learned that the employee failed to ensure that data in the employer's system was taken correctly from time sheets, and the employer's records did not match the time sheets. She was then discharged on September 9. The employee claimed that she was discharged until October, when she came into work after giving birth and asked to resume her employment. Her request was denied, she said, and the owner of the employer told her that no time for returning had been set and no management decision to rehire her had been made. The employee relied in her motion for summary judgment on a letter that the employer's attorney sent to her lawyer stating that as of October, "there is no sufficient work available for her." The court refused to interpret the

letter as stating that the employee was terminated *because* of lack of work, or even that she was discharged in October; the statement in the letter could be consistent with the employer’s version of the facts – that the employee was fired in September but sought to be rehired in October. The court explained that, even if the letter had stated that the employee was let go in October due to insufficient work, that would still not require the employer to reinstate her.

Drew v. Quest Diagnostics, Inc., 2012 WL 2341690 (S.D. Ohio June 20, 2012)

Plaintiff, a 15-year employee, informed her supervisor that she would need a leave of absence to undergo a hysterectomy. In response, her supervisor allegedly told her that it was “not a good time to take leave,” and then urged her to read the book titled, “No More Hysterectomies.” The employer nonetheless granted the FMLA leave request. While on leave, plaintiff found out that her domestic partner had cancer. Shortly thereafter, while plaintiff was still on leave, a company human resources staff member contacted plaintiff to inform her that she would be terminated in a reduction-in-force (“RIF”) due to defendant’s loss of a significant client contract. The HR generalist also allegedly suggested to plaintiff that the termination might be a “blessing in disguise,” as she would have more time to take care of her partner, and that, in any event, plaintiff “would not be able to give 100% to her job anyway.” Plaintiff alleged in her complaint that defendant knew about the health problems, the FMLA leave that would be necessary, the insurance costs at stake, and therefore fired her. Defendant countered that it had applied a neutral RIF procedure that took into account which employees could be let go based on performance evaluations and written disciplinary actions. Because plaintiff had two disciplinary actions within the year prior to the RIF, Defendant argued it was required by its procedure to include her in the RIF.

The district court disagreed that the comments by the defendant’s HR generalist would constitute direct evidence of discrimination. While the court conceded that the statements could reflect animus, it concluded that “the idea that such a diagnosis would be stressful on an employee, and the idea that the employee would need time to take care of her spouse, do not necessarily translate into direct evidence of animus toward FMLA leave.” However, the court declined to dismiss the case at summary judgment finding that a reasonable jury could view the supervisor’s “repeated remarks . . . that it was a bad time to take leave, and her suggestion regarding the anti-hysterectomy book, as additional evidence in favor” of a finding of discrimination. The court also ruled that plaintiff had created a question of fact about whether the discipline used to include her in the RIF was pretextual, given that other disciplined employees were not terminated in similar situations. Accordingly, the court concluded that a reasonable jury could find a sufficient factual basis to support plaintiff’s theory that her termination was the product of unlawful animus toward her as a result of taking FMLA leave.

Ayanna v. Dechert LLP, 19 WH Cases2d 1329 (D. Mass. 2012)

The employee was employed as an attorney at an 800-attorney international law firm. According to the employee, he was progressing well within the firm until he took time off under the FMLA. Prior to his leave, he had received two years of stellar performance evaluations and a \$30,000 bonus in the year prior to his termination. During his second year at the firm, Ayanna used four weeks of paid paternity leave plus additional time provided for under the FMLA to care for his wife, who had some medical issues, and new baby. He alleged that when he returned

from FMLA leave, his employer retaliated against him by incessantly criticizing and even poking fun at him for being the primary caretaker for his children. He also claimed that the law firm assigned him less work as a result. On the day of his termination, the law firm gave the employee a negative evaluation that he claimed improperly called him out for “personal issues” [that] interfered with his meeting the employment requirements” at the firm.

In December 2010, plaintiff filed a lawsuit alleging violations of the FMLA and Chapter 151B sex discrimination on the grounds that he was fired because he was a male caregiver to his wife. In refusing to dismiss the employee’s FMLA retaliation claim at the summary judgment stage, the court clung to the law firm’s statement about the employee’s “personal issues,” suggesting that a “reasonable jury could find that the comment was directed at Ayanna’s recent need to take FMLA leave.” The court also noted as an inconsistency in the employer’s story its claim that plaintiff’s low client billable hours also supported his termination, since other attorneys also missed the minimum hours mark without being terminated. In plaintiff’s complaint, he claimed that the firm maintained a “macho culture” where time off to attend to fatherhood and being an “engaged” dad were seen as weak and undesirable. However, in a nod to the employer, the court dismissed this claim, finding that it was too vague to support a sex discrimination claim.

Wright v. Stark Truss Co., Inc., 2012 WL 3039092 (D.S.C. July 24, 2012)

Plaintiff was admitted to the hospital following a suicide attempt, and his wife (also an employee of the employer) informed the employer’s office manager that he would need time off from work. The office manager advised plaintiff and his wife to conceal from their manager the specifics about why plaintiff was in the hospital, otherwise they would be fired. On the day plaintiff returned from work, his manager discharged him, citing cost saving measures.

Plaintiff brought a claim alleging retaliation under the FMLA. The district court denied the employer’s motion for summary judgment on the grounds that a reasonable fact finder could conclude that the employer’s proffered legitimate, nondiscriminatory reason to terminate plaintiff’s employment was pretext. As the court noted, plaintiff was fired on his first day back from work, the employer had not considered firing plaintiff before his leave, plaintiff and his wife were the only ones fired during that month, and there was other evidence that the cost-saving explanation was not believable. The court was also persuaded by the statement of the office manager who had told the employees to conceal the reason for the hospitalization to avoid termination. Accordingly, plaintiff’s claim survived summary judgment.

Gunn v. Transamerica Life Ins. Co., 2012 WL 3596587 (E.D. Ark. Aug. 21, 2012)

The employee began working for defendant in 1992, working her way from a clerk to a supervisor by 2001. Several times during her employment she took FMLA leave for various reasons. In 2010, she took leave between June 30 and August 1 for her own serious health condition. The employee did have some documented performance problems during her employment. This included comments in 2010 that she failed to meet performance expectations. In June 2010, her manager met with her about these problems. Following the meeting, the manager informed human resources that she did not think plaintiff would improve and wanted to

discuss potential “next steps”. The HR department authorized a transcript for the manager to read to plaintiff to terminate her employment. However, plaintiff was out of the office on leave for the rest of that week and then through the end of the following month on FMLA leave. While she was out of work, she called the employer’s help line, concerned that she was being targeted for termination because of her age and medical leave usage. When she returned to work on August 3, her employment was terminated.

The employee filed suit, claiming retaliation for using FMLA leave. She alleged she was told by another manager that she was a “fool” if she did not get an attorney because of “what they did to you, firing you under FMLA is against the law”. The employer moved for summary judgment but offered no evidence to undermine this reported conversation. The court denied the summary judgment motion, stating that a plaintiff’s testimony that an agent of her employer told her that she should take a termination to court and fight it is evidence from which a jury could reasonably infer the employer had illegally discriminated.

Summarized Elsewhere:

Worst v. Glynn County School District, 2012 WL 1068135 (S.D. Ga. March 29, 2012)

Fries v. TRI Marketing Corp., 139 WH Cases2d 186 (D. Minn. 2012)

Blosser v. AK Steel Corp., 2012 WL 3112307 (S.D. Ohio Jul 31, 2012)

Augustus v. AHRC Nassau, 2012 WL 6138484 (E.D. N.Y. Dec. 11, 2012)

Gerdin v. CEVA Freight, LLC, --- F. Supp.2d ---, 2012 WL 5464966 (S.D. Tex. Nov. 8, 2012)

Fleck v. Wilmac Corp., 2012 WL 1033472 (E.D. Pa. Mar. 27, 2012)

4. Comparative Treatment

Cotora v. Lee County, 2012 WL 2996550 (M.D.Fla. July 23, 2012)

The employee was discharged for a delay in responding to an ambulance call and then attempting to cover it up by altering time records. Plaintiff sued, claiming his discharge was in retaliation for taking two FMLA leaves - one to care for himself, and one to care for family members. The court granted summary judgment to the employer on the claim relating to the leave for the employee’s own serious health condition as it was barred by sovereign immunity. The court denied summary judgment relating to the FMLA leave to care for a family member, as it was not barred by sovereign immunity and plaintiff produced evidence of another EMT with a similarly poor disciplinary record who was issued a last chance agreement and a substantial suspension instead of being discharged when that employee delayed responding to a call which resulted in a patient’s death.

Gervais v. Franklin Public Schools, 2012 WL 988026 (D. Mass. Mar. 23, 2012)

Plaintiff, a schoolteacher, filed an action against her former employer alleging discrimination on the basis of pregnancy. Plaintiff had been employed on a year-to-year contract for two years with the school district and had not yet obtained tenure. Her reviews over those two years were generally good, with a few areas noted as opportunities for growth. In June 2007, plaintiff received a letter advising her that her employment was ending and her contract would not be renewed. At the time of the termination of her employment, plaintiff was pregnant. She advised her supervisors and coworkers of her pregnancy as much as five months before the termination of her employment.

The district court granted summary judgment to the employer, holding that plaintiff had failed to present a *prima facie* case of pregnancy discrimination under the *McDonnell Douglas* framework. Although she could show that she was pregnant, had satisfactory job performance and was dismissed from employment, she did not allege sufficient facts to satisfy the fourth element, that the person continuing to perform her job duties was comparably qualified. The district court rejected as insufficient plaintiff's assertion that her position was filled "with an individual for whom no serious claim has been made was more or better qualified." Nonetheless, the district court considered the second and third stages of the *McDonnell Douglas* analysis. In doing so, it rejected the employer's argument that the plaintiff's notification of her intention to take FMLA leave was not, as a matter of law, the basis for its decision not to renew her contract. Specifically, the argument was rejected because the plaintiff had advised her supervisor of her pregnancy before the decision regarding her employment had been made.

Summarized Elsewhere:

Madry v. Gibraltar Nat'l Corp. 2012 WL 404968 (E.D. Mich. Feb. 8, 2012)

Grant v. JPMorgan Chase Bank, N.A., 2012 WL 5966644 (S.D. Tex. Nov. 28, 2012)

Peterson v. Long Island RR Co., 2012 WL 2319238 (E.D.N.Y. June 19, 2012)

Marez v. Saint-Gobain Containers, Inc., 688 F.3d 958 (8th Cir. 2012)

Augustus v. AHRC Nassau, 2012 WL 6138484 (E.D. N.Y. Dec. 11, 2012)

Wright v. City of Topeka, Kansas, 2012 WL 3600167 (D.Kan. August 21, 2012)

C. Mixed Motive

Ion v. Chevron USA, Inc., 19 WH Cases2d 207 (S.D. Miss. Apr. 11, 2012)

Plaintiff was employed as a lab chemist at defendant's Pascagoula Refinery. Approximately two years into plaintiff's employment, his supervisor provided him with a Performance Agreement and Attendance Improvement Plan, which detailed issues with plaintiff's performance to date. These issues included unexplained absences and the plan laid out the company's expectations and a method by which to monitor his progress toward meeting expectations. At the same time defendant provided plaintiff with this plan, it also suspended plaintiff for five days without pay because of his performance issues. Following his suspension,

plaintiff called in sick on two consecutive days, and mentioned on the second day that he was working on paperwork for short term disability. The company then received a Certification of Health Care Provider form on plaintiff's behalf, stating that he was incapacitated and unable to perform work due to too much stress. The duration of his incapacity was undetermined. Plaintiff was informed that he needed to report to the company clinic to complete a GO-135 Form.

The next day, plaintiff's supervisor learned from plaintiff's officemate that he had stated he intended to fake a nervous breakdown and take a leave of absence with FMLA benefits. The following day, his supervisor also learned that plaintiff had appeared at the clinic as requested, but had acted aggressively towards the employees and refused to sign the form, making them so uncomfortable that they reported it to the supervisor. He had also been repeatedly calling the clinic, asking questions about HR and various employee policies. The next day, plaintiff called in sick again, and informed his supervisor that he had submitted his FMLA paperwork and would be out of work for a month. A few days later, his supervisor sent him a detailed letter terminating his employment for "an abuse of management constituting insubordination." Plaintiff filed suit against the company, alleging interference with his FMLA rights and retaliation for exercising his right to FMLA leave. The employer moved for summary judgment on the retaliation claim.

The district court granted the employer's motion, dismissing plaintiff's retaliation claim as a matter of law. The court applied the mixed-motive framework, because the plaintiff had alleged that discrimination was not the sole reason for his termination, but was a motivating factor. The court found that the company's reasons for his discharge – his unexcused absences, his poor performance, his statements regarding faking a nervous breakdown, and his behavior toward clinic employees – were legitimate and non-retaliatory. However, the court also found that plaintiff was able to show that these reasons could have been pretext, because his termination letter referenced the fact that he had been absent from work since his suspension, which could indicate that the company took his FMLA leave into consideration in making the termination decision. Finally, the court found that the company had shown that it would have taken the same action against the plaintiff regardless of the FMLA leave, in light of all of the other issues and the fact that the company had begun the disciplinary process against plaintiff before he had exercised his FMLA rights.

***Malena v. Victoria's Secret Direct, LLC*, -- F. Supp. 2d --, 2012 WL 3542192 (S.D.N.Y. Aug. 16, 2012)**

Plaintiff worked as an executive assistant at the company. During more than two years of employment, plaintiff received excellent reviews from her supervisor. After plaintiff took maternity leave in July 2008, her supervisor began treating her coldly, criticizing her for conduct that was not a problem before, and disallowed her from putting photographs of her children in her cubicle. In a conversation with human resources, the supervisor expressed concern about plaintiff's ability to continue in her job with two children, one of whom often kept plaintiff out of the office with illness. In subsequent meetings with human resources, plaintiff's supervisor discussed replacing plaintiff. Plaintiff herself met with human resources but did not attribute her supervisor's conduct to her pregnancy or maternity leave. In February 2009, Plaintiff's employment was terminated in a reduction-in-force that resulted in 32 terminations and several

reassignments, including the demotion of plaintiff's supervisor. The company claimed that the RIF decisions were made by the CEO based on dollar figures and whether an employee's position was critical to the company's functioning. It conceded seeking input from managers, but maintained that it did not seek input about plaintiff from plaintiff's supervisor. Plaintiff brought various claims, including FMLA retaliation claims, against the companies and her supervisor individually. All defendants brought a motion for summary judgment on plaintiff's FMLA claims.

The court granted the supervisor's motion for summary judgment. It held that the supervisor could not be individually liable under the FMLA because she did not have authority to hire or fire plaintiff, did not process FMLA requests for the company, and did not have sole authority to set plaintiff's hours, salary or schedule.

The court held that genuine issues of material fact remained on plaintiff's FMLA claim against the company. Although plaintiff met her prima facie burden and the company asserted a legitimate nondiscriminatory reason for its decision to terminate plaintiff's employment, the question of motive remained disputed. The court noted that the supervisor's comments and behavior could reasonably be construed as retaliatory. While the company asserted that its decisions were based on financial reasons, it had not, the court held, set forth evidence showing whether or not it considered the supervisor's complaints about plaintiff when making the decision to terminate plaintiff.

Summarized Elsewhere:

Linzy v. Sara Lee Corp., 19 WH Cases2d 117 (N.D. Miss. Apr. 10, 2012)

Nurse v. Windham Community Memorial Hospital, 2012 WL 6727620 (D. Conn. Dec. 28, 2012)

Varise v. H & E Healthcare, L.L.C., 2012 WL 5997202 (M.D. La. Nov. 30, 2012)

D. Pattern or Practice

Medley v County of Montgomery, 2012 WL 2913207 (E.D. Pa. July17, 2012)

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

Oakley v. Verizon Communications Inc., 2012 WL 335657 (S.D.N.Y. Feb. 1, 2012)

Current and former employees of a national telecommunications company challenged nine of the employer's current and former policies in a putative class action, asserting that seven of the policies interfered with FMLA rights and that two of the policies constituted retaliation against employees who took FMLA leave.

The employees challenged three former policies, asserting that each interfered with FMLA rights. First, until December 2009, employees could not obtain certification for FMLA absences until after the first day of absence, even if the absence was foreseeable. Second, until December 2009, an employee who was denied FMLA coverage had 14 days to seek administrative review of the denial in writing; if the employee failed to explicitly write "I am requesting administrative review," the employer took the position that no proper request for review was made, would not review the denial, and would not notify the employee that the request for review was insufficient. Third, until October 2010, the employer required that employees who were granted intermittent leave and sought to exceed the frequency or duration of approved intermittent leave, re-certify their health conditions by obtaining new paperwork from their health care providers.

The employees also challenged four current policies, asserting that each interfered with FMLA rights. First, the employees asserted that the employer does not permit them to enter their own absences in the employer's absence management program, and supervisors or administrators who enter the absences may mistakenly classify an absence that is related to a prior FMLA certification as requiring new certification. Second, the employer requires health care providers to put their initials next to subsequently-added information when an employee's first submission for FMLA leave is incomplete. Third, the employees challenged the employer's policy of denying FMLA requests if the employee failed to complete and submit certification documents within a 39-day deadline, which began to run from the first day of reported absence. Fourth, the employees asserted that when they submitted certifications for intermittent leave, they were required to continue to certify each subsequent absence while the certification was pending, and

once the certification was approved, it was not applied retroactively to validate absences that occurred while the certification was pending.

In addition, the employees asserted that the employer's no-fault absence policy was modified in November 2006 in order to retaliate against employees for exercising their FMLA rights. The employees also argued that, under the attendance policy, if an employee had perfect attendance for six months, she moved down a disciplinary step, but if she took FMLA leave for two weeks during the six months, she moved down a disciplinary step after six months and two weeks. The employees asserted that the period is not likewise extended when employees take vacation.

The employees sought class certification of current and former employees who applied for FMLA leave and were denied their FMLA rights as a result of the employer's policies and procedures. The employees also sought certification of subclasses of employees who were allegedly harmed by the attendance policies. The United States District Court for the Southern District of New York denied the motion for class certification. As to certification under Rule 23(a), the court held that commonality and typicality were lacking, primarily because the employees identified nine different policies and not all of them impaired every class member, thus resolution of whether one requirement was illegal did not advance the claims of class members challenging a different requirement. As to certification under Rule 23(b)(1), the court determined that equitable relief was inappropriate because the class included former employees and sought to enjoin policies that the employer had since discontinued. And as to certification under Rule 23(b)(3), the court explained that individual questions of causation and individual damages questions would predominate over common questions, even if numerous subclasses were formed.

2. Possible Defendants

Breidenbach v. Shillington Box Co. et al., 2012 WL 85276 (E.D.Mo. 2012)

Plaintiff began working for defendant in January 2004 as a production worker. On July 23, 2010, plaintiff sustained an injury to his neck, back, and/or spinal cord while performing his job duties, and after being treated by a doctor, returned to work the same day. Plaintiff continued to experience pain in his neck and shoulders, and he requested additional care and treatment for his injury. The employer's HR manager denied the request. On his own, plaintiff sought treatment with another doctor that diagnosed him with a strained neck muscle, and ordered him to take off work. The HR manager initially refused to accept the doctor's note, but the plant manager stated that plaintiff could not be ordered to return to work when he had a doctor's note prohibiting him from working. Plaintiff continued to experience pain, and requested intermittent leave under the FMLA as a result of his work-related injuries. Plaintiff was subsequently assigned duties that he was physically unable to perform, and was sent home on multiple occasions instead of having accommodation requests met. On May 26, 2011, defendant posted a notice stating the plant was closed on May 27, 2011. Plaintiff was given a write-up for "no call, no show" when he didn't show up for work on May 27. He was suspended on June 8, 2011 for refusing to sign the write-up, and later discharged after he filed a claim with the EEOC.

The Court denied the individual defendant's motion to dismiss the FMLA claims based

upon a finding that plaintiff had alleged sufficient facts to maintain his FMLA claims against the individual defendants for individual liability.

Wilkinson v. Greater Dayton Reg'l Transit Auth., 2012 WL 5879782 (S.D. Ohio Nov. 21, 2012)

The plaintiffs claimed that their employer, the Greater Dayton Regional Transit Authority (GDRTA), interfered with their entitlement to medical leave or family leave and by retaliating against them for exercising their rights under the FMLA. The court dismissed plaintiffs' FMLA claims against an individual employee of the defendant, finding that GDRTA qualified as a "political subdivision" and hence, a "public agency" under the FMLA such that the FMLA's individual liability provision does not apply to an individual employee of defendant. **Summarized Elsewhere:**

Smith v. City of Marion and Rodney Berry, 2012 WL 694314 (D.S.C. Jan. 27, 2012)

Valentino v. Wickliffe City School District Board of Education, 19 WH Cases2d 802 (N.D. Ohio 2012)

Lopez v. Four Dee, Inc., 19 WH Cases2d 837 (E.D.N.Y. 2012)

Horen v. Cook, 2012 WL 5877422 (N.D. Ohio Nov. 20, 2012)

Fields v. Dep't of Public Safety, 2012 WL 6005775 (M.D. La. Nov. 27, 2012)

3. Jurisdiction

Harrelson v. Unlimited Development, Inc., 2012 WL 3715493 (S.D. Ill. Aug. 27, 2012)

Plaintiff, a dietary manager at a nursing home, was granted FMLA leave to care for a "family member" suffering from a serious medical illness. Plaintiff was discharged after she failed to report for work after the expiration of her leave. She sued defendant for retaliatory discharge under the FMLA. Defendant filed a motion to dismiss the FMLA claim for lack of subject matter jurisdiction, arguing that the "family member" referenced in plaintiff's complaint was her adult brother, who is not a family member covered by the FMLA.

The district court denied defendant's motion. Plaintiff's application for FMLA leave stated that she sought leave to care for her "Brother raised as a son." Because the FMLA defines "son" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age older and incapable of self-care because of a mental or physical disability," the district court found that plaintiff's adult brother was not covered under the FMLA. The court, however, found that whether plaintiff's brother qualifies as a family member under the FMLA is substantive, not jurisdictional. Thus, the court held that it had subject-matter jurisdiction to consider plaintiff's FMLA claim and denied the defendant's motion.

Sanders v. Shinseki, 2012 WL 5985469 (D.Kan. Nov. 29, 2012)

Plaintiff was employed by defendant as a Contract Representative in the Veteran's Association Medical Center. The employee alleged that she began experiencing irritable bowel syndrome and colitis in August 2007. In July 2008, the employee requested permission to use a personal heating pad at work to treat symptoms related to her colitis and irritable bowel syndrome. The employee's supervisor denied her request, and several days later the employee was suspended for rendering herself unavailable to take calls from veterans. In September 2008, Sanders provided a medical recommendation from her doctor that she be allowed to use a heating pad which was granted on November 4, 2008. The employee alleged that after her initial request to use the heating pad was denied, the employee was forced to use FMLA leave from September 3 through November 17, but the employer disputed this claim. While on leave, the employee was informed that her shift was changing and that she was to report to work on November 13. The employee did not report to work, and was issued a fourteen (14) day suspension. The employee went through the federal employee's complaint process, and on December 2, 2011, filed a lawsuit against the employer under, *inter alia*, the FMLA.

The employer filed a motion to dismiss on the basis of lack of subject matter jurisdiction as it related to the FMLA claim. The district court for the District of Kansas granted the employer's motion to dismiss on the grounds that the FMLA does not create "an express nor an implied right of action whereby federal employees may obtain judicial review of adverse FMLA decisions."

Fields v. Dep't of Public Safety, 2012 WL 6005775 (M.D. La. Nov. 27, 2012)

Plaintiff alleged that her employer discriminated and retaliated against her because she took leave under the FMLA after exacerbating a pre-existing mental disorder. The district court dismissed plaintiff's FMLA claims for lack of subject matter jurisdiction, determining that the employer was immune under the self-care provision of the FMLA. The court reasoned that, in enacting the self-care provision of the FMLA, Congress did not validly abrogate the state's Eleventh Amendment immunity from suit. Therefore, because plaintiff took leave under the self-care provision of the FMLA, defendant was immune from plaintiff's claims arising under the FMLA.

Summarized Elsewhere:

Jackson v. Alabama Dep't of Corrections, 2012 WL 3104047 (M.D. Ala. June 29, 2012)

- B. Arbitration
 - 1. Introduction
 - 2. Individual or Employer-Promulgated Arbitration Agreements and Plans

Summarized Elsewhere:

Richey v. AutoNation, Inc., 149 Cal. Rptr. 3d 280 (Cal. Ct. App. 2012)

3. Arbitration Under a Collective Bargaining Agreement

III. REMEDIES

A. Damages

Wai v. Federal Express Corp., 18 WH Cases2d 1451 (11th Cir. 2012)

The employer appealed the district court's denial of its motion for a new trial and renewed motion for judgment as a matter of law following a jury verdict for plaintiff, a former customer service representative, who attended four medical appointments to examine a nodule on her thyroid and was discharged one month later after receiving her third disciplinary letter in twelve months.

At trial, plaintiff's supervisor testified that the employer had not given plaintiff appropriate paperwork following her medical appointments, even though plaintiff had informed the supervisor about the nature of her appointments and even asked if they fell under the FMLA. Because the employer's point person on plaintiff's FMLA inquiry advised the supervisor that the plaintiff's appointments were "not yet an FMLA issue," the supervisor informed plaintiff that her leave was not covered under the FMLA. Plaintiff testified that her damages included various medical and other benefits, for which she paid \$30 per week, a pension (which she did not elaborate on), medical benefits until she became eligible for Medicare, and the difference between the income she earned while working for defendant and her income at two subsequent jobs – as a vacation planner earning approximately \$12,000 a year, and as a waitress earning \$27,000 a year. The jury found for plaintiff and awarded her \$225,000 in damages without differentiating how it had calculated those damages. Plaintiff then moved to amend the judgment to include prejudgment interest and liquidated damages of \$236,000, which the district court awarded.

On appeal, the employer first argued that it had not received adequate notice of the employee's medical condition, given that plaintiff's statements were general in nature and that she furnished a return to work form with no restrictions indicating that she should be covered by the FMLA. The court rejected this argument, given the quality and quantity of the employee's communications with her immediate supervisor, as well as the fact that her supervisor saw her return from a medical procedure swelled up, with a large bandage on her neck, and unable to speak. Given the circumstances, the court concluded that the employer should at a minimum have further inquired about the availability of FMLA leave.

The employer also challenged the \$225,000 award as unsupported by the law or evidence and the court agreed. First, the court concluded that the jury must have awarded front pay in arriving at the \$225,000 award, even though it was instructed not to. Second, given the testimony provided, the back pay award could not have exceeded \$45,975 – the difference between plaintiff's subsequent pay and the pay she received from defendant. As there was no testimony concerning the value of her retirement benefits, those could not be factored into the jury's award. Also, the difference in the value of her health insurance premiums did not exceed \$2,500. Accordingly, the total amount of damages (before liquidation) could not have exceeded \$50,000, and yet the district court's award of liquidated damages was \$236,000. For that reason,

the liquidated damages award was vacated. Finally, the court noted that the district court did not inquire into the feasibility of reinstatement, which is the preferred remedy. Given the size of defendant's worldwide operations, the court reasoned that it would be difficult to imagine any impediments to reinstatement; the district court was ordered to examine this possibility on remand.

Neel v. Mid-Atlantic of Fairfield, LLC, 2012 WL 3264965 (D. Md. Aug. 9, 2012)

A trial was held for the sole purpose of determining plaintiff's damages and appropriate remedies. The court had previously granted partial summary judgment in favor of the plaintiff and found the employer failed to (1) provide proper notice to a key employee taking FMLA leave that the leave would result in grievous economic harm to the employer and (2) that the employee had a reasonable time to return to work and, as such, the employer was barred from claiming the key employee exemption to liability.

In regard to plaintiff's back pay, plaintiff's final salary was used without consideration of future pay increases and bonuses, which were deemed to be too speculative. The court found plaintiff had properly mitigated her damages because she applied for openings on job-posting websites, contacted colleagues in the industry, sent letters to long term care companies about openings and applied for a variety of positions. The employer's general testimony about the availability of comparable job openings in the industry did not rebut plaintiff's specific testimony. Further, plaintiff did not fail to mitigate her damages by refusing a job a significant distance from her home and which paid 1/3 less than her previous salary. The job was not substantially equivalent to her former position and plaintiff was under no obligation to accept it. Lastly, the court required the employer to pay for plaintiff and her husband's lost health benefits and concluded it was required to allow plaintiff to recover prejudgment interest on her lost wages and benefits at the prime interest rate.

In addition to the back pay award, plaintiff was granted liquidated damages in the amount equal to the sum of her lost compensation and prejudgment interest. The court found the employer had no legitimate basis for denying restoration and had neither provided proper notice of its intent to deny restoration nor given a reasonable time to return to work as required for denying reinstatement to a key employee. The employer's reliance on the advice of an experienced employment attorney was unavailing. In regard to front pay, defendant's offer of reinstatement was insufficient because it did not provide any information regarding bonus eligibility or the location of the facility where plaintiff was to work. However, front pay was not appropriate because the record indicated plaintiff would have most likely moved on to different employment and plaintiff had found new employment. Under the circumstances, an award of front pay would have constituted a windfall to the plaintiff.

Reyes v. New York City Health and Hospitals Corp., 2012 WL 3764061 (E.D. N.Y. Aug. 29, 2012)

Plaintiff, a psychiatrist, allegedly submitted an application for leave under the FMLA in the spring or summer of 2007, but did not retain copies of her application. She alleged that defendant verbally denied her request for FMLA leave because she failed to provide two weeks'

notice. On December 24, 2009, defendant suspended plaintiff for one month without pay pending a disciplinary conference related to an incident that occurred the prior day. Plaintiff's union representative advised her to submit an application for FMLA leave, which she did on December 30, 2009. On January 7, 2010, plaintiff's mother had a stroke. On January 20, 2010, plaintiff submitted one FMLA certification from her mother's physician and one from her father's physician. In a letter dated January 28, 2010, defendant approved the plaintiff's request for FMLA leave for the period of January 23, 2010, through April 17, 2010. Defendant paid the plaintiff's regular salary for the entire period that she was on FMLA leave.

Plaintiff returned to work on April 20, 2010, but was suspended shortly thereafter due to her involvement in an incident concerning a patient. While suspended, plaintiff found a new job and resigned. She subsequently sued defendant, arguing that it wrongfully denied her 2007 request for FMLA leave and wrongfully delayed approval of her January 2010 request. The district court granted defendant's motion for summary judgment. The court found that plaintiff's claim regarding her 2007 leave request must be dismissed as time-barred because the alleged violation occurred more than two years before plaintiff filed her lawsuit. The court found that plaintiff failed to present evidence that defendant's conduct was "willful" and, therefore, denied her request to apply a three-year statute of limitations. The court also held that plaintiff's other FMLA claims must be dismissed because she failed to demonstrate that she had been prejudiced by any delay in approving her January 2010 leave request. Plaintiff acknowledged that she did not lose any salary or incur any expenses as a result of not taking FMLA leave in 2007, and the undisputed evidence showed that defendant paid plaintiff for the period for which she was on FMLA leave in 2010. Further, the court found that courts routinely deny requests for damages for pain and suffering, emotional distress and physical injury suffered as a result of an FMLA violation, because such damages are not specifically enumerated in the statute. Moreover, punitive damages are not available under the FMLA.

1. Denied or Lost Compensation
2. Actual Monetary Losses
3. Interest

Summarized Elsewhere:

Garcia v. Renaissance Global Logistics, Inc., 2012 WL 680378 (E.D. Mich. March 1, 2012)

4. Liquidated Damages

Holder v. Ill. Dep't of Corr., 2012 WL 223357 (S.D.Ill. Jan. 25, 2012)

Plaintiff alleged FMLA interference because defendant required him to pay for defendant's contribution to his health insurance benefits during his FMLA leave. Defendant had approved plaintiff's FMLA beginning in August 2007 and continuing intermittently until late spring of 2008. In 2009, defendant informed plaintiff that the state of Illinois had mistakenly paid the defendant's contribution for plaintiff's health insurance premiums from January 2008 through June 2008, and that plaintiff was obligated to repay that amount. In May 2009, defendant

began garnishing 25% of the plaintiff's wages and plaintiff then filed suit. More than two years later, on the eve of trial, defendant conceded that it was required to pay its contribution to plaintiff's health insurance benefits through the month of January 2008. Defendant cancelled garnishment withholding, refunded its share of the cost of plaintiff's health insurance, and asked the court to amend the pretrial order to state that plaintiff's claims for January 2008 benefits were moot.

The Southern District Court of Illinois stated that defendant's concession that it was required to pay its contribution to the employee's health insurance benefits through the month of January 2008 did not moot plaintiff's claim. The concession did not offer all the relief plaintiff could have recovered under the FMLA. The court also granted plaintiff's motion for liquidated damages on the ground that defendant did not meet its burden of showing that their decision to withhold from the cost of health insurance was in good faith.

Summarized Elsewhere:

Thom v. Am. Standard, Inc., 666 F.3d 968, 18 WH Cases2d 1132 (6th Cir. 2012)

Pagan-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 19 WH Cases2d 993 (1st Cir. 2012)

Marez v. Saint-Gobain Containers, Inc., 688 F.3d 958 (8th Cir. 2012)

a. Award

Garcia v. Renaissance Global Logistics, Inc., 2012 WL 680378 (E.D. Mich. March 1, 2012)

Following a three-day trial, a jury found in favor of plaintiff on her FMLA interference claim and awarded her \$57,000 in damages. Plaintiff then sought an award of liquidated damages and interest, as well as front pay. The court declined to award liquidated damages, concluding that the employer could reasonably have concluded that plaintiff was unfit to return to work following her leave, given that she could not lift more than thirty pounds, which the employer contended was an essential function of the job. Moreover, the court noted, the employer offered to allow plaintiff additional leave beyond that required by the FMLA.

Prejudgment interest was awarded for the time period beginning with the employee's discharge, over the employer's contention that it should only be awarded from the date the complaint was filed. The court also held that interest should be computed daily but compounded annually. As to front pay, the court found that the fact that plaintiff named several of her former supervisors as defendants, coupled with the fact that she obtained a substantial award from the employer, militated against reinstatement and favored an award of front pay. The court considered the following factors in awarding one year of front pay, totaling \$26,000: Plaintiff was 38 years old; she was in good health; the local economy was challenging; and plaintiff had difficulty conversing in English.

b. Calculation

5. Other Damages

Summarized Elsewhere:

Brown, et. al. v. ATX Group, Inc., et al., 2012 WL 3962620 (N.D. TX. July 16, 2012)

Pagan-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 19 WH Cases2d 993 (1st Cir. 2012)

B. Equitable Relief

1. Equitable Relief Available in Actions by the Secretary
2. Equitable Relief Available in All Actions
 - a. Reinstatement
 - b. Front Pay

Summarized Elsewhere:

Garcia v. Renaissance Global Logistics, Inc., 2012 WL 680378 (E.D. Mich. March 1, 2012)

- c. Other Equitable Relief

C. Attorneys' Fees

D. Tax Consequences

IV. OTHER LITIGATION ISSUES

Summarized Elsewhere:

Baker v. Enterprise Leasing Co. of Indianapolis, Inc., 2012 WL 4358740 (S.D. Ind. Sept. 21, 2012)

A. Pleadings

Boyd-Richards v. DeJongh, et al., 2012 WL 13682 (D. Virgin Islands, Jan. 4, 2012)

Plaintiff was employed as a teacher and took two months of leave to seek a diagnosis for an undisclosed medical condition. Plaintiff submitted a doctor's note for both months, but it was unclear which absences during that time were covered by the note. The school placed plaintiff on administrative leave and then cited her for job abandonment after she did not return after the two-month leave. Over a year later, the plaintiff attempted to return to work and was told that she should not return to work because she had been charged with job abandonment and was being placed on administrative leave. After nearly another year, plaintiff received a notice of

termination from one of the defendants, stating that she was dismissed for job abandonment. plaintiff filed suit, alleging that she was terminated, in part, in retaliation for taking sick leave. defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The court found that plaintiff stated a claim under the FMLA because she alleged that: (1) she requested FMLA leave; (2) she notified her employer of her intention to be absent in order to receive treatment for her medical condition; and (3) during that absence, which was less than 12 weeks, the employer began termination proceedings. However, the court dismissed one individual defendant because plaintiff failed to allege that the individual was an “employer” within the meaning of the FMLA.

Rhodes v. R&L Carriers, 115 FEP Cases 1331 (6th Cir. 2012)

Plaintiff was a human resources manager and, shortly after being hired, discovered numerous violations of state and federal employment discrimination laws as well as violations of the FMLA. Plaintiff claimed that he brought these concerns to his supervisors, who then discharged him. Plaintiff then filed suit, alleging FMLA retaliation. The district court dismissed the complaint for failure to state a claim, stating that plaintiff failed to provide, among other things, the dates of his meetings with his supervisors and the names of employees who were not permitted to return to work following FMLA leave. The Sixth Circuit reversed, stating that rather than demanding “highly specific factual allegations to satisfy the plausibility requirement” of *Twombly/Iqbal*, the district court should have looked at whether plaintiff pleaded factual content sufficient to draw a reasonable inference that defendant was liable for the misconduct alleged.

Baldwin v. Board of Trustees of University of Illinois, 2012 WL 3292831 (N.D. Ill. Aug. 8, 2012)

Plaintiff took FMLA leave to have surgery after being diagnosed with kidney cancer. In her complaint, plaintiff alleged that after she returned from leave, defendant engaged in a series of discriminatory, harassing and retaliatory acts, including requiring her to complete unnecessary medical certifications and denying her requests for time off to see her doctor. Plaintiff claimed constructive discharge and FMLA retaliation. In deciding defendant’s motion to dismiss plaintiff’s FMLA retaliation claim, the court held that plaintiff failed to allege that defendant harassed plaintiff because she exercised her rights under the FMLA. The court noted that plaintiff “doesn’t link her mistreatment in any way to her taking leave; rather, she simply alleges that the defendants’ actions ‘were willful and not in good faith.’” The court, however, declined to hold that plaintiff failed to sufficiently allege constructive discharge. It noted that it was “unlikely” plaintiff would be able to establish she was constructively discharged, but it was “not persuaded that the door should be slammed shut entirely right now.” The court granted plaintiff leave to amend.

Anderson v. Lockheed Martin Corp., 2012 WL 933215 (D. Md. March 16, 2012)

Plaintiff informed her supervisor that she needed to take a couple of weeks off work to provide care for her elderly mother, and alleged that her supervisor instructed her to take unpaid leave, as permitted by the FMLA, rather than using vacation time. Plaintiff took leave and returned to work in the same position she had held before taking leave, though she claimed that the defendant had changed her job responsibilities in the interim to effectively strip her position of all work. Prior to taking leave, plaintiff had been involved in an altercation with a co-worker for which the plaintiff received a two-week suspension.

Approximately a year and a half after requesting leave to care for her mother, plaintiff was discharged. Plaintiff subsequently filed a *pro se* action alleging, *inter alia*, willful interference and retaliation under the FMLA. Defendant moved to dismiss, and the district court found that plaintiff had failed to allege that her mother had a serious health condition that required her care. In the absence of such an allegation, the court found that plaintiff had not pleaded an entitlement to FMLA leave and, therefore, could not state a claim for interference or retaliation under the FMLA.

Bright v. Evonik Cyro, LLC, 2012 WL 811221 (E.D. Ark. March 12, 2012)

Plaintiff, a warehouse assistant employed by defendant, requested and initially received permission to use FMLA leave to take his wife to her doctor appointments. Plaintiff was subsequently discharged. Plaintiff then filed an action against the company and three other fictitious defendants alleging, *inter alia*, that at the time of his discharge, he “was on medical leave and under doctor’s care in violation of [the] FMLA,” and that he had previously been required to make up the time he missed from work while out on FMLA leave. The company moved to dismiss plaintiff’s complaint. The district court found that the allegations set forth in the complaint as to the FMLA, while confusing, were that plaintiff was eligible to use FMLA leave, that either the plaintiff and/or his wife suffered from a serious health condition sufficient to qualify plaintiff for use of FMLA leave, that plaintiff had actually used leave protected under the FMLA, and that his absences were attributable to the use of FMLA leave for treatment of a serious health condition. Although the court noted that plaintiff’s FMLA claim might not survive a motion for summary judgment, it determined that the complaint alleged facts sufficient to state a facially plausible claim of retaliation under the FMLA, and denied defendants’ motion to dismiss.

Katoula v. Detroit Entertainment LLC, 2012 WL 6088325 (E.D. Mich. Dec. 6, 2012)

Plaintiff filed suit asserting an FMLA claim more than two years after his discharge. The employer moved to dismiss the complaint, arguing that the bare allegation that “[t]he Defendant’s illegal actions . . . were willful, intentional and malicious and were in reckless indifference to the Plaintiff’s federally protected rights under the FMLA,” were insufficient to state a claim for willfulness so as to extent the statute of limitations from two years to three years. Accordingly, the complaint was untimely under the FMLA’s two year statute of limitations.

The court agreed with the employer, holding that the complaint was devoid of any facts to suggest that the employer knew its discharge of plaintiff violated the FMLA or that the

employer acted with reckless disregard of whether it was violating the FMLA by terminating the plaintiff's employment. This was particularly true where the complaint included allegations that the employer had granted plaintiff FMLA leave in the past.

Brown, et. al. v. ATX Group, Inc., et al., 2012 WL 3962620 (N.D. TX. July 16, 2012)

The employee and her husband, parents of a minor child diagnosed with a serious medical condition, sued defendants alleging violations of the FMLA and seeking injunctive relief, declaratory relief, an order for protective leave under the FMLA, specific performance, damages, attorney's fees, expert fees, costs of court, prejudgment interest and post judgment interest. Defendants moved to dismiss the complaint for failure to state a claim and plaintiffs moved to strike the exhibits attached to defendants' motion to dismiss. The employee also moved for temporary intermittent leave under the FMLA.

Defendants argued that the employee could not recover under the FMLA because she had no damages. The employee's admissions in the complaint showed that defendants did more than what was required of them under the medical certification provided by the minor child's doctor. In granting defendants' motion as to the interference claim, the court found that the employee did not allege any facts to support her conclusory allegations that her child's health deteriorated as a result of the FMLA violation nor did she allege any days for which she required FMLA eligible leave, was denied such leave, and reported to work. Last, the employee's assertions that she suffered mental anguish, pain and suffering failed to give rise to a plausible claim for relief under the FMLA. In dismissing the retaliation claim as well, the court found that the employee made only vague and conclusory allegations that defendants were setting her up to be discharged. The employee did not allege that she was discharged, that defendants threatened to discharge her or that defendants took action to dissuade a reasonable person from making or supporting a charge of discrimination. The husband's claims, which were derivative claims against the defendants for loss of consortium, were also dismissed for failure to state a claim because a claim for loss of consortium is not available under the FMLA.

The employee's motion for a preliminary injunction was denied because she failed to establish a likelihood of success on the merits of her FMLA claim, she did not identify a specific irreparable harm she would suffer if she was denied temporary intermittent leave under the FMLA, she failed to show the balance of equities weighing in her favor and because she failed to carry her burden of showing why the preliminary injunction should issue in the case.

Weiler v. Draper Chevrolet Co., 19 WH Cases2d 1728, 2012 WL 3758732 (E.D. Mich. Aug. 29, 2012)

Plaintiff worked for defendant as a body shop manager from 2000 until her discharge in 2011. In her complaint, plaintiff alleged that on several days in July 2011, she notified defendant that she would not be coming to work "due to illness," and that on July 25, 2011, her mother informed defendant that plaintiff "would not be at work due to illness." Further, the complaint alleged that plaintiff "received doctor's excuses for July 25, 2011 and July 26, 2011." On July 25, 2011, defendant discharged plaintiff due to absenteeism.

Plaintiff filed suit against defendant, alleging that defendant violated the FMLA by refusing to grant her FMLA leave “even though Plaintiff clearly was ill and would need time off work to receive medical treatment.” Defendant filed a motion to dismiss plaintiff’s FMLA claims, arguing that plaintiff failed to state a claim for relief under the FMLA. The district court agreed with defendant and dismissed plaintiff’s claims without prejudice. First, the court found that plaintiff failed to state a state a *prima facie* case for interference under the FMLA because, although she repeatedly alleged in her complaint that she suffered from an unspecified “illness” and that she received doctor’s excuses on two dates, she failed to allege that she had a “serious health condition” requiring either inpatient care or continuing treatment. Second, the court held that plaintiff failed to allege that she provided adequate notice to defendant of her need for FMLA leave. Under the federal regulations interpreting the FMLA, calling in “sick,” without more information, is insufficient to trigger an employer’s obligations under the FMLA. The court found that plaintiff’s allegations did not establish that she gave the requisite notice to defendant. Finally, although the complaint alleged that plaintiff received two doctor’s excuses, it did not allege the content of the excuses or that plaintiff sent the excuses to defendant.

Smith v. Commonwealth of Virginia Department of Agriculture & Consumer Services, 2012 WL 240749 (E.D.Va., June 25, 2012)

Plaintiff filed a *pro se* and *in forma pauperis* suit against her employer, a state department. Her complaint lacked clarity and precision and failed to delineate specific causes of action. However, because courts must afford *pro se* filing a liberal construction, the court construed plaintiff’s complaint to assert several claims under federal law, including, a violation of FMLA.

Plaintiff also had a mentally ill son and plaintiff missed days of work in order to attend to her son’s court hearings and school appointments. Plaintiff claimed that defendant should have informed her that she could have taken FMLA leave for her son’s illness after she was discharged for poor work performance. The court construed plaintiff’s FMLA claim as one arising under the family-care provision of the FMLA. The court reasoned that, although under 29 U.S.C. Section 2612(a)(1)(C), the Eleventh Amendment does not bar a claim under the FMLA’s family-care provision, plaintiff did not state sufficient facts to establish that her son’s mental illness required continuing treatment by a health care provider. Accordingly, the court dismissed the case without prejudice.

Denton v. Fairfield Medical Center, 2012 WL 2409224 (S.D. Ohio, June 26, 2012)

Plaintiff worked for defendant for about 21 years. A few months prior to her discharge, plaintiff applied for leave under the FMLA due to a surgery and the employer granted her request. Plaintiff returned to worked after about two months of leave. A month after returning, plaintiff was informed that her FMLA leave had been exhausted. The next day, plaintiff was informed that her position was going to be “posted” and that she had thirty days to find another position. Plaintiff applied to several positions but only received one interview and was not offered the position. Plaintiff claimed that her employer interfered with her FMLA rights by not providing her with twelve weeks of protected leave.

In granting defendant's motion to dismiss, the court found that plaintiff failed to state an interference claim under the FMLA because plaintiff was granted all of the leave that she requested. The court also found that plaintiff failed to state a retaliation claim because plaintiff relied solely on temporal proximity to establish a causal connection between her leave and her discharge.

Sanders v. Frauenshuh Hospitality Group of KY/IN, LLC, 2012 WL 3060934 (W.D. Ken. Jul. 26, 2012)

Plaintiff's original employer approved plaintiff's FMLA leave request for the birth and care of her child. Her FMLA leave was to start approximately one month before her due date. While plaintiff was on FMLA leave, defendant acquired her original employer. Plaintiff contacted defendant multiple times between the acquisition and her return to work date, but defendant did not return her calls. Plaintiff filed suit, alleging that defendant refused to reinstate her and marked her as "not rehireable" in the company database. Defendant moved to dismiss plaintiff's suit under Fed. R. 12(b)(6) for failure to state a claim, arguing that plaintiff's amended complaint failed to state a viable claim for FMLA interference or retaliation.

The district court denied defendant's motion to dismiss, finding that plaintiff alleged she properly requested and was approved for leave under the FMLA. Plaintiff's complaint also gave information on the start date and expected duration of her leave. The complaint also stated that at the end of her leave, defendant refused to reinstate her. Based on these allegations, the district court concluded that plaintiff had pled a plausible claim for interference and retaliation under the FMLA.

Marbrey v. Jewish Hospital, 2012 WL 3273621 (W.D. Ky. Aug. 10, 2012)

Plaintiff, a medical assistant, alleged defendant hospital interfered with her FMLA rights when it terminated her employment, purportedly as a result of downsizing. The district court granted defendant's motion for summary judgment, finding plaintiff's evidence was insufficient for a reasonable jury to conclude that plaintiff's use of FMLA leave was a factor in her employer's decision to terminate her.

Plaintiff was granted two periods of continuous FMLA leave over an approximately six-month period and was granted intermittent leave of 20 days per year. The month after her second period of continuous FMLA leave ended, a supervisor asked plaintiff to bring in documentation confirming her prior FMLA leave had been approved. The day plaintiff provided the documentation she was informed she was being terminated due to downsizing. Plaintiff filed suit alleging interference with her FMLA rights and retaliation but only referenced the interference section of the statute. The court rejected defendant's argument that because plaintiff failed to reference the retaliation provision of the statute, she failed to give notice of her claim that she was discharged in retaliation for taking FMLA leave and she should accordingly be precluded from raising the claim.

The court stated that if an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-protected leave, the employer has denied the

employee a benefit to which she is entitled. The court held that the evidence viewed in the light most favorable to plaintiff was insufficient to conclude that her FMLA leave played any part in her termination. The court found that the only connection between plaintiff's FMLA leave and her termination – that on the day she was terminated she provided her employer with documentation concerning her previously-approved and previously-taken FMLA leave – was too “insubstantial” for a reasonable jury to find that her usage of FMLA leave during a six-month period that ended one and one-half months before she was terminated played any part in the decision to terminate her.

Davis v. Metro. Pier & Exposition Auth., 2012 WL 2576356 (N.D. Ill. July 3, 2012)

Plaintiff worked for defendant from 2005 to 2011 as Assistant Construction Manager and later as Assistant Director of Security Systems. In her position as Assistant Director of Security Systems, plaintiff was instructed to reduce her department by two people and was told not to eliminate any Caucasians. When plaintiff chose one Caucasian and one African American employee for termination, defendant required plaintiff to fire another African American employee. Plaintiff claimed to also experience gender-based discrimination in the workplace. Shortly thereafter, plaintiff took FMLA leave due to a miscarriage and a herniated disk. While on leave, her supervisor continued to contact her for work-related matters. Upon her return, plaintiff found that defendant had reassigned her staff to someone else and limited her duties significantly. She was told to report to another employee who was previously her equal. Plaintiff filed an internal complaint based on gender and race based discrimination, retaliation and violation of FMLA rights. Defendant failed to properly investigate these claims. Plaintiff's new job responsibilities were never formally discussed with her despite promises to do so, and plaintiff resigned in 2011.

Plaintiff brought a claim for interference with FMLA rights and defendant filed a motion to dismiss. In deciding the motion, the court found that plaintiff alleged significant facts in support of her FMLA claim. The court found that plaintiff pleaded sufficient facts to meet these elements and that her claim should not be dismissed. Plaintiff was entitled to FMLA leave based on her alleged facts, defendant was put on notice, and defendant did not properly reinstate her after FMLA leave.

Russo v. Manheim Remarketing, Inc., 2012 WL 2191649 (D. Ariz. June 13, 2012)

Plaintiff worked for defendant, in its Seattle location. On July 16, 2009, plaintiff tripped over a carpet tear, fell, and sustained injuries to his shoulder, neck, and leg. During the course of his recovery, plaintiff discussed his treatment and availability with defendant's executives. Plaintiff indicated he still was seeking medical treatment and would not be able to return immediately to his regular duties. Plaintiff alleged that, in response, defendant terminated him on October 8, 2009. Plaintiff further alleged that defendant failed to notify him of his rights under the FMLA, denied him FMLA leave, and terminated him in violation of the FMLA. Defendant moved to dismiss, arguing that plaintiff's FMLA claim depended on his status as an FMLA “eligible employee.” Defendant argued that, because plaintiff made no allegations pertaining to his status as an eligible employee in his complaint, he failed to state a claim upon

which relief could be granted. The court rejected this argument stating that it must draw all reasonable inferences in favor of plaintiff.

Christmas v. Arc of the Piedmont, Inc., 2012 WL 2905584, 19 WH Cases2d 970 (W.D. Va. July 16, 2012)

Plaintiff worked for defendant as a direct support professional. She requested and was granted FMLA leave to care for her sick husband. When plaintiff returned to work from her leave, defendant told her that her employment had been terminated while she was on leave. Plaintiff filed suit, alleging that defendant violated the FMLA by terminating her while she was on FMLA leave. Defendant moved to dismiss, arguing that the suit was time-barred because plaintiff filed it more than two years after her termination and that plaintiff failed to state a claim under the FMLA.

The court denied the motion to dismiss. First, the court noted that while, generally the FMLA has a two-year statute of limitations, that period is extended to three years for willful violations. Because plaintiff alleged that defendant granted her request for FMLA leave and then fired her without justification while on leave, the court concluded that the question of whether defendant acted willfully should be resolved on a motion for summary judgment or by a jury, not on a motion to dismiss. Further, the court concluded that plaintiff stated a claim sufficient to withstand a motion to dismiss, because she alleged her employment was terminated while she was on FMLA leave. That temporal proximity between the leave and the termination was sufficient to establish a *prima facie* case sufficient to withstand a motion to dismiss.

Summarized Elsewhere:

Corral v. Hersha Hosp. Mgm't, Inc., 2012 WL 4442666 (D.N.J. Sept. 24, 2012)

Turner v. Florida Prepaid College Board, 2012 WL 4208923 (N.D. Fla. Sept. 20, 2012)

Hill v. Walker, 2012 WL 4792738 (E.D. Ark. Oct. 9, 2012)

Barker v. Professional Educators of Tennessee, 2012 WL 4793544 (M.D. Tenn. Oct. 9, 2012)

Hollstein v. Caleel & Hayden, LLC, 2012 WL 4050302, 116 FEP Cases 1037 (D. Colo. 2012)

Pulczynski v. Trinity Structural Towers, Inc., 691 F.3d 996, 19 WH Cases2d 1017 (8th Cir. 2012)

Algie v. NKU, 456 Fed.Appx. 514 (6th Cir. 2012)

- B. Right to Jury Trial
- C. Protections Afforded

Hill v. Walker, 2012 WL 4792738 (E.D. Ark. Oct. 9, 2012)

Plaintiff, a former employee of the state department of human services, brought a cause of action against defendant in both her official capacity as an employee of the state and her individual capacity. Plaintiff alleged FMLA retaliation on the theory that she was discharged from employment in order to prevent her from becoming FMLA eligible. The employee requested FMLA leave prior to becoming eligible. Furthermore, the leave request was for a time period beginning and ending before eligibility would have commenced. The plaintiff relied upon 29 C.F.R. § 825.220(e) to argue that a cause of action existed under these circumstances because the FMLA protects all individuals, regardless of eligibility, who “oppose any practice which they reasonably believe to be in violation of the Act or regulations.”

In rejecting plaintiff’s theory and granting defendant’s motion to dismiss, the district court noted that appellate courts addressing the issue have held that an employee must be eligible for FMLA leave in order to state a claim for FMLA retaliation. It also distinguished this case from cases where an employee requests FMLA leave prior to becoming eligible, but for a time period after eligibility. The district court concluded that it did not need to decide whether a request for FMLA leave based upon a good faith or reasonable belief to entitlement was actionable because nothing in the complaint gave any indication that plaintiff could believe in good faith that she might be covered under the FMLA. Furthermore, plaintiff failed to allege that she possessed a good faith belief that she was entitled to FMLA leave.

Mezu v. Morgan State Univ., 2012 WL 4041299, 19 WH Cases2d 1147 (4th Cir. Sept. 14, 2012)

The employee applied for FMLA leave to care for her daughter, following the daughter’s brain surgery. The employer denied the leave, and the employee sued, alleging interference with her right to take FMLA leave. The employer subpoenaed the daughter’s medical records, and the daughter moved to quash the subpoena. The magistrate judge denied the motion to quash, and the district court overruled the daughter’s objections to that denial.

The Fourth Circuit affirmed the denial of the motion to quash. The Court acknowledged the daughter’s right to confidentiality in her medical records. However, an element of proof in the mother’s lawsuit was that she was entitled to FMLA leave. Further, part of the employer’s defense was that the daughter was capable of self-care, meaning the mother was not “needed” to care for her. Given these issues in the mother’s lawsuit, the Fourth Circuit concluded that the daughter’s medical records were relevant and that the subpoena should be enforced. The court also rejected the daughter’s claim that her mother’s employer waived the right to challenge whether the daughter was capable of self-care by not asking for a second opinion when the mother requested leave. The court held that, because the second and third opinion process is permissive instead of required, an employer is not forever foreclosed from challenging an employee’s entitlement to FMLA leave.

D. Defenses

Braziel v. Medtronic, Inc., 2012 WL 4092600 (E.D. Tex. Aug. 22, 2012)

Plaintiff alleged her employer retaliated against her under the FMLA. The employer filed a motion to dismiss the complaint. The employer first argued that plaintiff failed to state a claim under the FMLA because she did not file the suit in a timely manner. Plaintiff was terminated on June 18, 2010 and she filed her lawsuit on June 15, 2012. The court found no facts to support a willful violation of the FMLA, so the two year statute of limitations applied. Thus, no act occurring prior to June 15, 2010 could be considered. Plaintiff's leave took place between May 17 and June 12, 2010 and therefore any claim that the employer interfered with, restrained, or denied the exercise or attempt to exercise leave rights under the Act were barred. The court also agreed with the employer that the employee did not allege any facts that could support a claim of retaliation under the FMLA. The court therefore granted the motion to dismiss as to all FMLA claims.

Summarized Elsewhere:

Macfarlan v. Ivy Hill SNF, LLC, 675 F.3d 266 (3d Cir. 2012)

1. Statute of Limitations

Sponcey v. Banner-Churchill Hosp., 2012 WL 2575345 (N.D. Ill. July 2, 2012)

Defendant employed plaintiff as a nurse from 1991-2007. In 2006, plaintiff was diagnosed with leukemia and took FMLA leave. Initially, defendant told plaintiff that she did not need to take FMLA leave, but rather she should use her paid time off. Plaintiff alleged that defendant failed to accommodate plaintiff's illness-related low energy levels. Defendant later granted plaintiff's FMLA leave and gave plaintiff credit for the paid time off. Plaintiff began receiving reprimands for seeing fewer patients than other nurses, and plaintiff overheard many people talking about plaintiff's confidential medical information. Plaintiff began a three-step complaint process as set forth in the policy manual but did not complete the process. Shortly thereafter, plaintiff was terminated for failure to increase her patient load.

Plaintiff initiated complaints with the Equal Employment Opportunity Commission ("EEOC"), the Nevada Equal Rights Commission ("NERC") and the Department of Labor ("DOL"). Two years later, plaintiff filed a complaint in court. The court granted defendant's motion to dismiss on all claims including an FMLA claim. Claims under the FMLA must be brought within two years of the wrongful conduct or within three years if the acts are willful. The court noted that the FMLA allows relief in court without requiring plaintiffs to exhaust other forms of relief; therefore plaintiff was not required to exhaust administrative relief before bringing her claims. Plaintiff's complaints with the EEOC, NERC and DOL did not toll the statute of limitations. The court found that the statute of limitations had run on plaintiff's FMLA, ADA, and right to privacy claims.

Maledy v. City of Enterprise, 2012 WL 1028176 (M.D. Ala. Mar. 26, 2012)

Following a conviction for driving under the influence, plaintiff took FMLA leave when she was admitted to a rehabilitation facility. Ten months later, plaintiff received notice that her employment was being terminated, following an investigation into her DUI. Plaintiff filed her initial complaint more than two years later, alleging that the employer used improper termination

procedures and improperly disclosed her confidential medical information. More than a year later, and more than three years after the termination of her employment, plaintiff amended her complaint to allege violations of the FMLA. Defendants moved to dismiss, arguing that her claims were time-barred.

The district court agreed and dismissed the claims. Although it construed plaintiff's complaint as alleging willful violations of the FMLA, therefore triggering the three-year statute of limitations, the complaint was nonetheless filed more than three years after the "last event" of her discharge. Further, plaintiff's FMLA claims did not relate back to the claims in the original complaint that was filed within the three-year statute of limitations such that the employer would have had notice of plaintiff's FMLA claims. Not only did the original complaint not mention any allegation that plaintiff was demoted following her two-week rehabilitation stay, but the original complaint also focused entirely on the procedures surrounding the termination of her employment, while the new FMLA allegations challenged the substantive reasons for her discharge. Because the claims did not relate back, plaintiff's FMLA claims were time-barred.

Summarized Elsewhere:

***Copeland v. Mid-Michigan Regional Medical Center*, 2012 WL 511534, 18 Wage & Hour Cases 2d 1611 (E.D. Mich. Feb. 16, 2012)**

***Griffey, et al., v. Daviess/Dekalb County Regional Jail*, 2012 WL 10881 (W.D. Mo., Jan. 3, 2012)**

***Freeman v. Philadelphia Housing Authority*, 2012 WL 3235323 (E.D. Pa. Aug. 8, 2012)**

a. General

Summarized Elsewhere:

***Katoula v. Detroit Entertainment LLC*, 2012 WL 6088325 (E.D. Mich. Dec. 6, 2012)**

b. Willful Violation

***Avent v. Kraft Foods Global, Inc.*, 2012 WL 3555378 (E.D. Va. Aug. 16, 2012)**

Plaintiff worked at a bakery facility for defendant. The terms of her employment, like her coworkers, were governed by a union agreement that included a strict "no-fault" attendance policy by which points were assessed for unexcused absences. For more than seven years of her employment, plaintiff used her FMLA leave for her son's and her own medical conditions. She also incurred several unexcused absences leading up to her discharge, which had resulted in disciplinary action under the union agreement. From January 31, 2008 to April 20, 2008, plaintiff did not work at all. Although her FMLA leave had expired, defendant – consistent with its practice – did not update plaintiff on her FMLA status. During her leave, defendant suspected that plaintiff had provided a fraudulent doctor's note in mid-January 2008, and a call to the health care provider confirmed that suspicion. Defendant sent plaintiff a written request that she authorize the company to seek authentication of other doctors' notes she had submitted. Plaintiff

refused. When plaintiff was released to return to work on April 21, 2008, defendant did not permit her to return. Defendant's human resource manager met with plaintiff and asked her to provide any additional information or documentation that would help determine whether defendant should terminate her employment. Plaintiff provided none, and her employment was terminated about a month later. Plaintiff filed a complaint with the Department of Labor, which determined that defendant had miscalculated its FMLA treatment of certain previous absences. As a result of the DOL investigation, defendant rescinded seven attendance points assessed to plaintiff.

Plaintiff filed a lawsuit for FMLA retaliation on September 22, 2010, more than two years after her discharge. Defendant moved for summary judgment on the ground that plaintiff's claims were time-barred. Plaintiff argued that the FMLA's three-year statute of limitations applied because defendant's conduct was willful. As evidence of willfulness, she cited to defendant's miscalculation of leave discovered by the DOL and subsequently corrected by defendant. She also noted that defendant had not provided her with updates on her FMLA status while she had been on leave, contrary to 29 C.F.R. § 825.300, the regulation outlining employer notice requirements.

The court held that plaintiff's claims were subject to the FMLA's two-year statute of limitation, and therefore were time-barred. It rejected plaintiff's arguments, holding that she had produced "no evidence" of willfulness. Neither defendant's "mere improper calculation of leave" nor its misapplication of internal policies constituted willfulness. In addition, the court noted that plaintiff's reliance on 29 C.F.R. § 825.300 was misplaced because it was not in effect during plaintiff's employment.

Upchurch v. Mount Carmel Health System, 2012 WL 3811802 (S.D. Ohio Sep 04, 2012)

The employee, a staff chaplain in the Emergency Department of his employer's hospital, was placed on administrative leave after exhibiting disruptive and erratic behavior, such as: leaving his work area, talking to himself, and explaining to others that he was hearing voices. An outside psychologist associated with the employer's employee assistance program rendered a principal diagnosis of Narcissistic Personality Disorder, however, the employee returned to work following a fitness-for-duty examination. Upon his return to work, the employee was placed on a performance improvement plan, requiring, *inter alia*, that he report to the duty chaplain any time he was leaving the workplace. Ten days after the employee returned to his duties, he reported to work but left abruptly without talking to his supervisor or reporting to the duty chaplain as required by the plan. The employer discharged the employee for job abandonment when he returned to work the next day. The employee subsequently was diagnosed with schizophrenia and received treatment for three years before he was able to start working again.

The district court granted the employer's motion for summary judgment as to the employee's claim for unlawful interference with his rights under the FMLA. First, the court held that the employee's lawsuit, brought two and a half years after his discharge, was untimely pursuant to the FMLA's two year statute of limitations. The court rejected the employee's contention that the employer's actions were willful and therefore entitled him to a three year statute of limitations. According to the court, even if the employer could reasonably have

construed the circumstances as a request for FMLA by the employee, there was insufficient evidence to create a triable issue that the employer discharged him “knowingly” or “with reckless disregard” for his FMLA rights. The court also based its grant of summary judgment on the undisputed fact that the employee would not have been able to return to work at the end of the twelve-week period following his alleged request for leave. Under these circumstances, the court ruled that the employer was entitled to terminate the employee’s employment without liability under the FMLA, even though the evidence of the inability to return to work in a timely fashion did not emerge until after the employment decision occurred.

Halilovic v. Southwestern Bell Telephone Co., 2012 WL 5471223 (E.D. Mo. Nov. 9, 2012)

The plaintiff filed a Complaint in the United States District Court for the Eastern District of Missouri, in which she asserted claims under the FMLA and Title VII. With respect to the FMLA claim, the Amended Complaint alleged that in 2008 she needed time off from work for a serious health condition and was granted leave under the FMLA, including intermittent leave. She alleged that when she returned from FMLA leave on July 30, 2009, she was initially offered the choice to resign or be terminated, and that she was terminated “less than (10) ten days after she returned from FMLA leave.” She further alleged that the defendant “knew or showed reckless disregard that its conduct was prohibited by” the FMLA and that the defendant’s interference with her rights under the Act was “in willful violation of the FMLA.”

The defendant filed a motion to dismiss, arguing that the plaintiff’s retaliation claim should be dismissed under the applicable two-year statute of limitations, because the plaintiff’s allegations were insufficient to invoke the three-year limitations period for willful violations under the Act. The court disagreed and held that the plaintiff’s allegations were sufficient to invoke the three-year statute of limitations of 29 U.S.C. § 2617(c)(2) for lawsuits alleging a willful violation of the FMLA.

***Lewis v. New York City Police Department*, 2012 WL 5467551 (E.D.N.Y. Nov. 9, 2012)**

Plaintiff was a Police Aide in the NYPD. Following her termination, the plaintiff sued her employer for FMLA interference and retaliation. The plaintiff applied for FMLA leave several times over the course of her employment. She also received multiple poor performance evaluations and was ultimately terminated for poor performance and excessive absences.

The court granted summary judgment to the employer on all claims. The court held the plaintiff’s FMLA interference claims were subject to a two year statute of limitations instead of three and were therefore time barred. In concluding the employer had not acted recklessly, the court noted that the employer responded individually to each of the plaintiff’s requests for FMLA leave, noting each time its justification for denying her request. In addition, the plaintiff had proffered no evidence that would suggest the employer’s denial of her leave requests was reckless.

The plaintiff’s retaliation claims were also rejected. The court held that the employer’s facially non-discriminatory reasons for the plaintiff’s termination – her excessive absences – were not rebutted.

Davis v. Navy Fed.Cred.Union, 2012 WL 73233 (E.D.Va. 2012)

Plaintiff was a former employee of defendant whose employment was terminated in December 2008. Plaintiff filed a pro se complaint against defendant alleging that she was frequently absent from work so that she could care for her child with mental disabilities, but that these absences were covered by the FMLA. Plaintiff alleged that defendant violated the FMLA by giving her unfavorable performance evaluations and otherwise treating her unequally. Plaintiff also alleged that defendant engaged in retaliation and discrimination on the basis of her age, race, and religious beliefs.

The Court granted defendant's motion for summary judgment as to her FMLA claim, finding that it was untimely. Plaintiff's employment was terminated in December 2008, but she didn't file her complaint until October 2011, outside the two-year statute of limitations. The Court dismissed the case without prejudice, so that plaintiff could cure the deficiencies by filing an amended complaint pleading willfulness, including supporting factual allegations to extend to three year statute of limitations.

Villalobos v. Vilsack, 2012 WL 4674056 (N.D. Cal. Oct. 1, 2012)

Plaintiff was a former probationary Forest Technician with the United States Department of Agriculture (USDA). During his employment, he often took intermittent time off work to care for his daughter, who had a serious health condition. Plaintiff claimed that he was never informed of his rights under the FMLA. In March 2010 plaintiff was temporarily reassigned to a new supervisor. Plaintiff alleged that the supervisor treated him differently than the other employees, including expressing frustration when plaintiff took time off to care for his daughter. In April 2010, plaintiff strained his neck and returned to work on modified duty. In June 2010, plaintiff took a medical leave of absence to treat his own health condition. On July 13, 2010 the USDA issued plaintiff a Notice of Termination, informing him that effective July 16, 2010, he would be terminated for discourteous and rude language, and a lack of candor. The notice also informed plaintiff that he had the right to file an appeal to the Merit Systems Protection Board (MSPB) and to file an Equal Employment Opportunity (EEO) complaint. The notice informed him that he had 30 days to appeal to the MSPB, and 45 days to file an EEO complaint. It was not until November 3, 2010 that plaintiff contacted an EEO counselor to initiate a discrimination claim. On July 31, 2012, after the EEO claim was ultimately dismissed as untimely, he filed a complaint in court alleging eight separate claims. In addition to five claims related to discrimination, and retaliation in violation of the Rehabilitation Act, plaintiff also claimed failure to grant family care and medical leave, failure to reinstate, and retaliation in violation of the FMLA.

Defendant filed a motion to dismiss portions of the complaint for lack of subject matter jurisdiction and to dismiss the FMLA claims on the grounds that plaintiff failed to state a claim upon which relief can be granted. Defendant argued that the FMLA claims must be dismissed because of the applicable two year statute of limitations. Plaintiff argued that a three year statute of limitations should instead be used, because defendant willfully disregarded his FMLA rights. The court noted that the FMLA does not define "willful" violation of the statute, and therefore borrowed the definition from the FLSA which states that the employer acts willfully if he knew

or showed reckless disregard for the matter of whether its conduct was prohibited. In this light, the court held that a reasonable jury could determine that defendant showed reckless disregard for whether its conduct was prohibited when it terminated plaintiff shortly after he took time off. Accordingly, the court denied the motion to dismiss plaintiff's FMLA claims.

Valentine v. Cal. Emp't Dev. Dep't, et al, 2012 WL 386682 (C.D. Cal. Feb. 6, 2012).

Plaintiff brought an action against her former employer, alleging she was retaliated against for exercising her FMLA leave rights. Defendant filed a motion for partial summary judgment as to the FMLA claim on two grounds. First, that the claim was barred by the two-year FMLA statute of limitations. Second, that there was insufficient evidence to support the retaliation claim.

As to the statute of limitations defense, defendant argued that plaintiff's FMLA claim was barred because she filed her complaint more than two years after her termination. Plaintiff argued that defendant committed a "willful" violation of the FMLA, thereby extending the statute of limitations to three years. The court found that because plaintiff was terminated just three days after allegedly injuring her back and taking FMLA leave, there was a triable issue of fact as to whether defendant's violation was willful. On this basis, the court declined to dismiss the FMLA claim. As to the retaliation claim, defendant argued that the plaintiff failed to provide sufficient evidence to support her claim. It cited plaintiff's deposition in which she stated that she "didn't recall" whether any representative of defendant discouraged her from taking FMLA leave, as well as testimony from plaintiff's supervisor that plaintiff was not discouraged from taking leave. In opposition, plaintiff argued again that she was terminated three days after requesting leave. The court found for plaintiff, and held that a question of fact existed as to whether defendant violated the FMLA. It found that the fact that plaintiff's termination occurred so soon after she requested leave suggested that her termination was related to her request for leave. On this basis, the court denied defendant's motion for partial summary judgment on the FMLA claim.

Summarized Elsewhere:

Katoula v. Detroit Entertainment LLC, 2012 WL 6088325 (E.D. Mich. Dec. 6, 2012)

Moore v. Washington Hospital Center, 2012 WL 2915165 (D. Md., July 16, 2012)

Hair v. Federal Express Corp., 2012 WL 4846999 (E.D. Wash. Oct. 11, 2012)

2. Sovereign Immunity

Brooks v. Delaware, Department of Health & Social Services, 2012 WL 1134481 (D. Del. March 30, 2012)

Plaintiff was employed by the Department of Health and Social Services, a department of the state of Delaware. Plaintiff alleged that the employer retaliated against her for taking medical leave in violation of the FMLA. The employer asserted that it was entitled to sovereign immunity and sought to dismiss the suit. The district court recognized that state sovereign

immunity for enforcement of the self-care provisions of the FMLA is well-established. The district court found that, because plaintiff's requested leave was for her own medical conditions, her claim fell under the FMLA's self-care provisions. Because the FMLA provides sovereign immunity in connection with self-care related claims, the district court concluded the employer was immune from suit and granted the employer's motion to dismiss.

Olschefski v. Red Lion Area School Dist., 2012 WL 6003620 (M.D. Pa. Nov. 30, 2012)

Plaintiff filed a lawsuit against her employer, the School District, and certain public officials in their individual capacities, arguing that the statutory right to hold them individually liable as public officials was not clearly established at the time of the alleged violations. As such, the individual defendants should enjoy qualified immunity. The court rejected the individual defendants' arguments, holding that qualified immunity requires a court to consider whether the plaintiff's rights granted by the FMLA were violated (an issue conceded by the individual defendants), and if so, whether that right (e.g., the plaintiff's right to intermittent leave for a serious health condition under the FMLA) was clearly established at the time of the alleged violation. The court found that the individual defendants' focus on the "uncertainty" of personal liability was misplaced, as exposure to personal liability was not an inquiry relevant to whether qualified immunity was available. The court believed it would be a misuse of qualified immunity to apply the doctrine to insulate from suit public employees who, as was the case here, do not dispute that their acts (if proven) would violate a clearly established right, but instead only take exception to liability on the basis that responsibility for their conduct should be borne by their own employer alone.

The court concluded that, based on the plain language of the statute, the rights allegedly violated were clearly established during the relevant time period and thus the motion to dismiss the individual defendants would be denied.

Coleman v. Maryland Court of Appeals, 132 S. Ct. 1327 (2012)

The employee worked for the Maryland Court of Appeals. He requested FMLA leave as a result of his own alleged serious health condition. Instead of providing leave, however, the Court of Appeals fired him. Coleman then brought a complaint against his former state employer, alleging violations of the FMLA. Maryland asked the trial court to dismiss Coleman's lawsuit because it was barred by Maryland's sovereign immunity. In order to work around the privilege of sovereign immunity and allow private lawsuits against state entities, the State had to show that the self-care provision of the FMLA remedies a pattern of gender-based discrimination (or some other form of legally cognizable discrimination) in states' sick leave policies. Here, Maryland argued that the self-care provision of the FMLA was passed pursuant to the Commerce Clause of the U.S. Constitution, which cannot be used to bypass the states' sovereign immunity. The district court granted the state employer's motion to dismiss on these grounds, and the Fourth Circuit affirmed.

The Supreme Court granted certiorari and affirmed the decisions of the lower courts. In a plurality decision, Justices Kennedy, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, the Court concluded that there was little evidence that Congress passed the self-

care provisions of the FMLA were necessary to its family-care provisions or how it reduced employer discrimination against women. Therefore, the plurality concluded that suits against states under the self-care provision were indeed barred by sovereign immunity. Justice Scalia concurred in the judgment, filing an opinion expressing alternate grounds. Justice Ginsburg filed a dissenting opinion, joined by Justice Breyer, and, with the exception of one footnote, Justices Sotomayor, and Kagan. The dissenters argued that the self-care provision validly enforces “the right to be free from gender discrimination in the workplace,” and that it therefore was a valid exercise of congressional power under section five of the Fourteenth Amendment.

Santiago v. Connecticut Dep’t of Transportation, 2012 WL 5398884 (D.Conn. Nov. 5, 2012)

Plaintiff began working for defendant in 1998. In 2000, he was diagnosed with cluster headaches. He applied for intermittent leave to the human resources specialist, but his request was denied. He filed suit against defendant and the human resources specialist claiming interference with his FMLA rights and retaliation in violation of the FMLA’s self-care provisions. Defendants filed a motion to dismiss the complaint, arguing the lawsuit must be dismissed in light of *Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012), which held that “suits against states under [the self-care provisions of the FMLA] are barred by the States’ immunity as sovereigns in our federal system.” The district court granted defendants’ motion in part.

Plaintiff recognized that, in light of *Coleman*, he was barred from seeking monetary damages against the employer defendant and the human resources specialist in her *official* capacity, but he claimed that he was seeking monetary damages against the human resources specialist in her *individual* capacity as an “employer” under the FMLA. The district court agreed with plaintiff and denied the motion to dismiss the claim for monetary damages against the human resources specialist in her individual capacity. The court also concluded that plaintiff could sue the human resources specialist for *prospective injunctive relief* in her *official* capacity. Finally, after noting that a suit for injunctive relief against a state is barred by the Eleventh Amendment unless the state has consented to the filing of the suit, the court concluded that plaintiff could not sue the state defendant for injunctive relief because he had not shown that the state defendant consented to the suit.

Rounds v. Michigan, 2012 WL 2680825 (E.D. Mich. 2012)

Plaintiff alleged wrongful interference with FMLA rights against her former employer, the State of Michigan. In response, the State-employer filed a motion to dismiss for lack of subject-matter jurisdiction, arguing that plaintiff’s claims were barred by the Eleventh Amendment. The court determined that although a state can consent to becoming a party in a lawsuit with a clear declaration that it has waived its sovereign immunity, there was no such waiver in this case. The court then turned to the State-employer’s argument that Congress has not validly abrogated the sovereign immunity of the states under the provisions of the FMLA on which plaintiff’s allegations were based. The court agreed with the State’s argument, because the Sixth Circuit had previously held that claims against states under the self-care provision of the FMLA are barred by the Eleventh Amendment. Accordingly, the court granted the State-employer’s motion to dismiss for lack of subject matter jurisdiction.

Steers v. Michigan, 2012 WL 2568169 (E.D. Mich. 2012)

Plaintiff was a former employee of the Michigan Department of State, a state employer, who filed a lawsuit alleging FMLA violations. Defendant employer moved to dismiss her FMLA claim based on sovereign immunity. Because a “state employer is not absolutely immune from private FMLA lawsuits under the Eleventh Amendment because Congress abrogated sovereign immunity through the Fourteenth Amendment in response to gender discrimination,” the court considered Supreme Court precedent, which instructed that the immunity only extends to the family-care provision of the FMLA and does not extend to leave associated with self-care. Consistent with that, the parties had agreed and the court concluded that plaintiff could not recover for alleged FMLA violations based on the self-care provision.

The court concluded that the only absences that would potentially support a cause of action against defendant in spite of the Eleventh Amendment were the absences from plaintiff’s intermittent leave period during which she cared for her husband and her absences to care for her son. Accordingly, the court denied the motion to the extent it addressed plaintiff’s family-care claims and granted defendant’s motion as to plaintiff’s self-care claims.

Wells v. West Georgia Technical College, 2012 WL 3150819 (N.D. Ga. Aug. 2, 2012)

The employee’s doctor informed the employee she was temporarily unable to work for an unspecified reason. The employee informed the employer’s human resources director and requested forms to apply for medical leave. Two weeks later, the employer denied the employee’s request for medical leave and discharged the employee. The employee filed suit, alleging the employer violated the FMLA by refusing to grant her request for medical leave. The employer filed a motion to dismiss, arguing the employee’s claim was barred by the doctrine of sovereign immunity. The employee argued the employer’s violations involved a breach of contract because her employment relationship with the employer was contractual. The court rejected that argument, noting the employee did not cite to any written contract and did not plead a breach of contract claim in the lawsuit. The court also rejected the employee’s argument that Congress abrogated immunity because the employee’s claim was under the FMLA’s self-care provision. The court held sovereign immunity had not been waived, and it granted the employer’s motion to dismiss.

Jackson v. Alabama Dep’t of Corrections, 2012 WL 3104047 (M.D. Ala. June 29, 2012)

Plaintiff sustained serious injuries during a motorcycle accident. As a result of his injuries, the employee was absent from work for approximately two months. According to the employee, he was harassed by his two supervisors when they asked for a doctor’s excuse for the days he missed. The employee, proceeding *pro se*, filed suit against the employer alleging that the employer discriminated against him by failing to give him FMLA leave as a result of his accident. The employee sought back pay and reinstatement.

The employer filed a motion for summary judgment arguing the employee’s FMLA claims were barred by the Eleventh Amendment. The presiding magistrate judge for the district court determined that because the employer was an administrative department of the state of Alabama, it had to unequivocally express consent to suit in federal court. The court also

acknowledged that while Congress had the authority to abrogate a state's Eleventh Amendment immunity, the Eleventh Circuit previously held that Congress failed to "abrogate validly the [s]tates' sovereign immunity in the FMLA self-care provisions." The court found that without a valid waiver or abrogation, the state could not be sued in federal court for either monetary damages or injunctive relief. The magistrate judge recommended that the employer's summary judgment be granted and the employee's claims dismissed for lack of jurisdiction. The district court adopted the magistrate judge's recommendation and issued an opinion regarding the same.

Reinhold v. County of York, Pennsylvania, 2012 WL 4104793 (M.D. Pa., Aug. 31, 2012)

Plaintiff, a County employee, was hospitalized for several different health conditions. The employer approved the employee's initial request for FMLA leave, which ended one week later. Several months later, the employee underwent a related FMLA-approved medical procedure lasting two days. The employee's supervisors then began expressing written concerns about the employee's "ongoing medical issues." Over the next two months, the employer issued two separate suspensions and a "Last Chance Agreement" related to alleged "drowsiness" on the job caused by the medication needed to treat the employee's ongoing medical condition. The employer also engaged in systematic harassment, including accusing the employee of using the bathroom too frequently, close supervision and timing of the employee's bathroom breaks, complaints that the employee was "sleeping in the bathroom," a request that the employee wear Depends undergarments, subject to frequent "smell tests" by the employee's co-workers, and an attempted "forced retirement." The employee was hospitalized a third time, for significant emotional distress related to the hostile work environment as well as complications related to her diabetic condition. Upon her return to work five days later, the employee was retroactively accused of "sleeping on the job" one day prior to her final hospitalization. The employee was terminated the same day she returned to work.

Seventeen months later, the employee brought claims for FMLA interference and retaliation, among numerous other claims under state, federal and common law. Following defendants' motion to dismiss, the Federal Magistrate Judge entered a Report and Recommendation finding that: (1) the Eleventh Amendment shields States from FMLA self-care claims; (2) a public agency employee can be held individually liable for violating the FMLA under certain circumstances; (3) the Eleventh Amendment does not preclude a claim for prospective injunctive relief against a state official acting in his or her official capacity; (4) the FMLA does not permit recovery of punitive damages; and (5) a complaint must specifically allege a provision, statutory or otherwise, giving rise to a claim for attorneys' fees. The district court also found that defendant's removal to federal court operated as a waiver of sovereign immunity under FMLA as to the original defendants only, but not as to the new defendants joined after removal. The Court further found that plaintiff's allegations were sufficient to state a claim for FMLA interference as she alleged that: (1) she was qualified for FMLA leave; (2) the defendants denied her a benefit to which she was entitled; (3) defendants failed to notify her of her FMLA rights; (4) the defendants unreasonably withheld FMLA approval; and (5) the defendants discouraged her from taking FMLA leave by virtue of continued harassment and discipline. As to plaintiff's retaliation claim, the court explained the "causal link" element of a retaliation claim cannot be addressed at motion to dismiss stage. Finally, the court recommended dismissal of all FMLA claims against the County and the individual defendants acting in their

“official capacities” but not as against the individual defendants acting in their “individual capacities.”

Lee v. State of Iowa, 815 N.W. 2d 731 (Iowa 2012)

Plaintiff worked in the traffic division of the State of Iowa. In the fall of 2004, she took FMLA leave granted to her by the employer. On November 3, 2004, she returned to work after being absent for several days. The employer demoted and suspended her for three days because she failed to follow an absentee policy requiring her to call in each day she was absent. On November 8, the employee called in for another day of absence. However, she did not do so on the following day she missed work, and the employer terminated her on November 10. The employee then filed suit against the employer pursuant to the “self-care” provisions of FMLA. In particular, she alleged that the employer violated the interference and retaliation provisions of the FMLA.

The employer argued the employee’s suit was barred by the Eleventh Amendment’s sovereign immunity provisions. The Iowa Supreme Court agreed, ruling that the Eleventh Amendment required dismissal of employee’s suit, and reversed an appellate court decision upholding a jury verdict awarding plaintiff \$165,122. In doing so, it rejected the employee’s argument that Congress abrogated Iowa’s sovereign immunity when passing the FMLA. The Court also held that Iowa did not expressly or constructively waive its immunity under the Eleventh Amendment. As to express waiver, the Court held that the employee did not raise that argument below and, thus, waived it on appeal. With respect to constructive waiver, the employee argued that the employer’s inclusion of FMLA provisions in its employee handbooks showed that it waived its sovereign immunity. The Court disagreed, stating that the employee could not show that the employer included such provisions to waive its sovereign immunity. Similarly, the Court rejected the employee’s contention that the employer waived its immunity by failing to include provisions in its handbook stating that it retained its sovereign immunity. Finally, the Court disagreed with the employee’s view that the employer waived its immunity because its employees knew that it would be illegal to terminate an employee for using FMLA leave.

Summarized Elsewhere:

Sanders v. Shinseki, 2012 WL 5985469 (D.Kan. Nov. 29, 2012)

Jacober v. U.S. Dep’t of Agriculture Agency, 19 WH Cases2d 1128 (S.D. Ill. 2012)

Cotora v. Lee County, 2012 WL 2996550 (M.D.Fla. July 23, 2012)

Bonzani v. Shinseki, 2012 WL 3993426 (E.D. Cal. Sept. 11, 2012)

3. Waiver

Summarized Elsewhere:

Pulczynski v. Trinity Structural Towers, Inc., 691 F.3d 996, 19 WH Cases2d 1017 (8th Cir. 2012)

4. Res Judicata and Collateral Estoppel

Petty v. United Plating, Inc., 2012 WL 2047532 (N.D. Ala.)

In *Petty*, the court was required to determine whether the plaintiff was collaterally estopped by the finding of the Alabama Department of Industrial Relations on his unemployment compensation claim to relitigate the reason for his discharge and, thus, establish that defendant terminated his employment for a reason unrelated to his FMLA leave. The state agency determined, after a fair hearing attended by both parties, that the plaintiff was not eligible for unemployment compensation because he was fired for misconduct when he left work without clocking out. Alabama law provides that state agency decisions have preclusive effect if (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision. The court held that these requirements were satisfied and thus the state unemployment compensation agency hearing decision (that employee was fired for misconduct when he left work without clocking out) *collaterally estopped* his claim that he was not properly reinstated at the end of his leave.

5. Equitable Estoppel as a Bar to Certain Defenses

Medley v County of Montgomery, 2012 WL2913207 (E.D. Pa. July17, 2012)

The employee, a nursing assistant for defendant, had a child with serious health conditions. Notwithstanding the fact that she had worked less than 1250 hours during the 12 months preceding the beginning of her application for FMLA leave, she alleged that her employer told her she was qualified for and covered by the FMLA. The employee executed a variety of FMLA forms provided by the employer confirming her entitlement to FMLA leave. Despite the employer's apparent approval, the employee's managers began to write her up for the FMLA absences that she took to take care of her son. One day, she spoke to a human resources official and indicated that she would file a grievance for being written up for her intermittent absences. The official tried to persuade the employee to not file a grievance, but the employee was adamant; the employee agreed to wait until the following day to file the paperwork. The next day, defendant discharged the employee because of an absence that occurred four days earlier, and was supposedly covered by the employee's alleged FMLA entitlement.

The employee filed suit, alleging FMLA interference and retaliation, based on equitable estoppel. Specifically, she claimed that because the employer had told her that she was covered by the FMLA, she had relied on that information to her detriment. The trial court determined that the doctrine of equitable estoppel was available to the employee and precluded the employer from arguing that she was not FMLA eligible. As a result, the employee's FMLA retaliation claim survived the motion to dismiss. This was not the result with respect to the employee's

interference claim – the district court determined that there were no FMLA benefits with which the employer could interfere because plaintiff’s equitable estoppel claim could not retroactively endow her with FMLA rights. The court did note that if the plaintiff had alleged that her employer’s misrepresentations interfered with her inability to take any *future* FMLA leave that she might have become entitled to, then her interference claim might have survived.

Goode v. Heritage Hospice, Inc., 2012 WL 1038669 (E.D. Ky. Mar. 26, 2012)

Following the termination of her employment, plaintiff filed a lawsuit alleging, among other claims, interference and retaliation violations of the FMLA. She had previously requested time off from work for bipolar disorder and was granted three weeks of leave, although she never applied for and was never granted FMLA leave. Her employment was terminated nine months later following an outburst in a meeting with supervisors. Although it was uncontested that plaintiff was not an “eligible employee” as defined by the FMLA, she contended that her employer was equitably estopped from denying her coverage under the FMLA because the employee handbook represented generally that the employer was covered by the FMLA.

The district court rejected this argument. It found that the employee handbook, which made general references to the FMLA and explained the procedures and requirements for an employee to request and be approved for leave, did not make misrepresentations of material fact that were definite or specific enough to trigger equitable estoppel. Likewise, plaintiff failed to show reasonable or detrimental reliance on the representations in the handbook – she never applied for FMLA leave by using the procedures spelled out in the employee handbook, and she presented no evidence that she changed her position in reliance on her belief that her employer was covered by the FMLA.

Summarized Elsewhere:

Nicholl-Kerner v. Lawrenceville Urology, 2012 WL 1898615 (D. N.J. May 23, 2012)