



**COMMITTEE ON FEDERAL LABOR STANDARDS LEGISLATION  
SUBCOMMITTEE ON THE FAMILY AND MEDICAL LEAVE ACT**

**2014 MIDWINTER MEETING REPORT OF 2013 CASES**

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## CHAPTER 2. COVERAGE OF EMPLOYERS

### I. OVERVIEW

### II. PRIVATE SECTOR EMPLOYERS

#### A. Basic Coverage Standard

#### **Waters v. Axl Charter School, 2013 WL 856524 (D. Colo. March 7, 2013)**

Plaintiff was employed as a schoolteacher by defendant on a three-year contract. After the conclusion of the second school year, she notified her supervisors that she was pregnant and was expecting to give birth approximately six months later. While working during her pregnancy, plaintiff alleged that she was subjected to frequent and unannounced classroom visits as well as aggressive questioning of her instructional methods, and that she was required to reschedule pregnancy-related doctor appointments with little or no notice. Approximately two weeks after she returned to work, plaintiff was informed that she would not be offered a contract to teach either of the two types of classes which she had taught previously. Defendant alleged that she had been offered a contract to teach a different class but had declined, while plaintiff claimed that she had never been offered the opportunity to teach the other class.

Among other claims, plaintiff asserted FMLA claims for interference and retaliation. Defendant moved to dismiss the FMLA claims, arguing that plaintiff was not an “eligible employee” under the FMLA because defendant employed fewer than 50 employees. Plaintiff claimed in response that defendant’s admitted policy of offering “Family and Medical Leave” and its failure to inform her that it was not subject to the FMLA or that she would not be eligible for FMLA leave should equitably estop defendant from denying that it is a covered employer under the FMLA.

The district court first determined that it would consider defendant’s motion to dismiss as a motion for summary judgment. The court then ruled that plaintiff would be permitted an opportunity to conduct discovery on the issue of how many employees were employed by defendant at the time that plaintiff made her request for leave because defendant filed its motion to dismiss before answering plaintiff’s complaint and prior to any exchange of discovery. However, the court rejected plaintiff’s equitable estoppel argument, finding that even if defendant were covered by the FMLA, plaintiff had not asserted that defendant had made any positive representation or misrepresentation to her regarding her eligibility under the FMLA upon which she had relied, but had only indicated its leave policy was consistent with the requirements of the FMLA.

#### B. Who Is Counted as an Employee

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#### **LaFleur v. Hugine, 2013 WL 5355035 (N.D. Ala. Sept. 24, 2013)**

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### III. PUBLIC EMPLOYERS

#### A. Federal Government Subdivisions and Agencies

##### **Robinson v. Shinseki, 2013 WL 5720336 (M.D. Fla. Oct. 21, 2013)**

A federal government employee brought an action *pro se* against the Secretary of Veterans Affairs. The employee alleged, among other things, that her supervisors interfered with her FMLA rights by suspending her without pay and terminating her employment. Defendant filed a motion to dismiss, raising two defenses: lack of subject matter jurisdiction and failure to state a claim. The district court granted the motion. The court held that, because the employee worked for the federal government, her rights were governed by Title II of the FMLA, which does not allow federal employees to maintain a private right of action against their employer. The court explained that the absence of an express waiver of the government's sovereign immunity in Title II bars private suits for violations of its provisions. Accordingly, the court granted the motion to dismiss because it did not have jurisdiction to consider employee's claim.

#### 1. Coverage Under Title I

##### **Murphy v. Volt Information Sciences, Inc., 2013 WL 5372787 (D. Or. Sept. 24, 2013)**

Plaintiff worked for Volt Information Sciences, Inc. ("Volt"), a contingent staffing supplier that provided temporary employees to the United States. At the time of the alleged interference and retaliation with her FMLA rights, plaintiff was assigned to the Bonneville Power Administration ("BPA") under the United States Department of Energy. She brought suit against Volt, the United States of America, and Secretary of Energy, Stephen Chu (together, the "Federal Defendants"). The Federal Defendants filed a motion to dismiss, arguing that plaintiff could not assert a private right of action and that the government could not be a joint employer under the FMLA.

Title I of the FMLA provides a private right of action against the federal government. Title II of the FMLA "governs leave for federal civil service employees," and does not provide a private right of action against the federal government. The Federal Defendants argued that Congress meant to exclude federal agencies from the kinds of employers covered by Title I by using the word "businesses" in the FMLA regulations and because Congress would not have given Title I employees a broader remedy against the government than it gave Title II employees. The court rejected these arguments. Although it conceded that the "test for waiver of sovereign immunity is a 'stringent one,'" it found "no ambiguity" in the language of the statute and thus denied the Federal Defendant's motion to dismiss on jurisdictional and sovereign immunity grounds. The Federal Defendants also argued that plaintiff was a Title I employee only with respect to Volt while plaintiff argued that the Federal Defendants were a joint employer with Volt. The court stated that "whether a federal government agency can be a 'joint employer'" was an issue of first impression, and noted that the FMLA does not contain any

language that specifically addresses the joint employment concept. In determining the federal government could be a joint employer under the FMLA, the court pointed out that Congress chose broad language for the Title I sovereign immunity waiver, which “clearly extends to cases in which the government is a joint employer,” and the FMLA regulations “cite an example of joint employment that mirrors the relationship between Volt and the Federal Defendants[.]” It gave an additional policy rationale that failing to reach its conclusion would leave plaintiff “without a remedy against the alleged wrongdoer.” On that basis, it denied the Federal Defendants’ motion to dismiss.

## 2. Civil Service Employees

### **Bellow v. LeBlanc, 2013 WL 3914886 (5th Cir. July 30, 2013)**

Plaintiff brought an FMLA lawsuit against her former supervisor in his individual capacity. Defendant filed a motion to dismiss on the grounds of qualified immunity, but the district court denied his motion. On appeal, the Fifth Circuit affirmed that defendant was not entitled to qualified immunity from suit in his individual capacity. The court recognized that the doctrine of qualified immunity promotes the “necessary, effective, and efficient performance of government,” and that it would shield from liability all but the “plainly incompetent or those who knowingly violate the law.” Therefore, a plaintiff seeking to bypass qualified immunity in a lawsuit against a public official in his individual capacity must show two things. First, that she had a “clearly-established” constitutional or statutory right under the FMLA to not be terminated for taking leave, and second, that defendant’s conduct, in this case, his decision to terminate her, was “objectively unreasonable” in light of clearly-established law.

In this instance, the Fifth Circuit determined that plaintiff had affirmatively shown both factors to be true. The court found that the first factor was satisfied under the plain statutory language of the FMLA, which defines “employers” to include state officials acting in their individual capacities. As to the second factor, the court held that the standard was one of “fair warning,” and that if it would be “sufficiently clear” to a “reasonable official” that his actions would violate plaintiff’s rights, qualified immunity could be abrogated. In this case, plaintiff’s allegation that the supervisor terminated her for taking FMLA leave sufficiently constituted an objectively unreasonable violation of her clearly established rights under the statute. Therefore, the Fifth Circuit affirmed district and denied defendant’s motion to dismiss.

#### ***Summarized Elsewhere:***

### **Bonzani v. Shinseki, 2013 WL 5486808 (E.D. Cal. Sept. 30, 2013)**

## 3. Congressional and Judicial Employees

### **Hemminghaus v. Missouri, 2013 WL 588197 (E.D. Mo. Feb. 13, 2013)**

The employee was a court reporter for a Missouri state court. The employee claimed to have made numerous requests for leave to take care of her children, and alleged that these requests were denied in violation of her FMLA rights. The employee bought a lawsuit under the FMLA against the State of Missouri and the judge for whom she worked.



The court granted summary judgment for the employer, holding the court reporter was not an eligible employee under the FMLA. The State of Missouri argued at the outset that plaintiff was not a covered employee under the FMLA because the Judge, not the state, was her employer, and the Judge did not employ 50 or more people. The court rejected this argument, noting that the state paid her salary and FMLA regulations treat the state and its subdivisions as a single employer for the purpose of employee eligibility. 29 C.F.R. § 825.108(c)(1). However, ultimately the court granted summary judgment for the employer because the employee was exempt from FMLA coverage as personal staff of a public elective office holder. 29 U.S.C. § 2611(3). Although the judge initially was appointed to the court, he was an “elective office holder” because Missouri judges have to face public elections after appointment to retain their positions. In addition, the employee was a “personal staff member” because she served at the pleasure of the judge, was accountable only to him, and they worked together with interdependent duties in a small division. Because she fell under the exception, the employee was not eligible for FMLA leave.

## **B. State and Local Governments and Agencies**

### **Morgan v. Alachua Cnty., 2013 WL 4780128 (N.D. Fla. Sept. 5, 2013)**

Plaintiff, a former firefighter/EMT for defendant, sued defendant county, individual county employees, and union officers for terminating him in retaliation for asserting his rights under the FMLA. Plaintiff was injured in a motorcycle accident and used his full twelve weeks of FMLA leave as well as some vacation and sick leave for treatment and recovery. Upon return, the county assigned plaintiff to a temporary “staffing” position rather than his permanent position. After returning to work, plaintiff violated the county’s attendance policy on three occasions and, as a result, defendant suspended him. After returning from his suspension, plaintiff requested additional FMLA leave for more treatment related to his injury. Following this request and a reported absence, the county terminated plaintiff’s employment, citing his attendance violations as the reasons for the termination. Plaintiff brought suit, alleging that claimed defendants terminated him in retaliation for asserting his rights under the FMLA. Defendants moved to dismiss, arguing that the complaint failed to state a claim for retaliation. A magistrate issued a report and recommendation, and the district court adopted the magistrate’s report and recommendation.

The district court granted the individual county employees’ and union’s motion to dismiss, but denied the county’s motion to dismiss. In dismissing the claims against the union officers, the court reasoned that the FMLA only grants a private right of action against an “employer” under 29 U.S.C. § 2617(a)(2). Thus, the court held that plaintiff’s employer for purposes of FMLA liability was defendant county, not the union officials. As to the county employees, the court noted that “government officials acting in their individual capacity are not personally liable as employers under the FMLA.” Therefore, the court dismissed the individual county defendants. Finally, in denying the county’s motion to dismiss, the court found that because plaintiff asserted that the attendance related rationale given for his termination was merely pretext, the county was on notice of the other elements of plaintiff’s FMLA claim and the allegations were sufficient to allow the county to answer and assert defenses.

**Bell v. Univ. of Cal. Davis Med. Ctr., 2013 WL 1896318 (E.D. Cal. May 6, 2013)**

Plaintiff worked for Meagher, an employee of the University of California Davis Medical Center (“UCDMC”). Plaintiff claimed to suffer from a serious medical condition and clinical depression. He requested medical leave on June 23, 2009, which was granted. On June 26, 2009, his physician wrote a medical certificate stating that plaintiff was unable to return to work due to his medical condition. A month later, plaintiff requested medical leave again and, shortly thereafter, was allegedly discharged for unsatisfactory performance. Plaintiff filed suit against UCDMC and Meagher.

The court dismissed plaintiff’s claims against UCDMC on the grounds of sovereign immunity. The court acknowledged that the FMLA’s “self-care provision” creates a private right of action against any employer, including a public agency. Nonetheless, the court applied the United States Supreme Court’s ruling that the FMLA’s “self-care provision” did not fall within the Fourteenth Amendment exception to Eleventh Amendment Immunity.” The court did not dismiss the FMLA claim against Meagher on sovereign immunity grounds, recognizing “a split in authority on the question of an individual public employee’s FMLA liability.” But the court dismissed the claim against Meagher because plaintiff’s complaint failed to state a claim for relief. Specifically, the court found that plaintiff did not allege that he was denied medical leave.

**Crugher v. Prelesnik, 2013 WL 5592969 (W.D. Mich. Oct. 10, 2013)**

A former corrections department employee brought an action against a prison warden in his official and individual capacity. The employee alleged that he was harassed and discharged in retaliation for exercising his right to take FMLA leave. The warden filed a motion to dismiss, arguing the claims were barred by sovereign immunity. The warden claimed that the State of Michigan was the real party at interest, and that the so-called *Ex Parte Young* exception to sovereign immunity did not apply because the employee did not allege the warden individually violated his rights. The employee responded that he was suing only for prospective injunctive relief, which is not barred, and that the proper defendant in such a suit is the official with authority to rehire him rather than the official who fired him.

Finding the employee’s position lacked merit, the court granted the warden’s motion to dismiss. The court reasoned that the Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. The exception to state immunity carved out by the Supreme Court in *Ex Parte Young* did not apply. The court explained that the rationale for the *Ex Parte Young* exception is that a state officer who violates federal law is stripped of his official character, and thereby loses the cloak of state immunity. Based on that rationale, the court found the proper defendant in an action brought pursuant to the *Ex Parte Young* exception is the state officer who allegedly violated federal law. Because the employee did not allege a causal connection between the warden and an alleged violation of federal law, his claim was barred by the Eleventh Amendment.

**Paulin v. Department of Health and Hospitals, 2013 WL 6405021 (E.D. La. Dec. 6, 2013)**

Plaintiff, proceeding *pro se*, was the former employee of a state health agency. Plaintiff filed suit under the FMLA, alleging the employer failed to restore her to her original position, or its equivalent, after she took a leave of absence to have her pacemaker replaced. The employee also brought claims under the FMLA for equitable relief to have her personnel file expunged, and a claim because she had been denied educational leave. The employer moved to dismiss, arguing that it was entitled to sovereign immunity as an arm of the state.

The court granted in part and denied in part the employer's motion to dismiss. The court found that under the Supreme Court's recent decision in *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2013), the employee's "self-care" FMLA claim was barred by the doctrine of sovereign immunity. However, the employee was allowed to pursue her request for injunctive relief regarding the expungement of her personnel file. The court construed this as a prospective "equitable claim," because *Coleman* barred suits for money damages only, not equitable relief. The court also declined to dismiss plaintiff's claim for "denial of educational leave" under the FMLA, noting that, although the FMLA did not provide for educational leave, that fact "did not rule out every possible avenue of federal relief." The court noted that the *pro se* plaintiff had not had an opportunity to explain the basis for the claim, and thus the court would not dismiss it *sua sponte*.

**Williams v. Dorchester County Detention Center, 2013 WL 6623184 (D. S.C. Dec. 16, 2013)**

Plaintiff, a detention center officer, suffered injuries after she was assaulted at work. She subsequently took FMLA leave and sought worker's compensation. After plaintiff's FMLA leave expired, she was unable to return to work was discharged. Following a full recovery, plaintiff reapplied for work with the detention center multiple times, but was not hired.

Plaintiff filed suit, in part, asserting claims for FMLA retaliation against her former employer, the detention center, and its director, in his individual capacity. The employer moved to dismiss plaintiff's FMLA claims against both defendants. The district court, adopted the Magistrate's Report and Recommendation, and dismissed plaintiff's FMLA claims. The court, citing Eleventh Amendment immunity, dismissed the detention center because it was under the control of the Sheriff of Dorchester County, a state agency. Adopting Fourth Circuit precedent, *Lizzi v. Alexander*, 255 F.3d 128, 135-36 (4th Cir. 2001), the court reasoned that because the State enjoys Eleventh Amendment immunity on FMLA claims, so should individual supervisors faced with FMLA claims.

**Parson v. Homer, 2013 WL 5441734 (S.D. Ohio Sept. 27, 2013)**

The employee was a police officer for the City of Monroe and suffered from a stuttering impediment. Plaintiff took FMLA leave various times in 2008 through 2011 for issues involving this impediment, as well as leave for his father's death and the birth of his daughter. Plaintiff claimed that the employer treated him unfairly following the leaves, three other employees interfered with his leaves, and he was disciplined because of absences. Plaintiff filed suit against

the employer and three employees in their individual capacities. Defendants then moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

The three individual defendants argued that well-settled Sixth Circuit precedent precluded their personal liability under the FMLA because they were public agency employees. Plaintiff argued that other circuit courts and district courts had allowed personal liability against public agency employees, thereby asking the court to reject the Sixth Circuit precedent. The district court declined to do so. It held that it was bound by Sixth Circuit precedent and did not find necessary facts in plaintiff's claims to justify straying from that precedent. The employer argued that some of plaintiff's claims under the FMLA were time-barred. Plaintiff filed his complaint on December 9, 2012. Because the employer did not provide argument as to why the two year statute of limitation applied and plaintiff had alleged willful violations, the court assumed that the three-year statute of limitation applied. As a result, the court found that any claim based on conduct occurring before December 9, 2009 would be time barred, but allowed plaintiff's claims based on conduct occurring after December 9, 2009 to move forward.

***Summarized Elsewhere:***

***Smith v. Grady, 117 FEP Cases 737 (S.D. Ohio 2013)***

***Mendel v. City of Gibraltar, 727 F.3d 565, 21 WH Cases2d 14 (6th Cir. 2013)***

#### **IV. INTEGRATED EMPLOYERS**

***Diaz v. Saucon Valley Manor, Inc., 21 WH Cases2d 868 (E.D.Pa. March 5, 2013)***

After she requested a reasonable accommodation to attend an inpatient treatment program, plaintiff was discharged. She filed suit seeking recovery under the FMLA, among other statutes. Defendant filed a motion for summary judgment seeking dismissal of its president, arguing she was not subject to individual liability under the FMLA. The court noted that the president may be individually liable if she exercised supervisory authority over the complaining employee and was responsible in whole or in part for the alleged violation while acting in the employer's interest. The court examined "the totality of the circumstances, including whether the person: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedule or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records."

Denying defendant's motion, the court found that the president had the authority to hire and fire plaintiff and did in fact fire plaintiff. The court also noted that the undisputed testimony established that the president was involved in the supervision of all of defendant's employees. The court determined that the evidence created an issue of material fact and denied defendant's motion for summary judgment.

***Dalton v. Manor Care of W. Des Moines IA, LLC, 2013 WL 599979 (S.D. Iowa Jan. 29, 2013)***

The employee, Director of Care Delivery, was treated and released from the ER after experiencing severe chest pain. Upon discharge, she was instructed to remain off of work for the next day. The employee informed her supervisor that she was being treated, and contacted her

again afterward to inform her of the work restriction. The employee was discharged three days later. The employee filed suit in federal court, alleging disability discrimination under the FMLA, the ADAAA and the Iowa Civil Rights Act against four corporate defendants and three employees of the employer.

A motion to dismiss, filed by two of the four corporate defendants, was denied by the court under the Rule 56 summary judgment standard. The 12(b)(6) motion was supported by a great deal of additional documentary evidence from both sides. The court determined that the additional evidence required review under the summary judgment standard of Rule 56. In evaluating the degree of integration between defendants, the court determined that the record created genuine issues of material fact regarding whether or not defendants are “employers” for the purposes of the claims filed. The documents included messages in the employee handbook from executive representatives of the moving party, and the moving party’s name appeared on everything from the handbook cover, to letterhead, job descriptions, performance documentation, and paychecks.

A preliminary issue was whether or not the employer requirement is a jurisdictional or substantive element of the ADAAA and FMLA, for determining whether 12(b)(1) or 12(b)(6) as the standard of review. The court began analysis with the ADAAA and found that the statute does not include the “employer” requirement as a jurisdictional requirement. The jurisdiction provisions for enforcement of the ADAAA are found within the jurisdictional provisions of Title VII, which provides that the U.S. Courts have jurisdiction of all actions under Title VII. The employer requirement is separate and thus a non-jurisdictional element of the claim. As a result of supplemental jurisdiction, the court did not evaluate the FMLA jurisdiction provisions.

***Dooling v. Bank of the W., 2012 WL 2921370 (E.D. Tex. July 17, 2013)***

Plaintiff, a loan officer for defendant GSB Mortgage, Inc. (“GSB”), filed suit against both GSB and defendant Bank of the West (“BOTW”) alleging she was demoted that defendant terminated her employment in retaliation for taking FMLA leave, arguing that defendants were joint or integrated employers for the purposes of FMLA liability.

Defendants moved for summary judgment, arguing that they were not “employers” under the FMLA because (1) GSB was plaintiff’s only employer; and (2) GSB did not meet the definition of employer under 29 U.S.C. § 2611(4)(A)(i), because only 12 employees were employed at plaintiff’s work site. Defendants also argued that plaintiff was not an “employee” under 29 U.S.C. § 2611(2)(B)(ii) because GSB employed less than 50 employees within seventy five miles of that worksite. In opposition, plaintiff argued that defendants were integrated or joint employers under the FMLA who, when combined, had more than 50 employees within a 75 mile radius and, therefore, she met the definition of an eligible employee under the FMLA. Plaintiff also argued that even if defendants were not treated as joint employers, they were estopped from arguing they did not meet the definition of employer because of their conduct.

The district court denied the motion for summary judgment. First, the court found that plaintiff established an issue of fact as to whether defendants met the “integrated employer test” enumerated by 29 C.F.R. § 825.104(c). Specifically, the court found that defendants had common management, their operations were interrelated in that they shared human resources

forms and policies, and insurance and benefit plans. Further, the court found that there was a fact question regarding centralized control of labor relations and the degree of common ownership and control because BOTW also owned all of the shares of GSB, and plaintiff worked for GSB in BOTW's branch office location. Moreover, an internal memo from a BOTW employee directed plaintiff to take leave questions to GSB. Thus, the court held there was sufficient evidence of an integrated relationship between defendants to preclude summary judgment for defendants.

Second, the court held that there were genuine issues of material fact to preclude summary judgment for defendants on the issue of estoppel. Under the estoppel theory, an employer who makes an erroneous representation to its employee that she is eligible for FMLA leave and has reason to believe that the employee will rely on it, is estopped from asserting a defense of non-coverage if the employee relies on the representation to her detriment. Here, the court found that plaintiff received a copy of a GSB employee handbook which contained a FMLA leave policy, but that there was a genuine issue of material fact as to whether plaintiff received a subsequent handbook, which had been revised to remove the FMLA policy. Further, the court found that plaintiff received a letter from a BOTW employee stating that she "possibly would be eligible" for FMLA leave. Thus, the court found that there was a factual dispute on the estoppel issue and denied summary judgment for defendants on that issue.

Finally, the court held that there were genuine issues of material fact precluding summary judgment on plaintiff's FMLA retaliation claim. The court found that plaintiff established a *prima facie* case for retaliation, and established an issue of fact as to whether there was a causal connection between the timing of her termination following her return from leave. Specifically, defendants asserted the after plaintiff returned to work, she ultimately terminated for "unsatisfactory work performance," poor "work quality" and "excessive absences" that defendant had noted before she took leave. Plaintiff argued defendants did not follow the prescribed discipline policy and that the notes on her warning regarding her work performance were not present when she signed it. Thus, she argued that defendant's articulated reasons for her terminated were pretext. The court found that plaintiff raised a genuine issue of material fact and denied defendant's motion for summary judgment.

**Skinner v. Legal Advocacy Center, 2013 WL 5720142 (M.D. Fla. Oct. 21, 2013)**

Plaintiff, an attorney, brought claims against her former employer ("Company A") for FMLA retaliation. She also sued another entity ("Company B"), alleging that it was also her employer for FMLA purposes. Both companies moved for summary judgment, arguing that Company A was plaintiff's sole employer, and that plaintiff's claim failed because Company A had too few employees to fall within the purview of the FMLA. Plaintiff argued that Company A and Company B should be deemed a single integrated employer, with enough employees in the aggregate to fall under the FMLA. Plaintiff also argued that even if she was not technically eligible, Company A held itself out as an FMLA-eligible employer, such therefore that it should be estopped from arguing that plaintiff was not entitled to FMLA leave. The court granted summary judgment for the companies.

In determining whether the companies were an integrated employer, the court applied four factors: commonality of management, interrelation of operations, centralized control of

labor relations, and common ownership/financial control. The first factor favor plaintiff because there were factual disputes as to which of the two companies controlled daily operations, and who had hiring and firing authority at Company A. Second, the interrelation between the operations was neutral and favored neither party. While the majority of the relationship between the two companies was governed by a contract which weighed in the companies' favor, there were a few other interrelated operations that favored plaintiff, such as shared office space, shared board meetings, and plaintiff's use of Company B's services when traveling. Third, the centralized control of labor relations weighed in favor of the companies, because plaintiff's supervisor at Company A was solely responsible for plaintiff's schedule. Additionally, Company B's employees were unionized, and Company A's were not. Although plaintiff alleged that there was one "split employee" who supposedly did work for both companies, the court found that this factor ultimately weighed in favor of the companies. Fourth, the degree of common ownership/financial control also weighed in favor of the companies. Company A and Company B descended from different entities. Also, Company A refused to take funding which would restrict the type of work they could do, while Company B received funding and could not perform certain "restricted" work. Thus, under the totality of the circumstances, the court could not conclude that the companies were an integrated employer. Therefore, plaintiff could not demonstrate that she was an eligible employee within the meaning of the FMLA.

Plaintiff's estoppel argument also failed. Even if the employer had made a definite misrepresentation, plaintiff could not show that she had changed her position in any way based on any alleged misrepresentations.

***Summarized Elsewhere:***

***Newman vs. Gagnan L.L.C.*, 939 F. Supp. 2d 883, 20 WH Cases2d 1205 (N.D. Ind. 2013)**

**V. JOINT EMPLOYERS**

***Miller v. Nordam Group, Inc.*, 2013 WL 6080268 (N.D. Okla. Nov. 19, 2013)**

A temporary staffing agency placed the employee with the employer on October 6, 2010. The employee became a permanent employee of the employer on July 18, 2011. On October 20, 2011 the employee requested a 30-day leave of absence because her father passed away. The employer instructed her to return to work on October 31 and asked her to notify the employer by October 28 if she could not return on that date. When the employee did not return to work on October 31, the employer terminated her employment, deeming it a voluntary resignation. The employee filed a complaint alleging that she was entitled to FMLA leave based on the theory that the employer and temporary staffing agency were joint employers.

The employee filed a motion for partial summary judgment on the issue of whether she was an "eligible employee" under the FMLA because she had worked for the employer for more than twelve months. The district court agreed with the employee. The employer and the temporary staffing agency were "joint employers" for a period of greater than twelve months based on a totality of the circumstances because both exercised some control over the work and working conditions of the employee. The court reasoned that the employer retained direction over the employee's work, her working hours, evaluating her work, and the power to discharge

her, while the temporary staffing agency continued to issue the employee's paychecks. Because the court found that the staffing agency and employer were "joint employers," the employee had been employed for the requisite twelve-month period and was eligible for FMLA leave.

A. Test

**Miles v. University of the District of Columbia and Howard University, 2013 WL 5817657 (D. D.C. October 30, 2013)**

As Director of the University of the District of Columbia's ("UDC") program for small business development, plaintiff reported to a supervisor at UDC and to the regional small business authority at Howard University. She notified both UDC's human resources department and her Howard contacts that she was pregnant and arranged for a workload transfer to another program office during her maternity leave. In February, she submitted a request for FMLA maternity leave. On March 11, plaintiff notified both UDC and Howard that she was bedridden due to pregnancy complications. Plaintiff gave birth on March 25 and was granted FMLA leave through June 14, 2011. On April 7, 2011, Howard notified UDC via letter that it had placed plaintiff's program under probation, requesting a written recovery plan within 30 days. The letter suggested UDC discharge plaintiff and nominate a replacement, subject to Howard's approval. In May, Howard terminated UDC's program and plaintiff exchanged emails with her UDC supervisor, where she told the supervisor that HR had instructed her not to respond to emails while on FMLA leave. UDC discharged plaintiff on June 30, 2011. She brought FMLA retaliation and interference claims jointly against UDC and Howard and both moved for dismissal.

Howard contended that it was not plaintiff's employer, but the court disagreed, determining that Howard had control over plaintiff's employment, as demonstrated by its April 7 letter that indicated naming her successor was subject to its approval. The court also held that plaintiff met all three requirements to state a prima facie claim of FMLA retaliation against UDC in that (1) she engaged in FMLA-protected activity by expressing concern informally, both to the HR department and via email to her supervisor, about working while on leave, (2) her termination was adverse, and (3) she showed a causal connection when "only a few weeks" passed between her taking leave and dismissal. The court also denied the motions to dismiss as to plaintiff's interference claim. Plaintiff claimed her employers interfered with her right to FMLA leave by denying her right to reinstatement. Further, she claimed the termination of her program and her position was due to her complaining about working while on leave. Defendants argued she was no longer eligible for reinstatement when her program was terminated, but the court found that neither UDC nor Howard had proved that plaintiff's dismissal would have occurred regardless of her complaints or taking FMLA leave. The court held that in the absence of such proof there was a legitimate question as to the cause of plaintiff's termination.

**Cuellar v. Keppel Amfels, L.L.C., 731 F.3d 342, 21 WH Cases2d 189 (5th Cir. 2013)**

Plaintiff alleged that defendant encouraged a staffing agency to interfere with her reinstatement with defendant after her FMLA approved maternity leave. Plaintiff had been employed by the staffing agency and assigned to work for defendant. Three days after her maternity leave had started, defendant informed plaintiff that she had been replaced by a non-



temp employee but was eligible for “rehire.” Plaintiff sued defendant for interfering with her FMLA rights by allegedly convincing the staffing agency not to seek her reinstatement, and for retaliation. The district court dismissed both claims and plaintiff appealed the interference claim.

The Fifth Circuit first determined that her primary employer and defendant were plaintiff’s joint employers. The court also noted that FMLA obligations differ for the primary and secondary employers in that only the primary employer is responsible for FMLA leave. The secondary employer has a duty to return the employee to her job if (1) it had replaced her with another temp employee, and (2) was then requested to return the original employee to her position. The appellate court found that the staffing agency was the primary employer.

The Fifth Circuit then upheld the dismissal of plaintiff’s interference claim against defendant, reasoning that defendant had no obligation to reinstate plaintiff because she had been replaced by a non-temporary employee and the staffing agency had not requested her reinstatement.

**Klein v. L-3 Communications Corp. et al, 2013 WL 5913776 (M.D. Ala. Nov. 1, 2013)**

A quality auditor for a company that maintains military aircraft was involved in a boating accident during which she suffered a spinal fracture. The employer did not place the employee on FMLA leave, did not discuss FMLA leave with her, and did not provide her with FMLA paperwork. Instead, the employer gave the employee 12 weeks of non-FMLA leave during which the employee drew short-term disability benefits. While the employee was on leave, the employer reduced its flight hours at the base where she worked, and the employee’s position was selected for elimination as part of a reduction in force. The employee subsequently filed claims of FMLA interference and retaliation against both the employer and its parent company.

The court granted the parent company’s motion for summary judgment, concluding that it could not be held liable as the employee’s “employer.” The parent company could not be liable under a “single employer” theory because there was insufficient evidence the parent and its subsidiary maintained interrelated operations. The court dismissed the employee’s “joint employer” theory as well because the evidence showed that the employee’s chain of command was always within the subsidiary. The court also granted the employer’s motion for summary judgment as to the interference and retaliation claims. The court rejected the employee’s argument that the employer failed to comply with the FMLA notice provisions because she had failed to plead this theory prior to the employer’s motion for summary judgment. The court also rejected the employee’s argument that the employer had failed to reinstate her following the expiration of leave following her back injury. First, the court held that the employee had not requested FMLA leave for the injury and, therefore, had no right to reinstatement. Second, the court held that even if the employee could establish a prima facie case, she had no greater right to reinstatement than if she had not taken FMLA leave, and that the undisputed evidence showed that the employee’s lay off had nothing to do with her medical leave. As to the retaliation claim, the court found that the employer articulated a legitimate, nondiscriminatory reason for the termination and the employee was unable to meet her burden to establish that the employer’s proffered reason was false or that the employer was motivated by discriminatory animus. The court rejected the employee’s argument that the employer’s use of a single performance

evaluation with which she disagreed to select her for the reduction in force was sufficient to establish pretext.

***Summarized Elsewhere:***

***Littell v. Diversified Clinical Servs., Inc.*, 2013 WL 1951912 (M.D. N.C. May 10, 2013)**

- B.** Consequences
- C.** Allocation of Responsibilities

***Newman vs. Gagnan L.L.C.*, 939 F. Supp. 2d 883, 20 WH Cases2d 1205 (N.D. Ind. 2013)**

Plaintiff was employed as a business analyst by Company A and Company B, franchises of Company C, which is owned by a parent company, Company D, collectively referred to as defendants. Plaintiff signed an employment agreement that specifically named Company A and Company B as his employers. In January 2011, plaintiff suffered a serious injury at work and was placed on leave. In April 2011, he returned to work with restrictions. Plaintiff asked defendants to accommodate his restrictions. A meeting was scheduled, but ultimately cancelled when defendants learned plaintiff had hired a lawyer. Defendants refused to accommodate plaintiff, eliminated his position, placed him on a leave of absence and informed him he would be considered for future openings when he was "fully released" by his physician. Plaintiff's physician subsequently released him back to work and plaintiff was offered a position as an Assistant Marketing Room Manager. Plaintiff accepted the job and performed satisfactorily, but the employer then terminated his employment after he requested time off for two doctor's appointments relating to his work injury as well as FMLA leave related to the birth of his child. Defendants stated that plaintiff was terminated for "violating rules that allow marketing room staff to be sent home when any rule is broken."

Plaintiff brought suit against all four companies, alleging FMLA violations. All four companies brought motions to dismiss. As an initial matter, company C and company D argued that they were not plaintiff's employers. The court accepted plaintiff's argument that both companies were liable under an affiliate liability theory. The court noted that in order to show joint liability under the FMLA, it must be shown that each alleged employer exercised control over the working conditions of the employee, while recognizing that these facts will vary on a case-by-case basis. In denying the motion to dismiss, the court noted that plaintiff alleged sufficient concrete facts to raise plausible inferences that there was considerable integration among the various defendants, including plaintiff's supervision by a company C employee, an advertisement for plaintiff's replacement as a business analyst that referenced company C as one of the employers, correspondence to plaintiff at the start of his employment indicating that he would have the chance to become an executive at company D, payment of some company A personnel through company D, and notification to employees that the employment policies of company C and company D were applicable to them.

Company A and company B's joint motion to dismiss was also denied. The court rejected their argument that plaintiff did not plead sufficient facts to infer that they were subject to the FMLA. The court noted that the companies themselves had made references that could reasonably lead someone to infer they were subject to the FMLA. Finally, Company A and

company B also argued that plaintiff was not eligible for FMLA leave. The court rejected this argument, stating that based on plaintiff's prior work schedule it was at least plausible that he would have accumulated enough hours at the approximate time he would have taken leave if he hadn't been terminated.

## **VI. SUCCESSORS IN INTEREST**

- A.** Test
- B.** Consequences

## **VII. INDIVIDUALS**

### **Grigg v. Griffith Co., 2013 WL 5754986 (E.D. Cal. Oct. 23, 2013)**

Plaintiff worked for defendant company for 33 years and eventually was promoted to Vice President/District Manager. He notified defendant that he would need a 12-week leave of absence for medical reasons. While he was on disability leave, defendant terminated plaintiff's employment. Plaintiff sued the company and a supervisor, alleging violations of his rights under the FMLA and the California Family Rights Act ("CFRA"). The supervisor filed a motion to dismiss plaintiff's claims for failure to state a claim against him.

The district court denied the supervisor's motion to dismiss because the FMLA allows suits against individual supervisors. The court stated, "the FMLA prohibits 'employers' from interfering with FMLA rights, and defines 'employers' to include 'any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.'" The court found that under the definition of "employer," "supervisors and corporate officers may be held individually liable." Accordingly, the court denied the supervisor's motion to dismiss.

### **Smith v. St. Francis Hospital, 2013 WL 3973170 (D. S.C. July 31, 2013)**

The employee alleged that she was improperly terminated while on FMLA leave, and filed suit naming the employer and three individual defendants. The district court in South Carolina granted one of the individual defendant's motion to dismiss for failure to state a claim. The court recognized that individual liability is possible under the FMLA with respect to "individuals such as corporate officers 'acting in the interest of an employer'." The record was clear, however, and the employee did not dispute, that the sole mention of the individual defendant at issue in the pleadings was insufficient to allow an action to proceed against him. Specifically, the sole allegation regarding the individual defendant failed to allege that he "had any ability to control, in whole or in part, whether [the employee] could take FMLA leave and/or whether she could return to her position" at the expiration of her leave.

### **Smith v. Center for Organ Recovery and Education, et al, 2013 WL 4049550 (W.D. Pa. Aug. 9, 2013)**

Plaintiff alleged that defendants, including her former supervisor, "unlawfully discriminated against her because she was pregnant and/or suffering from disabling conditions

resulting from an abnormal pregnancy.” Defendants filed a partial motion to dismiss, asserting that one individually-named defendant was not a supervisor within the meaning of the FMLA, which the court denied. Noting that the FMLA and its implementing regulations make individual liability available for violations by “corporate officers acting in the interest of an employer,” which the Third Circuit has explained includes individuals who “exercise[] supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation while acting in the employer’s interest,” the court concluded that plaintiff adequately pled an FMLA claim against the individual because of the economic reality of plaintiff’s relationship with the individual defendant.

Specifically, the court explained that the complaint alleged that the individual defendant “forced her to take FMLA leave in lieu of granting her a reasonable disability accommodation necessitated by her pregnancy, thereby constituting an unlawful FMLA interference.” According to the court, this suggests that the individual defendant “carried out the functions of an employer with respect to [plaintiff.]” The complaint also asserted that the individual defendant was involved in the refusal to accommodate plaintiff’s medically necessary shift restriction and her termination. The “pleadings therefore implicate at least two of the four non-exhaustive factors indicating a supervisory relationship [sic] the power to hire and fire as well as the power to control an employee’s work schedule.”

**Shockley v. Stericycle, Inc., 2013 WL 5325632 (N.D. Ill. Sept. 19, 2013)**

The employee sued his former employer and several individual co-workers, alleging FMLA interference and retaliation based on discipline and the termination of his employment. The individual defendants were the director of human resources, the director of the employee’s department, and a leave administrator. The individual defendants filed a motion to dismiss, arguing that the employee’s complaint failed to allege that any of them had supervisory authority over the employee, which they contended was necessary for plaintiff to assert FMLA claims against them. The district court denied defendants’ motion. The court found that it was sufficient at the pleading stage for the employee to allege that the individual defendants controlled, at least in part, the employee’s access to FMLA leave. In considering the roles of the individual defendants, the court found that the two directors exercised at least some degree of control over the employee’s terms of employment, and that the leave administrator had authority regarding his eligibility to take FMLA leave.

**Lacher v. Board of County Commissioners for Oklahoma City, ex rel. Oklahoma County Clerk’s Office, et al., 2013 WL 268983 (W.D. Ok. Jan. 24, 2013)**

The employee filed a suit against several defendants, including the Board of County Commissioners of Oklahoma City, Carolyn Caudill in her individual and official capacity as County Clerk, and John Wilkerson in his individual and official capacity as her supervisor. The employee alleged interference and retaliation under the FMLA, among other federal and state statutory and common law claims. In February 2011, the employee began taking time off to go to the doctor to obtain care for stomach ulcers. She missed work February 15 and 16, 2011 after fainting for medical reasons. The employee alleged that she was not informed of her rights under the FMLA at that time, nor after informing a defendant Caudill of her

medical issues and need for leave. The employee's doctor placed her on leave from March 10, 2011 to March 17, 2011 due to abdominal pain associated with the employee's ulcers. The employee alleged that within ten minutes of submitting her medical release on March 10, 2011, the employee received a termination letter from the employer.

The court granted defendants' motion to dismiss which argued that defendants were not employers under the FMLA, and therefore not the proper party to the employee's FMLA claim. In granting the motion to dismiss, the court held that defendant Caudill in her individual capacity, defendant Wilkerson in his individual capacity, and Defendant Board of County Commissioners were not the employee's employer. The court also dismissed the employee's claims against defendant Caudill in her official capacity because the employee failed to request FMLA leave and did not allege that defendant Caudill denied FMLA leave or sick leave.

**Felder v. Edwards, 2013 WL 6383126 (S.D. Miss. Dec. 5, 2013)**

A former deputy superintendent suffered an on-the-job injury when she fell down a flight of stairs. She subsequently requested accommodations, including the right to work from home. The employer initially allowed her to work from home, but when a new superintendent took office, the accommodation was revoked and the employee was required to take sick leave for absences. At some point during this time period, the employee took FMLA leave. While she was on leave, she received a notice of non-renewal informing her that, due to financial constraints of the school district, her position was being eliminated for the following year. The employee sued under various statutes, and included a claim for interference under the FMLA. The suit named the school district and two superintendents in their individual capacities.

One of the individual defendants filed a motion to dismiss, arguing she was entitled to qualified immunity and could not be sued under the FMLA. The court agreed, dismissing her from the case. The court acknowledged that public employees who act, directly or indirectly, in the interest of an employer satisfy the definition of "employer" under the FMLA, and therefore may be subject to liability in their individual capacity. Those public employees may be immune from suit because of qualified immunity, based on (1) whether the claims as pled in the complaint establish a violation of a clearly established right, and (2) whether the conduct was objectively reasonable in light of clearly established law at the time of the incident. Applying this framework, the court found that the new superintendent retained her qualified immunity from suit. The employee alleged only that the new superintendent interfered with her rights under the FMLA by not allowing her the reasonable accommodation of working from home. The court found that, because the FMLA does not require that employees be reinstated to work with reasonable accommodations, the employee did not allege violation of a clearly established right. The new superintendent thus retained her qualified immunity, and the court dismissed the employee's FMLA claims against her in her individual capacity.

**Haybarger v. Lawrence County Adult, Probation, 20 WH Cases2d 793 (W.D. Pa. 2013)**

The employee filed a claim against an individual defendant, alleging discrimination and retaliation in violation of the FMLA. Defendant was a government employee, and he moved for summary judgment. Defendant argued that qualified immunity under the Eleventh Amendment did not allow the FMLA claim to be brought against him. The court denied defendant's motion for summary judgment. The court reasoned that defendant had confused suits against him in his official capacity with suits against him as an individual. The court had already dismissed the suit against him in his official capacity. The court concluded that qualified immunity would not apply to a suit against him in his individual capacity. Rather, he could be liable for money damages in that capacity. Accordingly, the court denied the employee's motion for summary judgment.

***Santee v. Lehigh Valley Health Network, Inc.*, 2013 WL 6697865 (E.D. Pa. Dec. 19, 2013)**

Plaintiff, a medical transcriptionist employed by Lehigh Valley Health Network, Inc. (LVHN), applied for intermittent FMLA leave in September 2009 with LVHN's Employee Health Department. Employees from the Department advised her that it required additional information to approve her leave. In November 2009, plaintiff was transferred to a different department. Plaintiff alleged that, after learning about her FMLA leave request, her new supervisor began treating her less favorably than similarly situated employees. In April and May 2010, Plaintiff complained to a human resources employee about the treatment, but her complaint was not addressed. In May 2010, Plaintiff also sent an email complaining about the treatment to her supervisor, with a blind copy to defendant's Administrator/Health Information Management, a Vice President, and Chief Operating Officer, but again her complaint was not addressed. Plaintiff was discharged in June 2010 and in June 2013 she filed FMLA claims against LVHN, her former supervisor, LVHN's Employee Health Department employees, the human resources employee, and the three employees she blind copied on the May 2010 email. Defendants moved to dismiss the FMLA retaliation claim.

The court denied LVHN's motion, finding plaintiff adequately pled a willful FMLA violation. In moving to dismiss the retaliation claim against them, the individual defendants contended that plaintiff did not adequately plead a claim against them in their individual capacities. The court determined plaintiff did not sufficiently plead a plausible claim against the human resources employee or the three individuals blind copied on the May 2010 email. The court found that plaintiff failed to allege that they had supervisory authority over plaintiff or were responsible in any way for her discharge, as required to establish individual liability under the FMLA in the Third Circuit. Similarly, while the Health Department employees communicated with plaintiff about her leave, plaintiff did not allege that they were involved in the discharge decision or had supervisory authority over her. But the court found plaintiff adequately pled a claim against her former supervisor, who made decisions regarding her employment, including disciplinary decisions.

***Summarized Elsewhere:***

***Morgan v. Alachua Cnty.*, 2013 WL 4780128 (N.D. Fla. Sept. 5, 2013)**

***Goff v. State Military Department*, 2013 WL 5352755 (M.D. Ala. Sept. 24, 2013)**

***Franklin v. Tuthill Corp./Transfer Sys.*, 2013 WL 3353933 (N.D. Ind. July 3, 2013)**

***Chase v. U.S. Postal Service*, 2013 WL 5948373 (D. Mass. Nov. 4, 2013)**

**Freeman v. Philadelphia Housing Authority, et al., 2013 WL 3761274 (E.D. Pa. July 18, 2013)**

## CHAPTER 3.

## ELIGIBILITY OF EMPLOYEES FOR LEAVE

### I. OVERVIEW

### II. BASIC ELIGIBILITY CRITERIA

#### **Schluckebier v. Assisted Living Concepts, Inc., 2013 WL 550744 (D. Neb. Feb. 12, 2013)**

Plaintiff, a residence director at an assisted living facility, became pregnant a few months after she started working for the employer. She claimed that after she announced her pregnancy to her supervisor, he began to treat her differently and made her job more difficult. Plaintiff went on short-term disability leave to have her child, but just a few weeks later, she received a voicemail from her supervisor, who called to tell her that her employment had been terminated. Had plaintiff been allowed to remain on the job, within about two months she would have worked the requisite number of hours to qualify for FMLA leave.

After her discharge, plaintiff brought a claim under the FMLA. Both parties moved for summary judgment, but the court denied both motions. Based on the evidence collected in discovery, it was not clear whether the employer discharged plaintiff because she inquired about taking FMLA leave once she became eligible. Determining the merits of plaintiff's claim would require analyzing the credibility of the witnesses, and accordingly, the court denied the motions for summary judgment.

#### **Gillis v. Wal-Mart Stores Inc., 117 FEP Cases 1744 (D. Or. 2013)**

Within the first nine months of her employment with defendant, plaintiff requested leave under the FMLA because she was pregnant. Defendant granted her requests for intermittent, then later continuous leave, designating both as FMLA leave. One month after plaintiff returned from leave, defendant discharged plaintiff because she stopped reporting to work. Plaintiff brought an FMLA interference claim against defendant.

In deciding defendant's motion for summary judgment, the court held that plaintiff's FMLA interference claim failed. The court reasoned that because plaintiff had worked for defendant for less than twelve months and had not completed 1,250 hours of service, she could not demonstrate she was entitled to FMLA leave. Although recognizing that she was not eligible for FMLA leave, plaintiff asserted that defendant was equitably estopped from arguing she was not an eligible employee, claiming that she had "detrimentally relied" on defendant's representations that she was eligible. In addition, she argued that defendant forced her to take continuous, instead of intermittent, leave, which denied her the opportunity to earn money during her leave. The court, however, was not convinced by plaintiff's equitable estoppel argument because plaintiff: (1) failed to show she could have continued to work intermittently because plaintiff's healthcare provider stated she was "incapacitated" during her pregnancy and, thus, required continuous leave, (2) did not provide any authority that the lost opportunity to make money is a protected right under the FMLA, and, (3) requested more than she would have been able to receive under the FMLA. Therefore, plaintiff's equitable estoppel claim failed as well.



**Clark v. Winkler Court, 2013 WL 6133594 (M.D. Fla. Nov. 21, 2013)**

The employee began working for the employer on April 23, 2012, and requested a medical leave of absence on a few occasions in 2013. He made one specific request in June 2013 for leave to undergo shoulder surgery. Sometime thereafter, the employee was discharged. The employee filed a lawsuit against the employer alleging interference and retaliation under the FMLA. The employer moved for summary judgment, which the court denied on both counts.

The employer argued that the employee was not eligible for FMLA leave because his request for medical leave that was at issue in the case was submitted on April 3, 2013. The court found, however, that the employee submitted a request for medical leave on June 14, 2013, with the stated reason being “shoulder surgery.” Based on that finding, the court concluded that there was enough evidence to show that, at the time the employee submitted a request for medical leave, she had been employed for more than twelve months.

**Hill v. Walker, 737 F.3d 1209 (8th Cir. 2013)**

Plaintiff, a social worker for the Arkansas Department of Human Services, suffered from depression and anxiety which allegedly worsened because of the stressful nature of her employment. After receiving medication for “job stress” and having “anxiety attacks,” plaintiff was placed under the care of her physician for “illness” from May 25 until June 20, 2011. Plaintiff requested a leave of absence using her available compensatory time, which her supervisor verbally granted. Plaintiff’s supervisor then forwarded FMLA forms for plaintiff to complete. Following staffing changes in the workplace, the supervisor reversed her initial approval and sent a certified letter notifying plaintiff that her request to use her compensatory leave time consecutively would “impose an unreasonable burden on the agency.” In the letter, the supervisor advised that plaintiff had to return to work by June 6, 2011. On June 7, 2011, plaintiff emailed her supervisor and expressed her disdain at her supervisor’s request. Despite her supervisor’s letter, plaintiff stated she would return to work on June 20, 2011. Ten days later, the supervisor sent another letter to plaintiff and informed her that she was discharged for violating department policy by failing to comply with “reasonable work-related instructions.” Plaintiff filed an internal grievance and the discharge decision was upheld. Subsequently, plaintiff filed suit alleging FMLA interference against the supervisor, individually and in her official capacity.

On appeal, the Eighth Circuit affirmed the district court’s dismissal of plaintiff’s FMLA interference claim. The court determined plaintiff was not an “eligible employee” under the FMLA because she had not worked for her employer for at least twelve months. Plaintiff argued that “the FMLA protects pre-eligibility requests for post-eligibility leave.” The court reasoned that plaintiff had not requested to take leave *after* her eligibility date, June 28, 2011. In contrast, the court adopted the rationale of *Walker v. Elmore Cnty. Bd. Of Educ.*, 379 F.3d 1249, 1253 (11th Cir. 2004), and held that plaintiff only sought to take leave before her eligibility date and her leave request was unprotected by the FMLA. Plaintiff also argued that defendant should be equitably estopped from denying her eligibility for FMLA leave because she relied to her detriment on her supervisor’s initial grant of the leave request. The court refused to adopt the estoppel argument because plaintiff had not detrimentally relied on her supervisor’s representation.

### III. MEASURING 12 MONTHS OF EMPLOYMENT

#### **Carr v. Mike Reichenbach Ford Lincoln, Inc., 2013 WL 1282105 (D. S.C. Mar. 26, 2013)**

When plaintiff was hired as comptroller, she had an almost 2 hour commute each way to work. During her employment, defendant's owner repeatedly encouraged plaintiff to move closer. Plaintiff also had several conversations with the owner regarding concerns about her health, including a condition which she was concerned might turn out to be cancer. After eight months, plaintiff informed the owner that she was not going to be able to move closer any time soon, and that she was undergoing testing for the medical condition. The owner informed her that he needed to hire someone else to do the job, but offered plaintiff an additional month's salary as severance if she would train the new employee. Plaintiff received a cancer diagnosis just nine days before her last day of work, while she was already training her replacement. In total, plaintiff worked just short of eleven months for defendant.

Plaintiff filed suit, alleging both interference and retaliation claims under the FMLA. The court rejected plaintiff's interference claim because she had not yet worked for 12 months, and specifically rejected plaintiff's argument that her discharge was a "preemptive" attempt by defendant to avoid giving her FMLA benefits. The court found no evidence that plaintiff had ever indicated to defendant that she might need FMLA leave, and the decision to replace plaintiff was made two months before she received her cancer diagnosis. The court also rejected plaintiff's retaliation claim for the same reasons.

#### **Basden v. Professional Transportation Inc., 714 F.3d 1034, 20 WH Cases2d 1017 (7th Cir. 2013)**

Plaintiff, a dispatcher at a transportation company, was discharged for accruing too many absences, which she claims resulted from newly-diagnosed multiple sclerosis. The trial court granted summary judgment to defendant on plaintiff's FMLA claim because plaintiff had not shown she was protected by the FMLA. The Seventh Circuit affirmed the judgment of the district court because plaintiff's employment was terminated before she had been employed for 12 months. According to the FMLA's explicit terms, employees without 12 months of tenure are ineligible for its protections. Plaintiff argued that the FMLA should not be interpreted to preclude relief for non-eligible employees who request leave for future periods. The Seventh Circuit found no authority for extending the scope of the FMLA as requested by plaintiff and affirmed summary judgment for defendant.

#### **Dunn v. Chattanooga Public Co., 20 WH Cases2d 214 (E.D. Tenn. 2013)**

Within the first year of her employment, the employee was diagnosed with cancer and required surgery that she scheduled outside her first year of employment. The employee requested medical leave for the surgery. The employee's supervisor informed the employee that he was expecting a promotion, and required a full-time employee. Because he needed a full-time employee, the supervisor discharged the employee. The employee then filed a complaint alleging, among other things, violations of the FMLA.

The district court granted the employer's partial motion to dismiss her FMLA claims, finding that the employee could not recover under either an interference or retaliation theory because she had not met the eligibility requirements under 29 C.F.R. § 825.110(d). The district court refused to adopt the Eleventh Circuit's conclusion that a pre-eligibility employee who notified her employer of expected post-eligibility medical leave was entitled to FMLA protection. The district court instead relied on past precedent and the statute which intentionally omits FMLA protection to employees who have been employed for less than one year.

**Saulsberry v. FedEx Exp., 2013 WL 596061 (W.D. Tenn. Jan. 15, 2013)**

The employee was hired as a part-time "handler" whose duties were to assist in loading and unloading various items from aircraft carriers. Also, on occasion he drove company vehicles, including a forklift, which required him to be DOT certified. On one occasion, the employee was reprimanded with a warning letter for not having worn his seat belt while driving a forklift. He was placed on probation for one year due to the warning letter. A short time later, the employee requested medical leave under the FMLA after he was diagnosed with vertigo, but the employer denied him FMLA protection because he was not eligible since he had not worked 1,250 hours in the prior twelve months. Based on the vertigo, the employer required him to submit to a medical examination by the plant doctor who recommended he be placed on a temporary suspension from driving, and resume all other duties as a handler while maintaining the same rate of pay. The employee received a performance reminder due to excessive unscheduled absences, which the employer upheld upon appeal. After sixty days, the employee resumed his forklift duties. The employee filed a complaint alleging the employer had interfered with his right to FMLA leave.

The district court granted the employer's motion for summary judgment, finding that the employee's claim of interference failed as a matter of law since the employee was not an eligible employee under the FMLA. The district court found that the employee did not work the requisite 1,250 hours immediately preceding the commencement of the leave.

***Summarized Elsewhere:***

**Clark v. Winkler Court, 2013 WL 6133594 (M.D. Fla. Nov. 21, 2013)**

**Shaw v. Economic Opportunity Planning Ass'n of Greater Toledo, Inc., 2013 WL 633825 (N.D. Ohio Feb. 20 2013)**

**Kiniropoulos v. County Child Welfare, 917 F.Supp.2d 377 (E.D. Pa. 2013)**

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

**Walker v. NANA WorleyParons, LLC, 2013 WL 357571 (D. Alaska, Jan. 28, 2013)**

Plaintiff began working for the employer in 2003 and, when she was hired, was told she could work one to two days per week remotely. Plaintiff was diagnosed with fibromyalgia in 2004 and by 2007 was working two days per week in the office and three days per week from home. Starting in October 2008, defendant started telling plaintiff that she needed to begin working more days in the office due to job performance issues. Plaintiff inquired about an accommodation for disability purposes and was given FMLA paperwork, which she never

completed. By April 2009, the employer told plaintiff that she needed to work three days per week in the office, or it would have to terminate her employment. Plaintiff claimed that she told defendant that she would not work three days per week in the office, but that she would go on FMLA leave. Defendant contended plaintiff refused to work three days per week in the office and it subsequently discharged her. Plaintiff then submitted the FMLA paperwork after her employment had been terminated.

Plaintiff filed an FMLA retaliation claim and the employer moved for summary judgment. The district court recognized that the right to FMLA leave “obviously cannot be exercised after the termination of an employment relationship.” However, the parties presented conflicting evidence as to whether plaintiff had actually been terminated by the time she submitted her FMLA paperwork. The court held that plaintiff submitted “sufficient evidence upon which a reasonable jury could conclude that she was still an employee when she attempted to turn in her FMLA paperwork, and that her attempt to do so was a negative factor in [defendant’s] decision to terminate her at that time.” Thus, the court denied defendant’s motion for summary judgment.

**Miller v. OPW Fueling Components, Inc., 20 WH Cases2d 1009 (S.D. Ohio 2013)**

Plaintiff was a bargaining unit employee who went on strike. The union and the employer entered into a settlement agreement whereby the employer would pay back-pay and interest, but would not admit wrongdoing. The settlement agreement did not reinstate workers to their prior positions. Plaintiff subsequently accepted an offer for a different position with the employer which allowed him to retain his original hire date. Upon return to work, plaintiff began experiencing respiratory issues and requested forms to apply for FMLA leave. After the employer refused to provide the forms, plaintiff filed a claim against the employer for FMLA interference.

The court dismissed plaintiff’s claim on a motion for summary judgment, holding that plaintiff was not eligible for leave because he had not worked 1,250 hours in the previous 12 months. Plaintiff argued that the settlement agreement was a “make whole” agreement and therefore he was entitled to credit for his time on strike. The court, assuming *arguendo* that a “make whole” agreement would have this effect, held that plaintiff did not receive a “make whole” award because he was offered employment in a different position, at a different rate of pay, reporting to a different supervisor and subject to a different employee handbook and attendance policy.

**Brown v. CVS Pharmacy, Inc. et al., 2013 WL 3353323 (M.D. Fla. July 2, 2013)**

Plaintiff filed suit against her prior employer for disability discrimination in violation of the Americans with Disabilities Act and Florida Civil Rights Act as well as for interference and retaliation in violation of the FMLA. Plaintiff, a pharmacy technician, was deaf in her right ear but could hear normally (although with pain) in her left ear. Plaintiff took FMLA leave in October 2010 for surgery on the left ear and returned in November 2010. On December 3, 2010, Plaintiff requested additional, intermittent FMLA leave for follow up care by her physician. On December 6, 2010, plaintiff was placed on a leave of absence and told "you can't work here

anymore". Plaintiff claimed that defendant interfered with her FMLA rights and retaliated against her for seeking FMLA leave.

Defendants then moved for summary judgment on the grounds that: (1) plaintiff was not eligible for FMLA leave because she had only worked 1,213 hours in the 12-month period preceding her December 6, 2010 leave request; and (2) plaintiff was not entitled to leave for her post-surgical doctor visits. The district court agreed. The court ruled that the appropriate date for determining whether plaintiff had worked the requisite 1,250 hours was December 6, 2010 – the date her leave was to commence. The court rejected plaintiff's argument that October 20, 2010 was the proper calculation date and pointed out that plaintiff had returned to work on November 15<sup>th</sup> without restrictions. Likewise, the court held that plaintiff was not entitled to intermittent FMLA leave for her post-surgical doctor visits because she had no medical restrictions as of November 15<sup>th</sup>. Therefore, defendants could not have interfered with plaintiff's FMLA rights because she was not eligible for FMLA leave.

The court also granted summary judgment in favor of defendants as to plaintiff's FMLA retaliation claims. Because plaintiff was no longer eligible for FMLA leave effective November 15<sup>th</sup>, there was no evidence that plaintiff had engaged in protected activity. Even assuming plaintiff had engaged in protected activity, however, the court found that she presented no evidence that the employer's adverse actions were causally related to plaintiff's exercise of her FMLA rights.

**Streeter v. Premier Services, Inc., 2013 WL 4780121 (N.D. Iowa Sept. 6, 2013)**

Plaintiff brought a *pro se* complaint under the FMLA against that the staffing agency that employed him and the food processing company where he worked. The food processing company filed a motion to dismiss that was converted to a motion for summary judgment, but the worker failed to respond. With little analysis, the court concluded that plaintiff was not an employee of the food processing company, granting summary judgment for that party and dismissing it from the case. Even if plaintiff had been an employee of the food processing company, the undisputed facts showed that he was not an "eligible employee" under the FMLA because he had not been employed for at least twelve months during which he worked at least 1,250 hours. Rather, he was employed for less than 90 days on three separate occasions in the prior year.

**Jones v. Sharp Electronics Corp., 932 F. Supp. 2d 893 (W.D. Tenn. 2013)**

Plaintiff, who has a bipolar disorder, filed suit against defendant, alleging interference and retaliation under the FMLA. Plaintiff had requested FMLA leave beginning September 20, 2009, and scheduled to end October 20, 2009. Notably, defendant notifies its employees that it uses a rolling twelve-month leave period to calculate remaining FMLA leave; plaintiff alleged that she did not understand the process for calculating leave.

Prior to her September 20<sup>th</sup> leave, plaintiff had taken 68 of her 84 days of FMLA leave. Even though she only had 16 days of leave remaining, defendant approved the entire FMLA leave. Plaintiff then submitted a letter from her doctor to extend her leave until November 13,

2009. Defendant approved her leave but notified plaintiff that she had exhausted all FMLA leave on October 5, 2009. Defendant also notified her that all her accumulated leave would be exhausted by November 18<sup>th</sup>, and that she risked termination if she did not return on November 2, 2009. On November 15, 2009, plaintiff's doctor recommended she not return to work until December 15, 2009. Defendant then terminated plaintiff's employment on November 24, 2009.

The court found that plaintiff was not an eligible employee because she had actually worked only 923 hours in the preceding year. The court also rejected plaintiff's argument that defendant was estopped from arguing that plaintiff was ineligible once it approved her FMLA leave for September 20<sup>th</sup> through October 20<sup>th</sup>. In its analysis, the court noted that although defendant had misrepresented her eligibility, plaintiff did not demonstrate that she had detrimentally relied on that representation. Notably, plaintiff had testified that she would have taken the leave whether FMLA approved or not. The court further noted that plaintiff had exhausted all leave based upon the rolling method, and her not understanding how her leave was calculated was irrelevant. Thus, her interference claim was dismissed. Furthermore, because plaintiff was not eligible for FMLA leave, her claim of retaliation was also dismissed. Finally, the court noted that even if plaintiff had been eligible for leave, defendant had a legitimate business reason to terminate plaintiff's employment when she did not return after her approved FMLA leave had ended.

**Simmons v. University of Michigan, 20 WH Cases2d 872 (E.D. Mich. 2013)**

The employee filed suit, alleging the employer failed to restore him to the same or an equivalent position upon return from FMLA leave, among other federal statutory claims. The employee started working for the employer in 1982 as a custodial worker. In 2006, the employee suffered injuries resulting from an automobile accident. He submitted a request for FMLA leave in May 2006, and was on leave through October 2006. The employee returned to work with restrictions. At some point in 2007, the employee reinjured himself and was eventually placed on unpaid medical non-FMLA leave in October 2007. The employee returned to work in March 2008 with no restrictions. However, over the next six months, the employee was on and off of work with varying restrictions. Finally, in September 2008, the employer received notice that the employee was released without restrictions. The employer informed the employee that he was required to return to work on September 15, 2008. The employee reported to work but with restrictions, and the employer discharged the employee on September 19, 2008. The employer and employee negotiated and rescinded the employee's termination soon thereafter. But the employee continued to be on and off medical leave and was not able to work without restrictions. Therefore, on October 27, 2009, the employer informed the employee that he was discharged as his two-year leave of absence had expired and the employer was not able to accommodate his restrictions any longer. The employee had only worked a few days from 2006 to the date of his October 2009 termination.

The employer moved for summary judgment on the basis that the employee was not a qualified employee under the FMLA. Specifically, the employer alleged that the employee had not worked a total of 1,250 hours during the twelve (12) months immediately preceding the beginning of the leave, and that once he had exhausted his leave entitlement, he was no longer entitled to protection under the FMLA. The court held that the employee had far

exceeded his FMLA leave entitlement and that he had not worked the requisite number of hours as required under the FMLA to be eligible for protection. Therefore, the court granted summary judgment in favor of the employer.

**Oulette v. Fountainview of Monroe, 2013 WL 5423084 (E.D. Mich. Sept. 26, 2013)**

Plaintiff, a Licensed Practical Nurse (LPN) employed by defendant and Union president since 2004, argued that she was discharged for requesting FMLA leave to care for her mother, who had just been diagnosed with metastatic cancer. Plaintiff had just been reinstated by an arbitrator following her discharge for forging a doctor's note in order to obtain medical leave. Defendant claimed that as a result of the work time missed due to her discharge, plaintiff had not worked 1,250 hours in the prior 12 months and, thus, was ineligible for FMLA coverage.

While some courts have found that wrongful termination resulting in reinstatement with back pay and full seniority and benefits counts towards the FMLA's hours worked requirement, the court determined that, in order for hours lost to wrongful termination to count, the reinstatement must be part of a "make whole" award. Accordingly, the judge agreed that plaintiff was not eligible for FMLA leave and granted the employer's motion for summary judgment.

**McArdle v. Town of Dracult/Dracult Public Schools, 21 WH Cases2d 489 (1st Cir. Oct. 9, 2013)**

Plaintiff was a middle school teacher going through a divorce, which caused him to suffer depression and anxiety. As a result, he was out nearly the entire Fall 2008 semester and about half of the Spring 2009 semester. The first day of the Fall 2009 semester, plaintiff again failed to report to work, informing the principal that he wanted to apply for FMLA leave. Plaintiff received FMLA paperwork from defendant, but never completed it. As a result, plaintiff was discharged for job abandonment. Plaintiff filed an FMLA interference claim and also alleged he was retaliated against for requesting leave. The district court granted defendant's motion for summary judgment and plaintiff appealed.

The First Circuit found that plaintiff was not eligible for FMLA leave because he did not work 1,250 hours in the previous 12 months. Plaintiff claimed this finding failed to account for the number of hours he worked at home grading papers, writing journal articles, and other work performed outside of his regular work hours. The court rejected this argument because it was implausible that he worked more hours at home than he recorded during his normal work times at school. The court also noted that plaintiff did not work at all during two, separate three-month periods, and during which he would not have had any need to work at home. As to plaintiff's retaliation claim, the Court noted that case law is split as to whether an individual who is not eligible for FMLA leave can bring a retaliation claim. While the Court was not convinced that an ineligible employee could never bring such a claim, there was no need to address the issue here as defendant articulated a legitimate, nondiscriminatory reason for his discharge. The court therefore affirmed summary judgment for the school district.

*Summarize Elsewhere:*

**Rincon v. American Federation of State, County, and Municipal Employees, 2013 WL 4389460 (N.D. Cal. Aug. 13, 2013)**

**Brown v. Pitt Ohio Exp., LLC, 21 WH Cases2d 563 (N.D. Ill. 2013)**

**Edwards v. National Vision, Inc., 2013 WL 2249051 (N.D. Ala. May 17, 2013)**

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

**Grote v. Beaver Express Service, LLC, 2013 WL 4402822 (D. Kan. Aug. 15, 2013)**

Following her discharge, the employee filed a lawsuit against her former employer under the FMLA and several other statutes. The employer filed a motion to dismiss the employee's FMLA claim, arguing that she failed to allege in her pleadings that the company employed 50 or more employees within 75 miles of her worksite. The employee argued that this eligibility rule was an affirmative defense, and that the employer had the burden to assert it. In support of her position, the employee pointed to the burden on employers to demonstrate when an exemption applies under the Fair Labor Standards Act. The court agreed, concluding that the employer had the burden of demonstrating that it did not employ 50 or more individuals within 75 miles of the employee's worksite. Accordingly, the court overruled the employer's motion to dismiss the employee's FMLA claim.

**Nordby v. Shane Company, Inc., 2013 WL 4519350 (D. Minn. Aug. 26, 2013)**

Plaintiff, a store manager, alleged that he was discharged a week after notifying his supervisor that he would need FMLA leave due to severe and chronic stomach pains. The employer moved for summary judgment because plaintiff did not meet the definition of an "employee" eligible for protected leave under the FMLA. Finding that there were only 46 employees working for the employer within 75 miles of plaintiff's worksite, the district court granted summary judgment for the employer.

Plaintiff mentioned a waiver or estoppel theory in his brief because the employer had granted FMLA leave to him on two previous occasions, and never informed him that he was not an eligible employee under the FMLA. The court did not address this issue, however, because plaintiff's counsel disavowed any waiver or estoppel theory in oral argument.

*Summarized Elsewhere:*

**Merical v. Valor Healthcare Inc., 2013 WL 5332145 (W.D. Pa., Sept. 23, 2013)**

**A. Determining the Number of Employees**

**Carmouche v. Marksville Housing Authority, 2013 WL 3049408 (W.D. La. June 17, 2013)**

Plaintiff, a former city Housing Authority employee, was terminated from employment after exhausting his available leave because of hip replacement surgery. The employee alleged he was denied the exercise of his FMLA rights, but the court granted the employer's motion for summary judgment. Because defendant did not employ fifty or more employees, plaintiff was



not an “eligible employee” under the statute. Plaintiff argued that the local housing authority was a political subdivision of the State of Louisiana, and that the state was his employer for FMLA purposes. The court found no merit in plaintiff’s argument because the FMLA regulation (29 C.F.R. § 825.108(c)(1)) did not mandate that the Housing Authority and the State be counted together as a single employer, and state law provided that the housing authorities are separate and distinct entities from the state, if certain criteria are met. Since it was undisputed that defendant did not employ fifty or more employees, there was no genuine issue of fact regarding the inapplicability of the FMLA to plaintiff.

**Mendel v. City of Gibraltar, 727 F.3d 565, 21 WH Cases2d 14 (6th Cir. 2013)**

Defendant employed forty one employees, excluding volunteer firefighters. Defendant also employed between twenty-five and thirty volunteer firefighters. At issue in this case was whether volunteer firefighters who received an hourly wage for those calls to which they chose to respond were “employees” or “volunteers” for purposes of determining if defendant had 50 “employees” and was, therefore, an “eligible employer” under the FMLA.

In its analysis, the court noted that the FMLA uses the same definitions for “employee” as the FLSA. The FLSA has an expansive definition of “employ” which, in turn, stretches the meaning of “employee.” Applying the Supreme Court’s “economic reality test,” the appellate court found the firefighters to be “employees,” but the analysis did not end there. The FLSA excludes individuals who volunteer to perform services for a public agency. The court was then required to decide whether the wages paid to the firefighters constituted “compensation” or merely a “nominal fee.” The court held that the substantial hourly rate for each call was more than a nominal fee, and the firefighters expected compensation for their time. Thus, the firefighters were employees and not volunteers making the city an “employer” under the FMLA. The court then reversed the judgment of the district court and remanded the case.

- B. Measuring the Number of Miles
- C. Determining the Employee’s Worksite

**Larson v. United Natural Foods West Inc., 2013 WL 2136959 (9th Cir. May 17, 2013)**

Defendant discharged plaintiff, a commercial truck driver, after he tested positive for alcohol use and a substance abuse professional diagnosed him with alcohol dependence. The district court granted defendant’s motion for summary judgment as to plaintiff’s FMLA and ADA claims and the Court of Appeals affirmed. The Court determined that plaintiff was not an FMLA-covered employee because his worksite had less than 50 employees within 75 miles. The Court found that the district court properly determined plaintiff’s worksite as the location where he reported for work, received deliveries, and returned at the end of the day.

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

**Horen v. Cook, 2013 WL 5583723 (6th Cir. Oct. 10, 2013)**

Plaintiff, a law clerk, requested and was granted two weeks of FMLA leave to care for her daughter after surgery. When plaintiff learned she would need more time off work, she was granted an additional month of leave. Four months later, plaintiff informed her supervisor, at state court judge, that she would need additional leave time because her daughter required another surgery. At a staff meeting the following day, a human resources employee informed plaintiff that she would need to file weekly time sheets to be signed by her supervisor each Friday. Plaintiff responded that she would be unable to do so because the judge was “never there.” When the judge found out about plaintiff’s comment, he confronted her, but she denied making it. As a result, the judge terminated her employment. Plaintiff then brought an action against the judge in her official capacity for FMLA retaliation. The judge moved for summary judgment on the basis that plaintiff, as a law clerk, was not an eligible “employee” under the FMLA.

The district court had granted summary judgment for defendant, and on appeal the Sixth Circuit affirmed. Because the law clerk was a member of a state judge’s “personal staff,” she was not an “employee” that was permitted to bring a claim for FMLA retaliation. The court looked to Title VII’s retaliation provision, noting that “employees,” under that law does not include “any person elected to public office in any State or political subdivision of any State by qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff.” In analyzing whether plaintiff was an exempt member of the judge’s personal staff, the Court applied several non-exhaustive factors from a prior Sixth Circuit decision. After balancing the factors, the Court held that the undisputed, material facts weighed in favor of plaintiff being classified as a member of the state judge’s “personal staff” for FMLA purposes.

**Littell v. Diversified Clinical Servs., Inc., 2013 WL 1951912 (M.D. N.C. May 10, 2013)**

Plaintiff was a former employee of defendant DCS. One year into his employment, plaintiff received a transfer to a different location, where he worked as a program director for defendant DCS in conjunction with defendant Rex Hospital, Inc.’s facilities. Although plaintiff was employed by and reported to defendant DCS, plaintiff alleged that Rex was his “de facto supervisor.” The parties do not dispute that if the court found a joint employment relationship, defendant DCs was the primary employer. Seven months after his transfer, plaintiff informed both defendants that he planned to take leave to undergo back surgery. Although plaintiff alleged that defendants originally expressed support for plaintiff’s leave, defendants allegedly informed plaintiff prior to his leave that he could either resign or be terminated immediately. Plaintiff resigned and subsequently filed claims under the FMLA.

Rex moved to dismiss plaintiff’s FMLA claims, which were before a magistrate judge. Rex contended that plaintiff did not allege he was an eligible employee of Rex, as his complaint alleged Rex employed him for seven months. Plaintiff countered that since he was an eligible employee as to DCS, and because Rex met the definition of a covered “employer” under the FMLA and constituted a joint employer with DCS, the FMLA applied against Rex regardless of whether plaintiff was an “eligible employee” of Rex. Plaintiff relied on a regulation that holds a secondary employer responsible for FMLA violations with respect to jointly employed employees, “whether or not the secondary employer is covered by FMLA.” However, this

regulation does not address whether an employee meets the definition of “eligible employee” as an initial matter. The magistrate judge recommended that the FMLA should be construed to require a plaintiff to qualify as an eligible employee specifically as to each employer sued. Otherwise, plaintiff’s interpretation would “render secondary employers subject to suit after a single day’s employment,” which ran counter to the FMLA’s purpose. Plaintiff’s FMLA estoppel claim failed as well because he based his claim on a regulation that was amended to remove the language cited by plaintiff. The magistrate judge recommended that the district court grant Rex’s motion to dismiss plaintiff’s claims because plaintiff was not an “eligible employee” under the FMLA as to Rex, and plaintiff’s estoppel argument lacked merit. The district court for the Middle District of North Carolina adopted this recommendation.

**Jehling v. A. H. Belo Corp., 2013 WL 5803813 (N.D. Tex. Oct. 28, 2013)**

Plaintiff worked as a newspaper sales employee until he was discharged on October 1, 2010. The employer, however, did not advise him of that decision until the following Monday, October 4, 2010. The employee was discharged after the employer conducted an investigation into whether he and other employees acted appropriately in dealing with receipt of a document containing confidential salary information. The employer concluded that employee lied during the investigation and that he had acted improperly after receiving the document. Just prior to being advised of his termination, however, the employee sent the employer an e-mail requesting FMLA leave.

The employee filed suit challenging his discharge on both interference and retaliation theories under the FMLA. The court granted the employer’s motion for summary judgment on both theories, holding that employee was not an “eligible employee” under FMLA since he was fired before he asked for FMLA leave. In particular, it reasoned that employee could not rebut the employer’s evidence showing that he was discharged on October 1, which was three calendar days before he asked for FMLA leave on October 4. The court also rejected his view that his discharge was not ‘final’ because it was not formally processed until after he made his FMLA leave request. It stated that where an employer decides to discharge an employee but has not formally processed the decision, it will not allow the employee to use an FMLA leave request as a shield from being discharge. The court also noted that, even if the employee was an “eligible employee,” the fact that he had requested FMLA leave would not protect him because the employer had a legitimate reason to terminate his employment. The court also rejected employee’s contention that the close temporal proximity between his FMLA leave request and discharge established the requisite causation. The employee’s theory failed because temporal proximity alone was not sufficient. The court also observed that the employer had articulated a legitimate reason for the close timing between the two events; after deciding to discharge him on October 1, it tried to reach the employee twice before it received his FMLA leave request. Thus, the employer had already made up its mind before receiving his FMLA leave request.

**Morkoetter v. Sonoco Products Co., 936 F. Supp. 2d 995 (N.D. Ind. 2013)**

Plaintiff was a former employee of defendant. Plaintiff suffered from a variety of physical, emotional and mental health conditions. Plaintiff claimed that just before his one-year employment anniversary with defendant he informed defendant of his need to take FMLA in the future due to his serious health conditions.

The court noted that the Seventh Circuit had not yet addressed whether an employee who was not yet eligible for FMLA coverage can bring a claim for retaliation when that employee gave notice to their employer of their intention to take FMLA leave once eligible and was terminated prior to achieving FMLA eligibility. The court held that that a request for FMLA leave before eligibility for post eligibility leave is protected by the FMLA. The court also rejected defendant's argument that plaintiff failed to properly plead all of the elements of a retaliation claim. The court noted that plaintiff alleged a close temporal proximity between when he gave notice of his intention to take FMLA leave and when he would become eligible for FMLA coverage, as well as the time between when his employment was terminated and when he would be eligible for FMLA leave. Therefore, the court denied defendant's motion to dismiss and found that plaintiff's allegations regarding the timing of events were sufficient to make a causal connection plausible.

*Summarized Elsewhere:*

**Hemminghaus v. Missouri, 2013 WL 588197 (E.D. Mo. Feb. 13, 2013)**

## **VII. EXCEPTION FOR CERTAIN AIRLINE EMPLOYEES [New Topic]**

## CHAPTER 4. ENTITLEMENT OF EMPLOYEES TO LEAVE

### I. OVERVIEW

### II. TYPES OF LEAVE

#### A. Birth and Care of a Newborn Child

#### **Speight v. Sonic Restaurants, Inc., 120 FEP Cases 1175 (D. Kan. 2013)**

Plaintiff was employed by defendant as a car-hop for approximately three and a half years. Plaintiff found out she was pregnant in July 2011 and discussed her pregnancy with an associate manager. Plaintiff further informed the manager that her doctor would induce labor if plaintiff had not delivered her baby by April 23, 2012. The week of April 14, plaintiff learned that a supervising partner for defendant had removed her from the work schedule. Based on past experience, plaintiff believed removal from the work schedule was a method of discharging employees. Plaintiff tried to contact the supervising partner on numerous occasions, but he did not reply. Plaintiff delivered her child on April 20, and was cleared to return to work on April 27. Sometime later, plaintiff discussed her work status with an individual in defendant's corporate office and learned about her FMLA rights. Plaintiff also learned that her work location never submitted any FMLA leave requests to the corporate office. Plaintiff believed she had been discharged because she was removed from the work schedule, and because no one responded to her inquiries regarding her removal. Plaintiff further alleged that, but for her belief that she had been discharged, she would have returned to work.

Plaintiff filed suit alleging interference with her rights under the FMLA, and defendant filed a motion to dismiss. Viewing the facts in the complaint in a light most favorable to plaintiff, the district court concluded that removing plaintiff from the schedule shortly before her due date could have been an adverse action preventing her from taking FMLA leave and/or denying her permission to take leave. It was reasonable to infer from the facts alleged that defendant knew plaintiff qualified for FMLA leave for the birth of her child and was required to provide her with notice of her FMLA rights, which it failed to do. As a result, the court denied defendant's motion to dismiss, finding plaintiff pled sufficient facts to state a plausible claim for FMLA interference.

#### B. Adoption or Foster Care Placement of a Child

#### C. Care for a Covered Family Member With a Serious Health Condition

##### 1. Eligible Family Relationships

#### **O'Hara v. GBS Corporation, 2013 WL 1399258 (N.D. Ohio Mar. 13, 2013)**

The employee was granted leave to care for her brother, who had a serious health condition. She alleged that the employer failed to provide her with proper notice of her right to FMLA leave, and further interfered with her right to take FMLA leave by terminating her employment in the same year that she went on leave.

The court granted the employer's motion to dismiss because the employee had not alleged sufficient facts to establish that she was an eligible employee under the FMLA. To establish a claim for FMLA interference, an employee must demonstrate that she was entitled to leave under the FMLA. The employee requested leave to care for her brother, but the FMLA does not extend to employees who seek leave to care for a sibling. The employee tried to argue further that equitable estoppel should bar the employer from claiming that she was not entitled to FMLA leave. However, the employee's complaint failed to allege that the employer made a definite misrepresentation of a material fact as to FMLA eligibility or coverage. Instead, her complaint stated that she "requested and was granted leave to care for her brother," and did not mention the FMLA. Because the employee could point to no affirmative representation by the employer as to her eligibility for FMLA leave, the employer was not equitably estopped from asserting ineligibility in its defense.

- a. Spouse
- b. Son or Daughter
- c. Parent

***Aboulhosn v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 940 F. Supp. 2d 1203 (C.D. Cal. 2013)**

Plaintiff, a former full-time employee of defendant, sued defendant for interference with his right to leave under the FMLA. Plaintiff requested leave to care for his father, who was living overseas and had high blood pressure. Plaintiff stated he needed to provide his father's home care and transportation. However, his father walked to his own doctor's appointments and was generally able to care for himself. Three months before plaintiff returned to the United States, defendant terminated his employment for job abandonment. Defendant filed for summary judgment, asserting that plaintiff had not completed and submitted the required forms on time, and that plaintiff did not qualify for FMLA leave because his father did not have a "serious health condition."

The court granted summary judgment to defendant because, although there were triable issues of fact regarding whether plaintiff had timely completed the required documents, plaintiff was not eligible for FMLA leave. First, the court found that plaintiff's father did not have a "serious health condition" because there was no evidence that he required inpatient care or was incapacitated during the relevant period. To the contrary, the medical certification left blank the section regarding incapacity and affirmatively stated that the medical condition did not cause periodic flare-ups. Second, the court found that plaintiff was not needed to "care for" his father. The evidence demonstrated that, although plaintiff accompanied his father while he took his medication, ate, and exercised, plaintiff's father could transport himself to the doctor and provide for his own hygienic, medical, and nutritional needs.

***Summarized Elsewhere:***

***Giarrizzo v. Mount Air Casino & Resort*, 2013 WL 5924806 (M.D. Pa. Oct. 31, 2013)**

d. Certification of Family Relationship

2. “To Care For”

**Brannan v. Unified Sch. Dist. 211, 2013 WL 120163 (D. Kan. Jan. 9, 2013)**

The employee, a custodian for the school district, requested leave in June, 2003, to care for her adult child and grandchild after the grandchild’s birth. She did not specifically request FMLA leave or a specific amount of time off, but she was given approximately three weeks of leave. In March, 2006, she again requested leave to care for her adult child after the birth of her grandchild and was given leave in the form of vacation time, compensatory and personal time, and unpaid leave. In October, 2009, the employee requested unpaid leave from January 5, 2010, through February 5, 2010, in anticipation of the birth of her third grandchild. She did not specifically request FMLA leave, and her daughter’s pregnancy was without complications. Defendant allowed the employee to use her remaining 8.5 days of paid leave and also granted her an additional five days of unpaid leave. Unhappy with defendant’s decision, the employee submitted her resignation, which she later withdrew. Before she left for her leave, the employee cleaned out her desk because she knew she planned to take more leave than for which she was approved, and she was not sure if she would still have a job when she returned.

Five days into her leave, the employee contacted defendant and indicated that her daughter had developed complications with her pregnancy, and the employee would need additional leave. Defendant then sent a letter to the employee, informing her that she must return to work on January 27, 2010, but she could obtain additional leave under the FMLA if she followed the proper procedures. On January 15, 2010, the employee sent a written request for an extension of leave, along with a note from her daughter’s doctor stating that the employee was helping her daughter care for her newborn. Defendant responded with a memo informing the employee that the doctor’s note did not indicate that her request qualified for FMLA leave and she was still expected to return on January 27, 2010. The employee did not return to work on that date, and defendant then terminated her employment due to her unauthorized absence.

The employee filed suit against defendant alleging FMLA interference, FMLA retaliation, and wrongful discharge under state law. Both parties moved for summary judgment, and the court granted defendant’s motion. The district court rejected defendant’s argument that relevant time period for determining the employee’s entitlement to FMLA leave was on or after January 27, 2010, the date the district required her to return to work. Adopting the rationale from the 11th Circuit, the court held that defendant could not use its accrued leave policy to render the employee ineligible for FMLA benefits, and if her leave prior to January 27, 2010, qualified under the FMLA, then the leave granted by defendant was protected. Nonetheless, the court ruled that the employee was not eligible for FMLA leave because her daughter was not incapable of self-care. In addition, the court held that, because the employee was ineligible for FMLA leave, she had not engaged in protected activity and thus could not prove her retaliation claim.

***Shulman v. Amazon.com, Inc.*, 2013 WL 2403256 (W.D. Wash. May 30, 2013)**

Plaintiff requested leave in order to research possible care options for an ill family member. On January 12, 2010, defendant denied plaintiff's request. On January 14, 2013, plaintiff filed suit against defendant, alleging FMLA interference. Plaintiff contended that his claim fell within the three-year statute of limitations for willful violations of the FMLA. Defendant moved to dismiss, contending plaintiff's FMLA claim was time barred and, even if it were not, it failed to state a claim for relief.

The court held that plaintiff's speculative reference to a "possible" willful violation of the FMLA was insufficient to bring the cause of action under the three-year statute of limitations because it failed to allege the requisite recklessness or willfulness to trigger the three-year statutory period. In addition, the court determined the asserted basis for plaintiff's leave was not protected under the FMLA. The court distinguished researching possible care options for an ill family member from actually caring for a family member. It noted that research may be done from afar, and does not require the physical presence of the family member. Thus, the court held that because plaintiff's request for leave to research care options did not require "close and continuing proximity to the ill family member," plaintiff failed to state a claim under the FMLA.

***Summarized Elsewhere:***

***Aboulhosn v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 940 F. Supp. 2d 1203 (C.D. Cal. 2013)**

***Brown v. Premier Chemicals, LLC*, 2013 WL 459227 (D. Nev. Feb. 4, 2013)**

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

***Clum v. Jackson Nat'l Life Ins. Co.*, 2013 WL 655146 (E.D. Mich. Feb. 22, 2013)**

Plaintiff, a customer service representative, had taken FMLA qualifying leave for neck surgery and after surgery continued to take FMLA leave on an intermittent basis for neck pain and treatment associated with the surgery. When the employee began having pain in her hand, she sought FMLA leave, but the FMLA certification she provided to defendant indicated that the employee was able to perform her work with one hand. Plaintiff then brought multiple claims against defendant, including FMLA interference and retaliation. Defendant moved for summary judgment on her FMLA interference and retaliation claims, arguing that the only medical certification provided by plaintiff indicated that she was able to perform her job duties.

The district court granted defendant's motion for summary judgment. The court noted that the certification provided to defendant did not establish that plaintiff was entitled to leave because she could perform her job functions. The court granted summary judgment on the employee's interference claim because the employee could not establish she was entitled to FMLA leave based on her doctor's statement that the employee was able to work. The court granted summary judgment on the employee's retaliation claim because the employee failed to provide a medical certification entitling her to FMLA leave, and there was no evidence the employer terminated her employment because she invoked her FMLA rights.



**Attakora v. District of Columbia, 2013 WL 3291438 (D. D.C. July 1, 2013)**

An employee claimed that he needed to travel to Ghana to seek “nontraditional” treatment recommended by his physicians. After he requested FMLA leave, and was discharged, he travelled to Ghana and received the medical treatment. The employee filed a claim against his former employer alleging FMLA interference and retaliation, but the court dismissed his claims without prejudice. The employee filed a second amended complaint, but the court denied the motion to amend, reasoning it would be futile. The court concluded that the employee failed to allege facts sufficient to show that the medical treatment was necessary. Specifically, while the testing he received overseas was useful, the employee did not allege that it was necessary for the diagnosis or treatment of his condition. The employee also failed to demonstrate that he needed to be absent from work in order to undergo such treatments. The court reasoned that alleging certain treatment is available overseas was not equivalent to showing that the employee needed to miss work to obtain the treatment.

***Summarized Elsewhere:***

**Attakora v. District of Columbia, et al., 20 WH Cases2d 1624 (D. D.C. 2013)**

**Howard v. Pennsylvania Dep’t of Pub. Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

**Hodges v. District of Columbia, 2013 WL 4047197 (D. D.C. Aug. 12, 2013)**

- E. Qualifying Exigency Due to a Call to Military Service [New Topic]
  - 1. Covered Military Members [New Topic]
  - 2. Qualifying Exigency [New Topic]
    - a. Short Notice Deployment [New Topic]
    - b. Military Events and Related Activities [New Topic]
    - c. Childcare and School Activities [New Topic]
      - i. Leave to Arrange for Alternative Childcare [New Topic]
      - ii. Leave to Provide Childcare on an Urgent Basis [New Topic]
      - iii. Leave to Enroll in or Transfer to a New School or Daycare Facility [New Topic]
      - iv. Leave to Attend Meetings with School or Daycare Staff [New Topic]
    - d. Financial and Legal Arrangements [New Topic]
    - e. Counseling [New Topic]
    - f. Rest and Recuperation [New Topic]

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

### III. SERIOUS HEALTH CONDITION

#### A. Overview

***Pivac v. Component Services & Logistics, Inc., 2013 WL 1104750 (M.D. Fla. March 18, 2013)***

Plaintiff asserted claims of FMLA interference and retaliation after her employment was terminated upon her return to work from a 14 day “Medically Excused Absence.” The court granted summary judgment in favor of the employer, finding plaintiff had not established any material issue of fact on the issue whether she suffered from a serious health condition. The employee had initially informed human resources that she felt she may be overworked and wanted time off to visit her parents, but later said she needed time off because she was crying and sad. She went to a doctor who provided her with no treatment, no referrals, no medicine, and no further appointments. She told the doctor she needed about seven days to get herself together and he gave her a “Medically Excused Absence form” for fourteen days. No medical records were submitted, no indication of continuing treatment, and no evidence was presented other than plaintiff’s conclusory statements that she suffered depression and anxiety as chronic health conditions.

#### B. Inpatient Care

***Summarized Elsewhere:***

***King v. Permanente Medical Group, Inc., 2013 WL 5305907 (E.D. Cal. Sept 19, 2013)***

#### C. Continuing Treatment

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

***Summarized Elsewhere:***

***Hodges v. District of Columbia, 2013 WL 4047197 (D. D.C. Aug. 12, 2013)***

a. Incapacity for More Than Three Calendar Days

**Tippins v. Honda Mfg of Alabama, LLC, 523 F.App'x 641, 21 WH Cases2d 240 (11th Cir. 2013)**

Due to medical reasons, the employee missed one partial day of work and one full day of work. Several weeks later the employee had a tooth extracted. The employee applied for FMLA leave to cover the time she missed work due to the tooth extraction procedure. The medical certification the employee returned to her employer indicated that her incapacity began on October 21, 2009 but that she could return to normal activities on October 24, 2009. The employer determined that employee's tooth extraction procedure did not qualify for FMLA leave because the employee was not incapacitated for more than three consecutive full calendar days. The employer terminated the employee for violating its attendance policy. The district court granted summary judgment in the employer's favor, and the Eleventh Circuit affirmed that decision. The Eleventh Circuit agreed with the district court and held that the employee's prior two absences could not be combined with her three days of absence. The FMLA contemplated more than three consecutive days of incapacity, and because the employee was not incapacitated for more than three consecutive days, she did not qualify for FMLA leave.

**Tippins v. Honda Mfg. of Alabama, LLC, 523 F. App'x 641, 21 WH Cases2d 240 (11th Cir. 2013)**

The employee was absent from work without completing the proper forms on several occasions, including a three-day absence beginning on October 21, 2009. Her health care provider submitted a certification form stating that she had dental work completed and her procedure did not involve a serious health condition. After the health care provider amended the documentation, the employer determined that the employee's dental issue did not qualify for leave under the FMLA and did not excuse her absences. Defendant then discharged the employee for violations of the attendance policy.

The employee sued, claiming that the employer denied her leave for a serious health condition. The employer filed a motion for summary judgment, arguing that the dental issue was not a serious health condition under the FMLA because it did not involve a period of incapacity for more than three days. The employee filed a motion for partial summary judgment, arguing that she should be allowed to combine two previous absences with her three-day absence to satisfy the period of incapacity. The district court granted the employer's motion and denied the employee's motion, relying on the language of the regulations requiring that the period of incapacity consist of three consecutive, full calendar days. The employee appealed the district court's ruling, and the court of appeals affirmed, holding that the period of incapacity must be continuous and uninterrupted.

**Covert v. The Lane Construction Corporation, 20 WH Cases2d 854 (M.D. N.C. 2013)**

Plaintiff was a former foreman for defendant. After his discharge, plaintiff filed an FMLA interference claim against defendant. Defendant moved for summary judgment, arguing that plaintiff did not qualify for FMLA leave because he did not have a serious health condition. Plaintiff was absent during three different periods, and he presented evidence that these absences

were covered because he had a serious health condition. *See* 29 C.F.R. § 825.115. As to the first absence, Plaintiff did not have a serious health condition because he could not show that he was incapacitated for more than three consecutive days, or that the medical issues he experienced at that time were related to a chronic condition. However, as to the later absences, plaintiff was able to show that he had a serious health condition. On both occasions, he went to the doctor and could not return to work within three calendar days.

The court granted summary judgment for defendant as to the first absence; however, the court denied summary judgment for the later absences. The court noted that a supervisor testified that plaintiff's absences were what motivated the conversation in which it was decided that plaintiff should be discharged. Since the court determined that these absences were protected, the court found that plaintiff presented sufficient evidence that his FMLA-protected absences were a motivating factor in the decision to discharge him. Accordingly, the court denied summary judgment for the employer as to those absences.

***Summarized Elsewhere:***

***Brushwood v. Wachovia Bank, N.A., 20 WH Cases2d 943 (4th Cir. 2013)***

b. Continuing Treatment

***McPhail v. Sonoco Products Co., 2013 WL 4067925 (D. S.C. Aug. 12, 2013)***

Plaintiff was employed in a paper mill operated by defendant from 2004 through his termination in September 2009. In 2006, plaintiff began having problems with attendance and performance, receiving at least twelve disciplinary notices (ranging from verbal warnings to short-term disciplinary layoffs) from 2007 to early 2009. From January 8, 2009 through August 18, 2009, plaintiff was given six written warnings for attendance and poor performance. Sometime after August 18, 2009, plaintiff was diagnosed with gastroenteritis, more commonly known as food poisoning. His physician instructed him to drink more fluids and prescribed two medications. The physician also wrote a note excusing him from work from August 20, 2009 through August 25, 2009. During the month after he returned to work, plaintiff received four additional disciplinary notices and got into a shouting match with a coworker. Plaintiff was discharged on September 18, 2009.

Plaintiff brought an FMLA retaliation claim, alleging that despite his multiple disciplinary problems, his employer only terminated him after he took FMLA leave. The employer filed a motion for summary judgment, arguing that plaintiff's gastroenteritis was not a serious medical condition within the meaning of the FMLA regulations. The court found that plaintiff's condition could only qualify as a serious health condition if he received "continuing treatment by a health care provider" as stated in the regulations. Plaintiff asserted that his physician's prescription of two medications was sufficient to show a regimen of continued treatment, but plaintiff admitted that he had not taken the medication prescribed. The court held that plaintiff had to show actual receipt of additional treatment as well as actual participation in the treatment to establish a serious medical condition and granted the employer's motion for summary judgment.

***Tsun v. WDI Intern., Inc., 21 WH Cases2d 104 (D. Hawaii 2013)***

On September 27, 2011, the employer approved plaintiff's request for leave to care for her ill father-in-law in Hong Kong. Plaintiff was granted two weeks of leave, but asserted that defendant told her she could take as much time as she needed and left her return date open on her leave paperwork. Plaintiff's father-in-law passed away the next day on September 28, 2011. Plaintiff was then given three days of bereavement leave and two weeks of personal leave. Plaintiff was to return to work on October 17, 2011. Plaintiff called a co-worker on October 11 and left a message for her manager indicating that she would return to work around the end of the month. On October 30, 2011, plaintiff allegedly slipped and injured her back. Plaintiff called her employer that day and indicated she would not return until November 19, 2011. Plaintiff did not complete any paperwork documenting her leave under the FMLA nor did she ever formally request FMLA leave. On November 14, 2011, her employer contacted her and asked her to return to work on November 21, 2011. When plaintiff returned on that date, defendant terminated her employment for effectively abandoning her job.

Plaintiff asserted that her employer violated the FMLA when it refused to reinstate her after she returned from her leave and that it interfered with her right to take FMLA and retaliated against her for taking FMLA leave by terminating her after she returned following her back injury. More specifically, plaintiff argued that her injury constituted a "serious health condition," which qualified her for FMLA leave because she met the "continuing treatment by a health care provider" prong of 29 C.F.R. § 825.115, which defines the term "serious health condition" under the FMLA. Plaintiff stated that she was incapacitated for three days after the injury occurred and then consulted with and received treatment thereafter from a doctor in Hong Kong. In granting defendant's motion to dismiss, the court ruled that plaintiff failed to demonstrate that she had a "serious health condition" that entitled her to FMLA protected leave. Specifically, the court found that plaintiff provided no evidence that the doctor she saw in Hong Kong was a qualified health care provider or that she received "continuing treatment by health care provider" such that her alleged incapacity qualified as a "serious health condition" as required under 29 U.S.C. § 2611(11).

***Brown v. Premier Chemicals, LLC, 2013 WL 459227 (D. Nev. Feb. 4, 2013)***

Plaintiff, a maintenance employee at a mill, alleged that his employer considered his FMLA leave as a factor in deciding to terminate his employment. The employer had an attendance policy under which employees were issued points for absences and late arrivals. Plaintiff was discharged for exceeding the number of points allowed under the policy. Plaintiff alleged that his employer improperly issued points under the attendance policy for days he was on FMLA leave, caring for his wife. Defendant moved for summary judgment, arguing that it properly issued points under the policy because plaintiff's wife did not have a "serious health condition" under the FMLA.

The parties agreed that plaintiff's wife had a serious health condition while she was hospitalized, but defendant argued that after she was discharged, she was not receiving continuing treatment because she had no activity or mobility restrictions. Plaintiff's wife was discharged with instructions to return for a follow-up appointment and to take antibiotics and Tylenol. Defendant contended this did not amount to "continuing treatment." The court

disagreed, finding that a person who receives treatment from a healthcare provider and a course of prescription medication has a serious health condition. In addition, the court found there was a factual dispute over whether plaintiff provided actual care for his wife. While medical records showed that plaintiff's wife was able to care for her own basic needs, she testified that plaintiff cooked, cleaned, and provided comfort for her. Plaintiff was also present in case of another emergency. As a result, the court denied the employer's motion for summary judgment.

**Burch v. P.J. Cheese, Inc., 935 F.Supp.2d 1259 (N.D. Ala. 2013)**

Plaintiff became General Manager of defendant's restaurant in 2004. In 2007, plaintiff's brother was murdered not far from the restaurant and plaintiff saw his brother lying dead at the murder scene. Plaintiff's supervisor instructed him to take time off work and plaintiff was absent from July 19 to August 5, 2007. His supervisor classified the time off as paid sick and vacation time. Although plaintiff had already returned to work, his supervisor left a message for him on August 9 stating that if he did not report to work that Saturday, he would be discharged. On August 16, plaintiff sought medical treatment and his doctor certified that he needed one month of leave. Plaintiff requested FMLA paperwork from human resources and attempted to show his supervisor the medical certification he obtained, but his supervisor instead decided to discharge plaintiff. Plaintiff never received the FMLA paperwork, but was reinstated to an Assistant General Manager position at a different restaurant on September 19. Plaintiff was discharged from that position after approximately one month for performance issues. Plaintiff filed suit, alleging FMLA interference and retaliation claims against defendant.

Defendant filed a motion for summary judgment, contending that plaintiff's condition following his brother's murder did not constitute a serious health condition. While the court found a dispute as to whether plaintiff was incapacitated from August 16 to September 16, the court determined plaintiff did not receive continuing treatment because he had only one appointment with a physician during the time period in question. Adopting the Tenth Circuit's approach, the court determined plaintiff's second appointment on September 22 did not qualify as continuing treatment because it fell outside of his alleged period of incapacity. Further, while plaintiff received a prescription on August 16, he did not actually fill the prescription. Pointing to a Department of Labor opinion letter, the court determined that treatment by a healthcare provider only results in a regimen of continuing treatment when the patient participates in the prescribed regimen to some degree. By not filling the prescription, plaintiff did not participate in his physician's regimen of continuing treatment at all.

c. Treatment by Health Care Provider

***Summarized Elsewhere:***

**Tsun v. WDI Intern., Inc., 21 WH Cases2d 104 (D. Hawaii 2013)**

2. Pregnancy or Prenatal Care
3. Chronic Serious Health Condition
4. Permanent or Long-Term Incapacity

## 5. Multiple Treatments

### **King v. Permanente Medical Group, Inc., 2013 WL 5305907 (E.D. Cal. Sept 19, 2013)**

Plaintiff, a full-time employee of defendant, took one week off work because she had the flu and was diagnosed with severe dehydration. Two weeks after returning to work, plaintiff had a doctor's appointment. Plaintiff missed additional days of work later that month because of illness, and defendant discharged plaintiff due to "alleged attendance issues." Plaintiff claimed that (1) defendant wrongfully denied her medical leave in violation of the FMLA, and (2) she was wrongfully terminated in violation of public policy, premised on a violation of the FMLA and/or the California Family Rights Act (CFRA). The court granted defendant's motion to dismiss as to both claims for failure to state a claim.

The court found that plaintiff had not alleged sufficient facts to demonstrate that she had a serious health condition. Plaintiff failed to allege that she had been placed on a continuing treatment plan or that she had received at least two treatments by a health care provider either of the two times she missed work. Because plaintiff's second doctor's appointment did not occur until after she had already returned to work and plaintiff did not allege that the second appointment was related to her earlier illness, the court found that plaintiff had not sufficiently alleged "continuing treatment." In addition, plaintiff failed to allege that she had received inpatient care. Therefore, she did not sufficiently allege that she had a serious health condition, and, thus, she did not qualify for protection under the FMLA. In addition, because plaintiff had not sufficiently alleged a violation under either the FMLA or the CFRA, plaintiff's wrongful termination claim also failed.

#### **D. Particular Types of Treatment and Conditions**

1. Cosmetic Treatments
2. Treatment for Substance Abuse

### **Ostrowski v. Con-Way Freight, Inc., 2013 WL 5814131 (3rd Cir. Oct. 30, 2013)**

Plaintiff was a Driver Sales Representative for defendant, which was subject to Department of Transportation drug and alcohol screening protocols. Plaintiff requested and was granted FMLA leave in order to enter rehab for alcohol addiction and was restored to his position with no change to terms or conditions of his employment upon his return. He was required to sign a Return to Work agreement in which he agreed to remain free of drugs and alcohol for the duration of his employment. Later, plaintiff relapsed and re-entered rehab. He was discharged for violating the Return to Work agreement. Plaintiff filed suit, alleging that he was discharged in violation of, among other things, retaliation for exercising his FMLA rights.

The court affirmed the grant of summary judgment for the employer because plaintiff failed to demonstrate that defendant's articulated reason for terminating plaintiff's employment – violation of the Return to Work agreement – was pretextual.

#### 3. "Minor" Illnesses

**James v. Kaiser Aluminum Fabricated Products, 2013 WL 1338733 (S.D. Ohio April 1, 2013)**

Plaintiff was a production analyst for defendant. Defendant used a points based attendance policy. An employee who accrued ten points would be placed on probation. If an employee on probation received more than five points within the next twelve-month span, the employee would be discharged. FMLA-approved absences would not count against the employee. Some of plaintiff's absences were approved, and some were not. Plaintiff applied and received FMLA-covered leave seven times over a period of six years. Plaintiff was placed on probation twice for unexcused absences. Plaintiff also applied for FMLA leave for migraines and depression. Defendant approved the request. On one occasion, plaintiff was absent. She went to a doctor, and provided defendant with an "urgent-care absence slip." However, during a conversation with her supervisor, she allegedly mentioned another reason for her absence. Her supervisor did not count her absence as an FMLA absence, and since she was already on probation, she was discharged.

Plaintiff filed suit, alleging interference and retaliation in violation of the FMLA. The court denied the employer's motion for summary judgment. Defendant argued that plaintiff's absences were not for her migraines (which had been approved for FMLA-leave) but for a sinus infection (which had not been approved for FMLA leave). Plaintiff presented evidence that her absence was caused by a migraine. Accordingly, the court denied defendant's motion for summary judgment because there was a genuine dispute of material fact on the issue of whether the absences were caused by an FMLA-covered medical condition. Additionally, the court ruled that plaintiff established a prima facie case of retaliation. Plaintiff ultimately was terminated, and there was close proximity in time between her FMLA leave and her termination. Therefore, the court denied defendant's motion for summary judgment as to plaintiff's retaliation claim.

4. Mental Illness



## CHAPTER 5. LENGTH AND SCHEDULING OF LEAVE

### I. OVERVIEW

### II. LENGTH OF LEAVE

#### A. General

#### **Gomez v. Dynamic Mfg., Inc., 2013 WL 3270660 (N.D. Ill. June 27, 2013)**

Plaintiff, a laborer at the employer's facility, sustained a leg injury after he was attacked by a co-worker. After the injury, the employee went on FMLA leave. On May 14, 2012, the employer notified the employee that his FMLA leave ended on May 15, 2012, and that he no longer had the right to reinstatement provided under the FMLA. The employer also rejected the employee's return-to-work notice because the employer could not accommodate the restrictions at that time. Finally, the employer stated that the employee might be able to be hired back if he sought reinstatement on the first day he was released to work. The employee returned to the employer's facility the following week, but the employer advised the employee that his position had been filled and that he was no longer employed by the company.

The District Court granted the employer's motion to dismiss the employee's FMLA interference and retaliation claims. The court found that the employer provided the employee with 12 weeks of sick leave as required under the FMLA. The court further found that the employee was unable to return to work on the day his FMLA leave ended. The court rejected the employee's argument that he could state a claim based on inadequate notice even when the leave exceeds 12 weeks. According to the court, the employee had no reason to believe that he would be entitled to FMLA protection after May 15, 2012. The court ruled that the employee could not state a claim for FMLA interference or retaliation because he was no longer protected by the FMLA.

#### B. Measuring the 12-Month Period

#### **Moore v. U.S. Foodservice, Inc., 2013 WL 5476405 (D. N.J. Sept. 30, 2013)**

Plaintiff, a Night Shift Warehouse Selector, sued his former employer claiming interference and retaliation under the FMLA. Plaintiff applied for and was granted intermittent FMLA leave in 2009, and was subsequently approved for further FMLA leave in 2010. At all times, plaintiff was subject to defendant's attendance disciplinary policy, which provided that five unexcused absences would result in termination. Plaintiff continued to accumulate unexcused absences, in addition to exhaustion of his excused FMLA absences. Plaintiff applied for FMLA leave again in 2011, just before the expiration of the one-year period that he potentially qualified for FMLA leave for the birth of a child. Plaintiff was then notified that his request for FMLA leave had been denied because he had not worked the required number of hours during the preceding twelve-month period to qualify for FMLA leave. After being denied any further FMLA leave, plaintiff continued to accumulate unexcused absences and was issued a final warning. Nevertheless, plaintiff accumulated three additional unexcused absences, and

again sought to have some absences authorized as intermittent FMLA leave. Plaintiff's requests were denied because he had exceeded his twelve weeks of FMLA leave during the prior twelve month period. Defendant then determined that plaintiff had accumulated seven unexcused absences, and terminated plaintiff's employment.

The district court concluded that plaintiff had used all FMLA leave to which he was entitled, and as such defendant could not have illegitimately prevented plaintiff from obtaining FMLA benefits. Thus, the district court granted summary judgment for defendant with respect to plaintiff's claim of interference under the FMLA. The court further held that plaintiff's earlier invocation of FMLA leave had no relation to his discharge. Thus, plaintiff could not establish a prima facie case of retaliation under the FMLA, and summary judgment for defendant was warranted on his FMLA retaliation claim.

***Summarized Elsewhere:***

***Gomez v. Dynamic Mfg., Inc.*, 2013 WL 3270660 (N.D. Ill. June 27, 2013)**

***Brown v. CVS Pharmacy, Inc. et al.*, 2013 WL 3353323 (M.D. Fla. July 2, 2013)**

C. Special Circumstances Limiting the Leave Period

***Nagel v. County of Orange*, 21 WH Cases2d 115 (S.D. N.Y. 2013)**

The employee, who was pregnant, was hospitalized for a medical condition and used FMLA leave. The employee's FMLA leave was to expire just six days after she delivered her baby. The employee requested additional leave beyond her FMLA leave, but the employer never changed her return-to-work date. The employee did not have any further contact with her supervisor about additional leave, except for a disability benefits form she submitted which suggested she would not be able to return to work for several months after her FMLA leave expired. Two weeks after her FMLA leave expired and she had not returned to work, she was discharged. The employee sued for FMLA retaliation, claiming the employer improperly refused to grant her an extended leave of absence, which the employee alleged was routinely granted to other employees, because she had taken FMLA leave.

The court granted the employer's motion for summary judgment, finding plaintiff was unqualified for her position because she was unable to return to work at the time her FMLA leave ended. There was no indication in that she had been treated any differently because of her FMLA leave request. Plaintiff was a probationary employee, not a permanent employee—a key fact in the employer's decision not to extend plaintiff's leave. The employer's rules and practices indicated that only permanent employees were eligible for a leave of absence, which was the mechanism available to extend plaintiff's authorized time off beyond her FMLA leave. Although plaintiff alleged that her employer improperly extended her probationary period beyond her first year of employment, this argument had been raised for the first time in opposition to summary judgment, and the court would not consider it. Moreover, plaintiff's probationary period had been properly extended as a result of extensive absences in her first year of employment. The court also rejected plaintiff's assertion that leaves of absence were routinely provided to all employees regardless of probationary status. Plaintiff provided no evidence of this assertion, while the employer pointed to four instances when it denied extensions of leave to probationary employees. Accordingly, the court granted summary judgment for the employer.

1. Birth, Adoption, and Foster Care
  2. Spouses Employed by the Same Employer
- D. Effect of Offer of Alternative Position
- E. Required Use of Leave

*Summarized Elsewhere:*

**Brannan v. Unified Sch. Dist. 211, 2013 WL 120163 (D. Kan. Jan. 9, 2013)**

**Howard v. Pennsylvania Dep't of Pub. Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

- F. Measuring Military Caregiver Leave [New Topic]

### III. INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES

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

*Summarized Elsewhere:*

**Langenbach v. Wal-Mart Stores, Inc., 2013 WL 6827814 (E.D. Wisc. Dec. 23, 2013)**

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

**Graham v. BlueCross BlueShield of Tennessee, Inc., 20 WH Cases2d 830 (6th Cir. 2013)**

Plaintiff worked for the employer until she was terminated for excessive absenteeism after failing to submit medical recertification following a period of extended leave. In May 2010, the employee requested intermittent FMLA leave for migraine headaches. The employee's original medical certification estimated the duration of leave as one episode per month, three to four days per episode. When the employee's subsequent absences exceeded the original estimate, the employer's FMLA administrator requested a modified certification. After several modifications, the employee's physician eventually concluded that he could not give a clear frequency or duration. The administrator then granted intermittent leave for a six-month period, subject to additional medical certification or recertification. Shortly after the leave approval, the employee missed 28 days of work. The administrator then requested recertification because the "frequency and/or duration" of her recent absence differed from her medical certification. The employee never provided the recertification but returned to work. This was followed by several more absences. Throughout this time, the employee admitted that she was aware that she needed to provide additional medical information in order for her absences to be excused. The employee was terminated after 26 unexcused absences following the request for recertification.

The employee asserted an interference claim under the FMLA, arguing that she should have been allowed to take FMLA in whatever increment she chose based on her initial medical certification, and that the employer's reliance on her absences to justify discharge violated the FMLA. The employer moved for summary judgment. In granting the motion, the court rejected plaintiff's interference claim on multiple theories. First, the court held a medical certification for

intermittent leave – which provides no estimate as to the frequency or duration of the employee’s absences – does not authorize an employee to take leave in whatever increment she chooses because it does not properly balance the employee’s interests with those of the employer. The employer’s conduct therefore did not constitute interference. The court also rejected the theory that the request for medical recertification amounted to interference. The court reasoned that the employer’s request for recertification after the 28 consecutive absences was reasonable, in that this constituted “significantly changed circumstances.” This conclusion was unchanged by the employee’s claim that she did not receive written notice of the recertification request where she testified she was orally notified of the need to provide this information after she returned to work prior to her discharge. The court, however, reserved a ruling on whether a blanket policy requesting recertification after a preset number of absences might violate the FMLA.

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

***Summarized Elsewhere:***

***Szostek v. Drexel University, 2013 WL 6667746 (E. D. Pa., Dec. 18, 2013)***

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

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

**E. Making Pay Adjustments**

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

**IV. SPECIAL PROVISIONS FOR INSTRUCTIONAL EMPLOYEES OF SCHOOLS**

- A. Coverage**
- B. Duration of Leaves in Covered Schools**
- C. Leaves Near the End of an Academic Term**

## CHAPTER 6.

## NOTICE AND INFORMATION REQUIREMENTS

### *Coleman v. Illinois Dept. of Human Services, 2013 WL 5348314 (N.D. Ill. Sept. 24, 2013)*

Plaintiff was on FMLA leave to care for her mother and daughter in 2006. In the fall of 2006, plaintiff suffering from migraines and asked to use FMLA leave for two absences due to the migraines in 2007. Her supervisor told her to submit FMLA application paperwork once she received her final diagnosis and that her supervisor would backdate one of the absences as FMLA leave, as the other had been considered an excused absence because she had provided a doctor's note. However, her supervisor failed to tell her that under company policy, she had to submit her FMLA request by a certain date. When plaintiff took off additional days for migraines, her supervisor said she would backdate those absences as FMLA-covered once the HR department approved the requests. Plaintiff also took off four days in 2007 to care for her mother, which her supervisor originally agreed to classify as FMLA leave. But later, her supervisor re-categorized these days to reflect only one of her absences as covered by the FMLA. When plaintiff missed work again because of her migraines, her supervisor treated the absence as unexcused because she violated defendant's policy that same-day leave must be requested at least one hour prior to the employee's shift. Plaintiff's employment was eventually terminated due to her absences. Plaintiff filed suit in June 2009, alleging FMLA interference and retaliation and defendants moved for summary judgment.

With regard to the interference claim, defendants first arguing that the claim was barred by the two-year statute of limitations. The court rejected this argument, finding that because plaintiff's supervisor was on notice of plaintiff's request for FMLA leave and told her the requests would be covered by the FMLA despite treating some requests as unexcused absences, there was a sufficient showing of reckless disregard warranting application of the three year statute of limitations. Defendants also argued that plaintiff's migraines did not constitute a serious health condition, but the court rejected this argument as well because the migraines rendered her unable to do her job. Defendants further argued that plaintiff failed to put them on notice of the need for FMLA leave due to her own health condition, but the court found plaintiff's communication with her supervisor was sufficient to put it on notice. Moreover, defendants could not rely on plaintiff's failure to provide it with timely medical certification, as required by company policy, because the supervisor's instructions led plaintiff to believe that her absences would eventually be treated as excused and FMLA-covered. Finally, defendants argued that they discharged plaintiff based on her accumulation of unexcused absences and, therefore, it was not a denial of her FMLA benefits. The court held that plaintiff met her burden of demonstrating that defendants denied her FMLA benefits by terminating her employment because human resources later approved her FMLA application and defendants would not have had grounds for discharging her had her absences been considered as FMLA leave. For these reasons, the court denied defendants' motion for summary judgment on the interference claim.

The court granted defendants' motion on the retaliation claim. Although plaintiff argued that she was discharged for requesting FMLA leave, the court found that the reason for her discharge was her failure to submit to the paperwork which would allow defendants to verify whether her medical condition was FMLA-covered. The court noted that defendants granted plaintiff's previous FMLA requests and also granted her last request, although too late to affect the discharge decision. For these reasons, plaintiff could not establish a retaliatory motive.

## **I. OVERVIEW**

## **II. EMPLOYER'S POSTING AND OTHER GENERAL INFORMATION REQUIREMENTS**

### **A. Posting Requirements**

#### **Willmore-Cochran v. Wal-Mart Associates, Inc., 919 F.Supp.2d 1222 (N.D. Ala. 2013)**

The employee, who suffered from irritable bowel syndrome (“IBS”), served as a pharmacy clerk for the employer, which had an established progressive discipline policy. After the employee received progressive discipline warnings for a pharmacy error and a poor attitude towards a customer, she was discharged when she had four unexcused absences in a six-month period. The employee contended that she should have been entitled to FMLA intermittent leave for these absences; that under the employer’s policies the absences would not have counted against her for attendance purposes had she been given FMLA leave; and that the employer failed to notify her of her eligibility for FMLA leave. She brought both FMLA interference and retaliation claims against the employer.

The employer moved for summary judgment on both FMLA claims. The employer contended that the employee’s IBS, as well as the acute bronchitis that caused one of her absences, were not “serious health conditions” within the meaning of the FMLA. It also contended that any medically related absences had been coded as authorized in her attendance record. Finally, the employer contended that the employee had failed to give sufficient notice of need for leave. The district court denied summary judgment as to the interference claim, finding factual issues existed as to all of these contentions. Although the court found the employee’s contention that she had given adequate notice because she advised her supervisors of her IBS condition, and had on various occasions advised her supervisors that she needed to be out because she was ill, to be a dubious claim of adequate notice, the court also found that the employer had not demonstrated that it had complied with its statutory obligation to provide the notice of rights required by 29 U.S.C. §2619. The court granted the employer summary judgment as to the retaliation claim, however, concluding there was no evidence showing that the discharged the employee due to any exercise, or attempt to exercise, FMLA rights.

### **B. Other General Written Notice**

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

#### **Clements v. Prudential Protective Services, LLC, 20 WH Cases2d 1102 (E.D. Mich. 2013)**

Plaintiff, a security guard employed by defendant, became pregnant and informed her supervisor that she would need time off for the birth of her child. Her supervisor assisted plaintiff in applying for a leave of absence, and it was undisputed that the supervisor did not explain or address the availability of FMLA leave to plaintiff. After the birth of plaintiff’s child, she contacted her supervisor about returning to work and was told that hours had been reduced

for all employees, that several employees had been laid off, and that the supervisor was not able to return her to work at her prior location. While plaintiff alleged that defendant never offered her a position at either her prior location or a new location, defendant alleged that a manager did alert plaintiff to the availability of jobs at other locations but that plaintiff had indicated that she was not interested in such positions.

The District Court granted defendant's motion for summary judgment. According to the court, plaintiff had made defendant aware of her pregnancy more than 30 days before going on leave, as required by 29 C.F.R. § 825.302, and that in the absence of any additional notice requirements put into place by defendant, plaintiff had satisfied the FMLA notice requirements. The court further found that defendant was estopped from relying on any noncompliance by plaintiff with defendant's internal leave-notice procedures as grounds upon which to deny liability because defendant had not provided notice of FMLA rights to its employees upon their hire. However, the court then granted defendant's motion to dismiss plaintiff's claim that defendant violated the FMLA when it failed to notify her of her FMLA rights or "offer" her FMLA leave because plaintiff had not articulated how defendant's alleged failure to notify her of her FMLA rights or its failure to offer her FMLA leave had caused her any damages.

Finally, applying the *McDonnell Douglas* burden-shifting framework, the court found that defendant had articulated a legitimate, nondiscriminatory reason for not reinstating plaintiff – that plaintiff would have been laid off even if she had been at work due to a reduction in hours and security officers at her site – unrelated to the exercise of her FMLA rights, and plaintiff had failed to contest the legitimacy of defendant's stated reason. Because defendant articulated without rebuttal a legitimate nondiscriminatory reason for failing to reinstate plaintiff, the district court granted defendant's motion for summary judgment.

***Summarized Elsewhere:***

***Wiseman v. Awreys Bakeries, LLC, 20 WH Cases2d 1138 (6th Cir. 2013)***

**III. NOTICE BY EMPLOYEE OF NEED FOR LEAVE**

***Baney v. Holder, 2013 WL 1103277 (N.D. Tex. Feb. 12, 2013)***

The employee, proceeding *pro se*, sued his former employer under the FMLA, as well as other statutes. Notably, the employee had an extensive litigation history, having initiated over 100 actions in the last ten years. In this lawsuit, the employee complained that he was required to exhaust his paid leave when he was approved for FMLA leave. He also complained that, in another instance, he did not request leave, despite his serious health condition, because he feared the employer would retaliate against him.

The magistrate judge reviewed the complaint in accordance with 28 U.S.C. § 1915 to determine whether it should be summarily dismissed. The magistrate judge entered a report and recommendation suggesting that the district court dismiss this action, including the employee's claims under the FMLA. The magistrate judge found that the employee's allegation about being required to use his paid leave did not violate the FMLA. Specifically, the court noted that the "FMLA allows an employer to require an employee to use accrued paid leave for FMLA leave." Similarly, the employee failed to state a claim by alleging that he did not request leave because

he feared retaliation. The magistrate judge concluded that this claim was frivolous because “an employee must provide the employer with notice of a serious health condition to invoke the leave requirements.” As a result, the magistrate judge concluded that the employee’s FMLA claims should be dismissed with prejudice as frivolous.

**A. Timing of the Notice and Leave**

**Holloway v. District of Columbia Government, 2013 WL 6857415 (D. D.C. Dec. 30, 2013)**

A sanitation worker with the District of Columbia was facing discharge after accumulating excessive unapproved absences. His union challenged the discharge, and a hearing was held to determine the appropriateness of termination. The hearing officer recommended a suspension rather than termination because the employee enrolled in an employee assistance program and was being monitored by his union. Meanwhile, one month after the hearing officer’s report, the employee entered a substance abuse program. One month later, the employer declined to accept the hearing officer’s recommendation and terminated the employee’s employment.

At the time the employee entered the substance abuse program, he did not inform his supervisor how long he would be absent and did not formally request leave. There was evidence, however, that the employee and his union asked his supervisor to grant him leave to enter a substance abuse program several months earlier. The employee asserted an FMLA interference claim, and the employer moved for summary judgment, arguing that the employee did not inform the employer of the need for leave. The court found that even though the employee did not formally request leave, a reasonable jury might find that he did provide notice to the supervisor. Therefore, the court denied the employer’s summary judgment motion on the interference claim. The employee also asserted a retaliation claim, alleging that his discharge was in retaliation for taking leave to attend the substance abuse program. The court applied the *McDonnell Douglas* burden shifting framework and found that although the employee could establish a prima facie case of retaliation based on temporal proximity—the employee was terminated one month after he began leave—such temporal proximity was insufficient to prove that the employer’s stated reason for termination was pretext.

1. Foreseeable Leave
  - a. Need for Leave Foreseeable for 30 or More Days
  - b. Need for Leave Foreseeable for Less Than 30 Days
2. Unforeseeable Leave

**Archie v. Dart, 2013 WL 1283466 (N.D. Ill. March 27, 2013)**

The employee, a deputy sheriff in the county department of corrections, sued her employer, the sheriff of Cook County, for violations of the FMLA. The case went to trial and the jury found for the employer. The district court denied the employee’s motion for a new trial because the verdict was not against the weight of the evidence.



At trial, the employee claimed she satisfied the elements of her FMLA interference claim because she showed she had a serious health condition, she gave her employer as much notice as she reasonably could and her employer interfered with her rights under the FMLA by delaying approval of her leave, and disciplining and harassing her. The employer did not dispute the employee was eligible for intermittent FMLA leave due to depression. A disputed issue at trial, however, was whether the employee provided adequate notice of her intent to take FMLA leave. The employee testified she gave notice as soon as she could, and therefore the jury had to find in her favor. The Court noted, however, that the employee worked in a jail and that the understaffing of correctional officers compromises safety and security. The employee frequently would call in less than an hour before a shift and sometimes called in after her shift began. The Court found that employees cannot take FMLA leave “willy nilly” and the jury’s verdict that the employee did not provide reasonable notice was not against the weight of the evidence.

The Court also found there was no evidence that the employee was denied FMLA leave or was in any manner discouraged from taking FMLA leave. The disciplinary forms at issue did not indicate that she sought FMLA leave, but showed that the employee called in late and requested “medical” leave, which differed from FMLA leave according to the employee’s own testimony. The court found, therefore, the verdict was not against the weight of the evidence.

**Fushi v. Bashas’ Inc., 2013 WL 231048 (D. Ariz. Jan. 22, 2013)**

Plaintiff worked at defendant’s grocery store. Her duties included ringing up customers and stocking and merchandizing dairy products. Financial troubles forced defendant to reduce labor costs, which led to increased duties for all employees. Plaintiff felt that the additional work was unevenly distributed and that she was denied timely assistance with her checkout duties *vis-à-vis* her male co-workers. Plaintiff was cited numerous times for job performance reasons, including recurrent attendance issues.

In February of 2009, plaintiff obtained a doctor’s note because of a rash she developed while working in the dairy section. Defendant transferred her from the dairy section and the rash healed. In May of 2009, plaintiff requested and received FMLA leave because of her rash and panic attacks. On August 1, 2009, plaintiff left the grocery store without informing the on-duty manager because of a panic attack she claims was brought on by not receiving timely checkout counter assistance. Plaintiff returned on August 3. However, plaintiff refused to participate in a meeting with her manager about her un-noticed departure two days earlier without the participation of a witness. An argument between the two ensued, and her manager sent her home for the day for “being insubordinate.”

Plaintiff claimed that she was retaliated against for taking FMLA leave. The court granted summary judgment for defendant on the FMLA claim. The court found that defendant did not deny or interfere with plaintiff’s requests for FMLA leave. The court noted that plaintiff failed to provide adequate notice of her intent to take leave on August 1, 2009, and failed to provide any other evidence of retaliation or interference. Thus, the court dismissed plaintiff’s retaliation and interference claims.

**Giarrizzo v. Mount Air Casino & Resort, 2013 WL 5924806 (M.D. Pa. Oct. 31, 2013)**

Plaintiff worked in defendant's environmental services department. Plaintiff's father underwent colon surgery and was released from the hospital into plaintiff's care. Plaintiff's father was a fall risk and needed assistance walking, dressing, monitoring his medication intake, and maintaining general hygiene. Plaintiff requested two days off from work to care for his father, and his supervisor approved the request. A few days before his leave was to begin, plaintiff reported to work, but became increasingly worried about his father's safety due to an impending storm. Plaintiff was notified by a number of defendant's staff that state officials were closing several highways around his workplace prior to the end of plaintiff's work shift, and that his home was in an area that had lost power. Plaintiff could not find his head supervisor to give notice of his intent to leave work out of concern for his father's safety. Instead, plaintiff notified an immediate supervisor, and asked that supervisor to inform the head supervisor of the situation. Later that same day, plaintiff attempted to contact his head supervisor via telephone and left multiple voicemail messages explaining why plaintiff left work. A few days later, while plaintiff was on leave as previously scheduled, defendant suspended plaintiff pending an investigation into the reasons for plaintiff's early departure. Plaintiff was subsequently discharged about one week later.

Plaintiff filed suit alleging he was discharged in retaliation for taking FMLA leave. Defendant filed a motion to dismiss plaintiff's claims. The district determined that plaintiff had previously informed a supervisor of his father's medical condition, had specifically mentioned his father's safety when leaving work early, and had conveyed the same information to his head supervisor through telephone messages. Thus, the court found that plaintiff had satisfied his obligation of providing sufficient information to allow his employer to reasonably determine whether the FMLA might apply. Additionally, the district court further found plaintiff's suspension was an adverse employment decision that occurred just four days after he requested FMLA leave. As a result, the district court held that both the temporal proximity and the other claims of causation alleged in the complaint were sufficient to survive defendant's motion to dismiss.

**Lichtenstein v. University of Pittsburgh Medical Center, 2013 WL 6577401 (W.D. Pa. Dec. 16, 2013)**

The employee took FMLA leave for one day because her mother was taken to the hospital. She told her supervisor that her mother was taken to the emergency room by ambulance. After she was discharged, plaintiff filed suit, alleging FMLA claims. At trial, the jury found in favor of defendant. Plaintiff moved for a new trial on three grounds relating to the FMLA.

First, plaintiff said that her notice to her supervisor was sufficient to put her employer on notice of her intent to take FMLA leave. The court found that this statement was insufficient notice in light of the guidance provided by 29 C.F.R. 825.303(b). The statement, combined with the fact that plaintiff returned to work the next day and did not mention her mother's condition, was insufficient notice. Second, plaintiff moved for a new trial because, according to her, the court erred when it dismissed her claim for interference. The court found that plaintiff was not

entitled to a new trial on these grounds because her interference claim was redundant to her retaliation claims. Finally, plaintiff moved for a new trial on the grounds that the court erred in instructing the jury with respect to the “same decision” defense under the mixed-motive framework. The court denied plaintiff’s request finding that in light of plaintiff’s many absences from work and other scheduling problems, there was sufficient evidence presented to the jury to find these reasons would have induced defendants to discharge plaintiff without consideration of her FMLA leave.

**Pená v. Country of Starr, 2013 WL 6672476 (Ct. App. Tex., Dec. 18, 2013)**

Plaintiff asserted an FMLA claim for retaliatory discharge, among other non-FMLA claims, and appealed the lower court’s decision to grant summary judgment to defendant. Plaintiff went on FMLA leave for a back injury and returned to work. However, during the course of his treatment, plaintiff was informed that he had to undergo surgery for an abdominal aortic aneurysm and that he would be out of work for approximately one week. Plaintiff notified his employer of his upcoming surgery and was granted one-week leave. Complications arose during surgery and plaintiff’s doctor signed a letter stating that plaintiff could not return to work for 90 days. Plaintiff’s daughter gave the note to the employer and the employer responded that nothing further was needed. Defendant discharged plaintiff one month after his surgery.

The court found that a material issue of fact existed on the adequacy and timeliness of the notice given to defendant of plaintiff’s need for FMLA leave and, thus, the case was allowed to proceed on those grounds.

***Summarized Elsewhere:***

**Bosley v. Cargill Meat Solutions Corp., 705 F.3d 777 (8th Cir. 2013)**

3. Military Family Leave [New Topic]

B. Manner of Providing Notice

**Miles v. Nashville Elec. Service, 20 WH Cases2d 1146 (6th Cir. May 9, 2013)**

The employee, who was hospitalized for a psychotic break, took FMLA leave. After submitting paperwork to the company, including a medical release stating that she could return to work on May 4, 2011 without restriction, the employee returned to work on May 5, 2011 and her time off was provisionally approved for FMLA leave. At midday, the employee’s supervisor gave her permission to leave early, even though no reason was given. The next morning, the employee called her supervisor to resign and then met with her supervisor to submit a resignation letter and her company ID card. The employee sought to rescind her resignation three days later, but the company refused to reinstate her.

The employee filed an FMLA interference claim, alleging the company did not fulfill its duty to determine whether she was requesting further medical leave following her return to work. The district court granted the company’s summary judgment motion, finding that the evidence demonstrated that the employee voluntarily resigned her job, and that the company had no duty under the FMLA to second-guess her decision to resign. The Sixth Circuit affirmed, holding that

the evidence, taken in the light most favorable to the employee, indicates that the employee wanted to resign and did want to take additional medical leave. Further, the employee admitted that no one at the company talked her into quitting, and that she wanted to resign her employment. Although an employer's knowledge of an employee's prior medical history may be relevant to the determination of whether an employee gave adequate notice to invoke FMLA rights, nothing gave the company reason to think that the employee was requesting FMLA leave. Also, asking to leave work early after an FMLA leave did not put the company on notice that the employee required additional FMLA leave.

**Riddle v. Hubbell Lighting, Inc., 2013 WL 3788790 (W.D. Va. July 19, 2013)**

Plaintiff was a manufacturing engineer for defendant. He was diagnosed with fibromyalgia, which caused him to have trouble sleeping and staying awake at work. Plaintiff asked for, and defendant approved, plaintiff's FMLA leave. Defendant's approval allowed plaintiff to call in on any day he felt too tired to work. On those days where he came to work and felt sleep deprived, he could notify his supervisor and was permitted return home. The day after his intermittent FMLA leave was approved, plaintiff fell asleep at his workstation. Defendant, the day after approving his leave, sent him home, suspended him, and then terminated his employment three days later. Plaintiff sued, alleging that defendant failed to accommodate his disability, arguing that he could have performed his job if defendant woke him up on the occasions that he fell asleep. He also alleged that defendant refused to let him use the FMLA leave to which he was entitled. Defendant moved to dismiss these claims for failure to state a claim.

The district court granted defendant's motion to dismiss plaintiff's FMLA interference claim. The court noted that the key question was whether defendant had notice of plaintiff's intention to take leave, which is a prerequisite to liability. The court found that he did not allege that he actually attempted to take his FMLA leave. Indeed, the complaint did not allege that plaintiff attempted either to call into work on a day he felt tired or notify his supervisor that he was feeling sleep deprived and wished to return home. The court held that, without more, plaintiff failed to state a claim for FMLA interference.

**Terry v. SimplexGrinnel LP, 2013 WL 1332240 (D. Mass. Mar. 28, 2013)**

Defendant designs, engineers and installs fire protection and communication systems. Plaintiff worked third shift at defendant's call center, processing incoming calls and alarms and making outgoing calls to dispatch first responders when necessary. In July 2010, plaintiff was found sleeping on the job and failed to respond to a tripped alarm for over three minutes. After she was awoken by a supervisor, she was found sleeping a second time a short time later. Her supervisor told her it was unacceptable to sleep at work. Plaintiff stated that she had been sick and her doctor had recently changed her medication. The next day plaintiff was called into work and told she was being suspended for three days for falling asleep. Plaintiff stated that she had not been feeling well and that they were working on her medication. She did not provide any further details regarding her illness or disability. Given the seriousness of her misconduct, and other prior incidents of misconduct, the employer subsequently decided to terminate plaintiff. The employer requested that plaintiff come to a meeting and was informed that she was being terminated. During the meeting, plaintiff provided a note from her physician stating that changes

to her medication may have caused her to fall asleep, but defendant still terminated her employment.

Plaintiff asserted that her employer was obligated under the FMLA to notify her that she could take leave due to her various medical conditions, and to grant her FMLA leave when she provided the employer with a doctor's note. In granting the employer's motion for summary judgment, the district court held that, even assuming plaintiff met the first three elements of a prima facie case, plaintiff failed to show that she gave sufficient notice that she intended to take leave. Plaintiff never requested leave before her termination and provided no legal authority supporting her contention that her employer had any obligation to discern her need for FMLA leave. Additionally, the court rejected plaintiff's argument that presenting a note from her physician at the termination meeting constituted a request for FMLA leave. The court stated that, even assuming the purported request was timely, the doctor's note only indicated plaintiff may have fallen asleep as a result of her medical condition and did not constitute notice that plaintiff needed time off from work.

**Jones v. Bracco Ltd. P'ship, 20 WH Cases2d 606 (D. S.D. 2013)**

The employee was the former Director of Operations for the employer's restaurant. The employee began experiencing health problems and emailed the employer that she would need to take medical leave. While the employee did not actually take leave following the email, she began feeling sick at work a few weeks later and another employee told her to go to the hospital. An emergency room physician thereafter drafted a letter to the employer stating that the employee could not return to work for a week, and the employee's husband delivered the letter to the employer. Two days later, the employer called the employee and terminated her employment. At the time of firing, no reason was given for the termination.

The employee then filed suit, alleging interference and retaliation under the FMLA. The employer filed a motion for summary judgment, alleging that the employee failed to provide proper notice of her leave under the FMLA and that she could not prove her interference or retaliation claims. The court denied the employer's motion for summary judgment. First, the court concluded that a genuine issue of fact existed regarding whether the employer was on notice of the employee's FMLA leave prior to terminating her. The Court noted that the employee had emailed her employer about her medical issues weeks before she had to leave work to go to the hospital, and that the employer was aware that the employee went to the emergency room.

The court then denied the employer's motion for summary judgment as to the employee's interference claim because "a question of fact exists as to whether the employee would have been laid off regardless of whether she took FMLA leave." The court found that the employer had presented no evidence that it disciplined the employee, rarely discussed disciplinary issues with the employee, and the employee's employment record contained no demerits. Finally, the court ruled that issues of fact existed as to the employee's FMLA retaliation claim. The court found a possible causal relationship between the firing and exercise of the FMLA rights because the termination occurred within a few days of the FMLA leave. Furthermore, the court expressed that, while the employer had put forth a legitimate, non-discriminatory explanation for the firing, the employee could potentially show that this reason was pretextual. The court again

highlighted the fact that, while the employer asserted that it terminated her employment for disciplinary reasons, it had presented no pre-litigation evidence of employee misconduct to support this assertion.

***Brown v. Travelcenters of America, LLC, No., 2013 WL 6212217 (N.D. Ohio Nov. 27, 2013)***

The employee went on FMLA leave so he could have surgery on his shoulder. Later that same year, the employee informed his employer that he would need additional leave in the future for follow-up surgeries. One month later, employee was discharged. The employee claimed that the employer interfered with his exercise of FMLA leave by actively discouraging him from taking leave, and by discharging him for expressing his need for leave in the future. The employer moved for summary judgment, arguing that plaintiff did not provide proper notice of his intent to seek FMLA leave as required under the FMLA.

The court denied the employer's motion for summary judgment. The employee did not give specific notice to the employer regarding when or how long his future FMLA leave would be, but the Court found that a formalized request is not required to recover for interference or retaliation under the FMLA. The court reasoned that an employer, once on notice that FMLA leave will be needed, cannot escape liability for an interference or retaliation claim by discharging the employee before the FMLA request can be formalized.

***Mathew v. North Shore-Long Island Jewish Health System, Inc., 2013 WL 5799883 (E.D. N.Y. Oct. 23, 2013)***

Plaintiff was employed by defendant as a radiologic technician. Plaintiff also had a second job as a bus driver for the New York City Transit authority. It was eventually determined that plaintiff falsely claimed on his timesheets to be at work on four days when, in fact, he was not present. Following a meeting regarding plaintiff's erroneous time sheets, plaintiff requested that yet another day erroneously indicating he was at work be changed to a vacation day. A second meeting was scheduled, and plaintiff was informed that he would have to resign or would be subject to discharge. A month or two prior to his termination, plaintiff had informed a doctor at the hospital that he was experiencing pain in his stomach. The doctor determined plaintiff had a hernia. Plaintiff mentioned having a hernia to his direct supervisor in passing, and complained to a co-worker on one occasion about pain in his side. Plaintiff never called in sick due to the hernia, and continued to work at both of his jobs until his forced resignation from the hospital. The supervisor responsible for disciplining plaintiff was never made aware of plaintiff's medical condition. One week after plaintiff resigned, he was again examined by a doctor regarding his hernia, and four days later he underwent outpatient surgery.

Plaintiff sued for retaliation and interference with his rights under the FMLA. The district court granted summary judgment for defendant. The court found that plaintiff did not exercise his FMLA rights by telling his direct supervisor that he had a hernia and indicating that he may have needed time off in the future to address the condition. The court found that there was no attempt to bring the matter to management's attention in a way that would prompt a decision on medical leave, and that management had no reasonable notice of plaintiff's medical issue before his discharge. Furthermore, the hospital provided a legitimate, non-discriminatory reason for plaintiff's discharge—his falsification of time sheets. Thus, there was no connection

between plaintiff's need for treatment of his hernia and plaintiff's termination. Because there was no evidence that plaintiff's termination was motivated by anything other than legitimate reasons, the district court found no support in the record for plaintiff's claims of retaliation or interference under the FMLA.

**Freeman v. City of Little Rock, 2013 WL 4591479 (E.D. Ark. Aug 28, 2013)**

The employee was a fire Battalion Chief with over 40 years of experience. In 2007, the employer notified all Battalion Chiefs, including the employee, of a mandatory six-day training course at the National Fire Academy and the employee registered for a February 2011 course to be held out of town. During Fall 2010, the employee suffered a mini-stroke caused by a hole in the heart and took sick leave for four shifts between September 24 and October 3, 2010. The employee, when asked, vacillated between an inability to recall giving notice and admitting no notice was given regarding the medical condition. On January 19, 2011 the employee sent notice to the National Fire Academy to cancel his six-day training course. However, the employee did not inform his supervisor, and the fire department did not find out until January 2012 of the employee's cancellation. Subsequently, the employee took three additional sick leaves for a second outpatient procedure. Again, the employee could not recall if he provided notice to his supervisor for the days off. In January 2012, the Fire Chief decided to withhold Battalion Chief Assignment (BCA) days from the employee until he completed the six-day training course. Battalion Chiefs received BCA days in addition to regular hours for which the chiefs received a higher rate of pay. When the employee requested make-up of the missed BCA opportunities between January and July 2012, he was denied. Only after the denial did the employee expressly give his supervisor and the Fire Chief notice of his medical conditions; but, again, his request for BCA make-up days was denied. From 2007 through 2012, the employee never requested FMLA leave or treated his sick leave as anything other than ordinary sick leave. He sued the department for its refusal to make up the BCA days.

The employer moved for summary judgment, which the court granted. The court particularly highlighted the failure of the employee to provide any notice during the 20 months between the cancellation of the first training course until the employee's notice to the employer in 2012. Furthermore, the court did not find the "self-contradictory" statements of the employee - whether or not he had given or recalled giving any notice in 2010 or 2011 to his supervisor - convincing. The court also did not find merit to the entitlement, discrimination and retaliation claims since the employee never acted upon or partook of any FMLA leave during the critical 2007 – 2012 time period.

***Summarized Elsewhere:***

**Carr v. Mike Reichenbach Ford Lincoln, Inc., 2013 WL 1282105 (D. S.C. Mar. 26, 2013)**

C. Content of Notice

**Brown v. Pitt Ohio Exp., LLC, 21 WH Cases2d 563 (N.D. Ill. 2013)**

Plaintiff alleged his former employer discharged him the day after he asked if he was eligible for leave under the FMLA leave and he requested leave to care for his ill father. Plaintiff filed FMLA interference, FMLA retaliation, and failure to provide proper notice claims against the employer. Defendant discharged plaintiff's employment because he was not eligible to take FMLA leave as he only worked 1,045.37 hours in the year preceding his discharge. The employer notified plaintiff that he could reapply when he was ready to return.

In opposing the employer's motion for summary judgment, plaintiff asserted that he never told the employer when his FMLA leave was to begin and, therefore, he may have been eligible when his leave started. The court found there was no issue of fact regarding plaintiff's eligibility for FMLA leave because he did not identify the date on which his requested FMLA leave would begin.

**Weiler v. Draper Chevrolet Co., 2013 WL 388585 (E.D. Mich. Jan. 31, 2013)**

According to plaintiff's proposed amended complaint, plaintiff, a body shop manager, underwent spinal fusion surgery in 2009 and a hysterectomy in 2010. In November 2010, plaintiff attempted suicide. From July 21 to July 25, 2011, plaintiff notified the employer that she would not be coming to work because she was having serious back problems and mental health issues, stemming from the medication for her prior procedures. On July 25, 2011, plaintiff called and left a message with her manager that she was not coming into work because "she was feeling like she did last November." On that date, plaintiff saw her physician, who sent plaintiff to the emergency room and wrote a note stating that she was unable to work on that date. Later on July 25, plaintiff sent her manager a text message stating that she was in the emergency room and was being admitted to a residential treatment facility. The facility and plaintiff's physician each faxed medical documentation to defendant. On July 28, while plaintiff was still receiving inpatient care, defendant notified plaintiff's mother that plaintiff's employment was terminated.

Plaintiff filed suit, alleging violations of the FMLA, and the court dismissed the complaint without prejudice on a 12(b)(6) motion to dismiss brought by defendant. Plaintiff subsequently filed a motion for leave to file an amended complaint. Defendant opposed the motion, asserting that the proposed amended complaint did not state a claim upon which relief could be granted. The court granted plaintiff's motion, explaining that the amended complaint sufficiently alleged that plaintiff invoked FMLA protection. Defendant moved for reconsideration, arguing that plaintiff did not notify defendant that the facility was for treatment, and that its medical documentation was dated July 28. The court denied defendant's motion for reconsideration. Applying the pleading standard announced in the *Iqbal/Twombly* decisions, the court concluded that the allegations were "sufficient to plausibly suggest that [defendant] was on notice that [plaintiff] was being admitted to receive inpatient mental health care." In the alternative, the court concluded that, based on the information provided, it was defendant's burden to inquire further if it felt that it lacked sufficient information regarding plaintiff's need for leave.

**Willoughby v. Connecticut Container Corp., 2013 WL 6198210 (D. Conn. Nov. 27, 2013)**



Plaintiff was an employee for a manufacturer, and was diagnosed with diabetes. Plaintiff submitted medical documentation stating that he would need to miss several days of work due to his illness. Five months later, plaintiff told his supervisor that he did not feel well. The supervisor told him to work, or go home. Later in the same shift, plaintiff's supervisor found him sleeping in a chair. The supervisor woke plaintiff up and sent him home. Plaintiff claimed he had an episode of hypoglycemia and, as a result, passed out. Plaintiff immediately sought medical treatment, and subsequently submitted medical documents to the employer's human resources department stating that he needed to be on leave for the next two days due to acute dehydration. Ten days later, he submitted another medical form indicating that he had been receiving medical care for hypoglycemia and syncope. Plaintiff also informed his employer that he had filled out his FMLA paperwork. Nevertheless, plaintiff was subsequently discharged for sleeping on the job.

The court denied the employer's motion for summary judgment. The employer argued that plaintiff failed to give proper notice of his intent to take FMLA leave, or the qualifying reason for his leave. The court found that there was a question of fact as to whether plaintiff met the FMLA leave notice requirement, since he turned in medical documentation regarding his medical condition immediately after the incident.

**Lanier v. University of Texas Southwestern Medical Center, 20 WH Cases2d 1423 (5th Cir. 2013)**

Plaintiff worked in her employer's information technology department. Her job required a daytime shift as well as a rotating on-call shift. Each on-call rotation lasted one week and occurred every twelve weeks. While scheduled for her week-long on-call rotation, plaintiff texted her supervisor to inform him that she would be absent from call duty that evening because her father was in the emergency room. A few weeks later, plaintiff cursed at her supervisor and left her work station to go to the employer's on site employee assistance office. She did not tell her employer where she was going and the employer considered her to have resigned. Plaintiff then sued her employer under several theories, including FMLA interference and retaliation.

The district court ruled for the employer and the Fifth Circuit affirmed. The court ruled that the employer did not interfere with plaintiff's right to take FMLA leave because her text message requesting to be taken off on-call duty for that night was insufficient to put the employer on notice that she was requesting FMLA leave to care for her father, particularly where she had taken FMLA leave before and knew the correct way to ask for it. The court also rejected the FMLA retaliation claim. The court reiterated that plaintiff's text message was not a legitimate request for FMLA leave so it could not be the basis for a valid retaliation claim. The court further ruled that plaintiff's trip to the EAP office was not protected FMLA activity and, even if it was, her employer did not know that is where she went and could not have taken action against her for that reason.

***Summarized Elsewhere:***

**Combs v. Quest Specialty Coating LLC, 20 WH Cases2d 982 (E.D. Mich. 2013)**

**O'Donnell v. Passport Health Communications, Inc., 2013 WL 1482621 (E.D. Pa. April 10, 2013)**

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

**Bourne vs. Exempla, Inc., 20 WH Cases2d 1218 (D. Colo. 2013)**

Plaintiff, a nursing assistant, suffered from nephrolithiasis, a chronic condition of recurring kidney stones. Her condition recurred several times a year with each incident lasting several days, during which time plaintiff could not lift objects or walk. In December 2009, plaintiff applied for and was granted intermittent leave, pursuant to the FMLA, from December 2009 through December 11, 2010. When her leave ended on December 11<sup>th</sup>, the employer did not notify her that she was no longer eligible for FMLA leave because she had not worked the requisite 1250 hours, nor did the employer request that she re-apply for another rolling year pursuant to the FMLA. Moreover, on December 20, 2010 plaintiff requested and was granted additional leave under the FMLA for her nephrolithiasis. In addition, from January 2011 through May 2011, plaintiff requested and was granted FMLA leave on thirteen additional occasions. In March 2011, plaintiff discussed the option of taking maternity leave in the future under the FMLA. The employer informed plaintiff that her leave had ended on December 11, 2010, but did not notify her that she did not qualify as an eligible employee until several months later, in May 2011. Plaintiff, however, still believed her leave for her nephrolithiasis was not affected and subsequently sought leave again in June 2011. The employer then informed plaintiff she was not eligible for FMLA because she had not met the 1250 hour requirement in the previous year, and notified her that she had not worked the requisite hours to qualify for the leave she had taken in March and April of 2011. The employer then terminated plaintiff's employment in July 2011 for her absences.

Plaintiff filed an action in the federal district court in Colorado alleging that the employer had interfered with her rights in violation of the FMLA and that it had failed to accommodate her disability in violation of the ADA. The employer brought a motion to dismiss, arguing that plaintiff did not qualify for FMLA leave because she admitted she had not worked the required number of hours. The employer further argued that it had no obligation to notify plaintiff that she was ineligible for FMLA leave before June 2011 because she had failed to follow the employer's customary FMLA request procedures. In denying the employer's motion to dismiss, the court held that the determination of plaintiff's hours was inappropriate for resolution in a motion to dismiss and that plaintiff's failure to follow employer procedures to request leave was not a proper basis to dismiss the claim. The court held that regardless of what the proper request procedure may have been, the employer could not establish it did not have notice of plaintiff's December 20<sup>th</sup> intent to take FMLA leave, given that it had granted her FMLA leave requests thirteen times between December 2010 and May 2011. The court recognized that while some courts have found that a failure to follow an employer's customary FMLA notice procedures prevented an employer from acquiring knowledge of an employee's intent to take FMLA leave, it determined this was not the case in this instance. Accordingly, the court denied the employer's motion to dismiss plaintiff's claim for FMLA interference.

**Brown v. Vilsack, 923 F. Supp. 2d 118 (D. D.C. 2013)**

As a result of plaintiff's ongoing attendance problems, his employer placed restrictions on his use of leave. Plaintiff was instructed that if he sought FMLA leave, to have it approved he would be required to submit a medical form completed by his physician. Plaintiff was suspended on two occasions for failing to comply with the leave restrictions, and when the problems continued, he was discharged. The employee challenged his discharge before the Merit Systems Protection Board, and an administrative law judge found that his removal was warranted.

On appeal, the district court granted the employer's motion for summary judgment, upholding the administrative law judge's conclusion that no FMLA violation occurred. There was no evidence that plaintiff's absences involved inpatient care, he never submitted medical evidence to support a request for leave, and he clearly did not invoke his entitlement to FMLA leave before any absences.

**McNamara v. Trinity Coll., 2013 WL 164221 (D. Conn. Jan. 15, 2013)**

The employee requested medical leave to care for his wife following her hip replacement surgery. The employer never informed the employee of his rights under the FMA and did not offer him FMLA leave. The employee did in fact take approximately two weeks medical leave to care for his wife. Although the employee periodically returned to work to assist when shorthanded, he advised the employer that he needed additional leave to care for his wife. The employee received a written disciplinary notice reprimanding him for missing work. The employee then requested additional leave to care for his child since he was the sole caregiver while his wife was recuperating. The employer discharged the employee because of his inability to meet his employment obligations and failure to report to work. The employee filed a complaint alleging retaliation under the FMLA.

The district court denied the employer's motion to dismiss, and held that pursuant to 29 C.F.R. § 825.302(c) the employee only needed to give the employer notice that he was requesting leave for a potentially qualifying reason to shift the burden of proof to the employer to show that it lacked intent to retaliate. The employee's failure to request or inquire about FMLA leave did not bar his retaliation claim. The court noted that sufficient notice does not mean that an employee must literally or actually invoke the FMLA. Instead, the court noted that FMLA retaliation may be based upon "proof of a plaintiff's inquiry notice to his employer that he was requesting potentially FMLA-qualifying leave, even though he may have been unaware of the FMLA's application to his request, so long as the employer had knowledge that the requested purpose likely qualified for FMLA protection."

**Vera v. Waterbury Hospital, 2013 WL 1296273 (D. Conn. Mar. 28, 2013)**

Plaintiff worked as a night shift “sleep tech” for a hospital. Plaintiff claimed to suffer from a form of heart disease that affected his heart rate and occasionally caused him to lose consciousness. He took a leave of absence from his in May 2009 by calling in sick and going to see his primary care physician. That doctor gave plaintiff a note indicating that he would be out of work for approximately two months, and another note indicating that plaintiff was not able to work a night shift job. The hospital, in response, instructed plaintiff regarding how to apply for FMLA leave and disability leave through the hospital’s third-party disability administrator. Plaintiff applied for short term disability, but did not apply for FMLA leave. The short term disability request was denied because it was not supported by medical documentation, a decision that plaintiff did not appeal. While plaintiff was on leave, his position was held open for seventy-eight days, even though he did not apply for FMLA leave or appeal the STD disability denial. The employer offered him the option of returning to his former position, but plaintiff did not do so. Plaintiff also did not respond to a letter sent by the hospital advising him that a failure to return to work from an unapproved leave of absence would result in his separation being characterized a voluntary resignation. The employer eventually terminated plaintiff’s employment.

Plaintiff sued under the FMLA, as well as a number of other statutes. The employer moved for summary judgment, which the court granted as to the FMLA claim. Plaintiff failed to apply for FMLA leave, and as a result, he could not satisfy even the basic requirements of his prima facie case of FMLA retaliation. Moreover, there was no evidence in the record that the employer somehow interfered with plaintiff’s FMLA rights. To the contrary, the employer’s supervisors encouraged plaintiff to apply for FMLA leave.

**Eagle v. Hurley Medical Center, 2013 WL 3270958 (E.D. Mich. June 27, 2013)**

The employee, a pharmacy technician, was granted intermittent FMLA leave for six months due to lupus flare-ups. The employee had two primary assignments, dispensing and intravenous admixture (IVAD). She testified (and the employer disputed) that the dispensing job was more physically demanding than the IVAD job. One day, plaintiff expected to be assigned to IVAD, but she was assigned to dispensing instead. Plaintiff informed her supervisor of the disability symptoms she was having that day, and stated that she could not perform the dispensing job. Her supervisor told her someone would be able to cover for plaintiff during her lunch break, but did not agree to change the assignment. After calling her union representative and seeing a nurse in the employer’s health office, plaintiff left work for the day, indicating on her call-off sheet that she was taking leave pursuant to her approved intermittent FMLA leave. Plaintiff was discharged for “gross misconduct relating to fraudulently using Family Medical Leave.”

Plaintiff brought claims for FMLA interference and retaliation, and the employer moved for summary judgment. The employer argued that plaintiff did not give sufficient notice of her intent to take FMLA leave, and walked off her job because she did not want to perform the dispensing job assignment. The district court disagreed and denied summary judgment on both claims, finding a genuine issue of material fact over whether plaintiff provided sufficient notice of her request for leave. The employer provided testimony from its supervisors that plaintiff did not inform them of her intent to take leave, but the court disagreed. Based on plaintiff’s

testimony that she was requesting the leave due to her disability symptoms, supporting statements from the nurse, and the fact that she indicated on her call-off sheet that she was taking FMLA leave, the district court held that sufficient evidence existed to raise a genuine issue of material fact. The court further found a genuine issue of material fact as to whether plaintiff was terminated for taking leave protected by the FMLA, precluding summary judgment on plaintiff's retaliation claim.

**White v. Dana Light Axle Manufacturing, LLC, 725 F. 3d 608 (6th Cir. 2013)**

The employer maintained a "no fault" attendance policy. Under the policy, employees were required to personally call in to report an absence on a daily basis. The policy further required that employees call a specific phone number and clearly stated that employees must call in each day of an absence before the start of their shift. Finally, the policy stated that if an individual failed to report to work for two days and had not called in, that person was considered to have voluntarily quit. The employee needed hernia surgery and, as a result, missed several days of work, but did not report his absences pursuant to the employer's absence call-in rules. The employee claimed that he assumed that he did not need to call in his absences while he was out for the surgery because he had previously met with his employer to discuss his upcoming surgery. The employee's failure to call resulted in multiple unexcused absences and the employee's discharge.

The employee filed suit, claiming the employer interfered with his right to take FMLA. The district court ruled for the employer and the appellate court affirmed the district court's decision. According to the appellate court, the issue hinged on whether an employer may impose and enforce its own internal notice requirements, even if those requirements go beyond the bare minimum that would generally be sufficient under the FMLA to constitute proper notice. Citing a 2009 change in the applicable FMLA regulations, the court noted that employers were expressly allowed to require that employees follow the employer's "usual notice and procedural requirements" absent unusual circumstances. In this case, the employee could identify no unusual circumstance, nor was there any evidence that the employer had waived its call-in rule. As a result, the employer lawfully discharged the employee.

***Summarized Elsewhere:***

**Riddle v. Hubbell Lighting, Inc., 2013 WL 3788790 (W.D. Va. July 19, 2013)**

**Terry v. SimplexGrinnel LP, 2013 WL 1332240 (D. Mass. Mar. 28, 2013)**

**Tucovic v. Wal-Mart Stores East LP, 2013 WL 1287186 (N.D. Ind. Mar. 28, 2013)**

**Freeman v. City of Little Rock, 2013 WL 4591479 (E.D. Ark. Aug 28, 2013)**

#### **IV. EMPLOYER RESPONSE TO EMPLOYEE NOTICE**

***Summarized Elsewhere:***

**Freeman v. Philadelphia Housing Authority, et al., 2013 WL 3761274 (E.D. Pa. July 18, 2013)**

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

*Summarized Elsewhere:*

**Bourne vs. Exempla, Inc., 20 WH Cases2d 1218 (D. Colo. 2013)**

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

*Summarized Elsewhere:*

**Howard v. Pennsylvania Dep’t of Pub. Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

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

**Dietrich v. Susquehanna Valley Surgery Ctr., 20 WH Cases2d 364 (M.D. Pa. 2013)**

Plaintiff, who suffered from hemophilia, owned and operated a landscaping business. He agreed to install a patio for one of the doctors affiliated with defendant employer. While working on the patio, he started passing blood in his urine, and he left early to begin taking his medication. He called his supervisor and said he would be absent the next day, which was a Monday. On Monday, he called again and said he would be absent on Tuesday while he awaited a delivery of additional medicine. On Tuesday, plaintiff went to the doctor’s house with a helper, and he claims that he only provided instruction and supervision to his helper. Plaintiff also claimed that on Tuesday, he called to say he would miss work on Wednesday, but his supervisor denied that. On Wednesday, however, plaintiff’s manager alleged that she saw plaintiff’s landscaping truck parked outside of the doctor’s residence and observed plaintiff with his shirt off. On Thursday, not long after plaintiff called his supervisor to say he expected to be at work on Friday, plaintiff was informed that he was suspended indefinitely. Defendant subsequently terminated plaintiff’s employment because he was working for his landscaping business when he missed work on Wednesday.

The court granted defendant’s motion for summary judgment as to plaintiff’s FMLA claims. The court noted that the failure to comply with the notice requirements of the FMLA does not automatically amount to a statutory violation and does not support a cause of action in the absence of injury. Here the district court found that plaintiff suffered no injury from defendant’s failure to send the required notices because he was aware he could stay home when his medical condition required him to; he was never denied leave when medically necessary; and he in fact received leave. Furthermore, the district court found that plaintiff presented no evidence that the reasons for his termination were pretextual.

**DeFillippo v. CBS Corp., 2013 WL 473182 (D. Mass. Sept. 3, 2013)**

Plaintiff requested time off to care for her mother, who had been diagnosed with Alzheimer’s disease. Plaintiff alleged that she was advised by another employee that she could take up to twelve weeks of unpaid leave, but that intermittent leave was not permitted under company policy. Accordingly, plaintiff took twelve weeks of consecutive leave. Two years later, plaintiff requested and received twelve weeks of consecutive leave. She still believed that

intermittent leave was unavailable under the company policy. Although the FMLA request forms completed by plaintiff mentioned intermittent leave, plaintiff did not understand that this would be allowed. If she had known that intermittent leave was available, she would have taken that instead of consecutive leave.

The employer moved for partial summary judgment, but the court denied the motion, because genuine issues of material facts existed. First, the court recognized that the FMLA imposes a duty on employers to provide information concerning the FMLA. Employers must “notify employees of their FMLA rights and respond promptly to employee questions about FMLA leave applicability and procedures.” Moreover, the employer’s failure to properly explain FMLA procedures can constitute interference with an employee’s FMLA rights if it causes an employee to forfeit FMLA protections. Courts have recognized that the failure to advise an employee of his right to take intermittent leave may be sufficient to establish a valid claim under the FMLA. On that basis, the employer’s summary judgment motion was denied. The court also held that equitable estoppel is available in FMLA cases against a private employer. Consequently, plaintiff was permitted to develop the record with respect to her assertion that defendant should be estopped from challenging plaintiff’s failure to raise the issue of intermittent leave.

**Young v. Wackenhut Corp., 2013 WL 435971 (D. N.J., Feb. 1, 2013)**

The employee took 12 weeks of FMLA leave in connection with the birth of her child. The employer met its general FMLA notice obligations by including a notice of rights in its employee handbook and posting the Department of Labor’s FMLA poster. However, it did not provide the employee with the required individual FMLA notices when she notified the employer of her intention to take FMLA leave. The employee did not return to work after her leave expired, and the employer discharged her shortly thereafter. The employee filed an FMLA interference claim.

The parties filed cross-motions for summary judgment and the court granted summary judgment in favor of the employee. The court rejected the employer’s argument that the summary of rights in its employee handbook constituted sufficient notice. Instead, under FMLA regulations, once an employee gives notice of an FMLA-related leave, the employer is obligated to provide three individual notices to the employee: the Eligibility Notice, the Rights and Responsibilities Notice, and the Designation Notice. Since the employer did not do so, it failed to give “individualized notice” as is required by the FMLA. In addition, the court found that the employee had suffered prejudice because, had the employer provided her with proper notice, she would have been able to structure her leave time differently in order to preserve the FMLA’s job protection.

1. Eligibility Notice [Renumbered and Amended Heading Title (Formerly IV.D.3, “Notice of Ineligibility”)]
2. Rights and Responsibilities Notice [Amended Heading Title (Formerly “Individual Notice”)]

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

**Wingfield v. Claiborne County Family Health Ctr., 2013 WL 1752406 (S.D. Miss. Apr. 23, 2013)**

Plaintiff was an eighteen-year employee with the employer. On August 1, 2010, plaintiff had knee replacement surgery, which required a prolonged absence from work. The employer knew about the absence, and expected plaintiff to return to work by December 1, 2010. The employer, however, did not provide plaintiff with individualized notice that her leave would count against her twelve-week FMLA entitlement. When plaintiff did not return to work by December 1, 2010, the employer asked plaintiff to provide written documentation regarding when she planned to return. In response, plaintiff provided documentation stating that she could not return at present, but there was no indication that she provided the employer with an expected return date. In March 2011, plaintiff had still not returned to work and she was discharged shortly thereafter.

Plaintiff filed a lawsuit alleging, among other claims, interference in violation of the FMLA. The employer moved for summary judgment, which the court denied. The court found that the employer failed to provide individualized notice that the leave would count against plaintiff's twelve-week FMLA entitlement as required by 29 C.F.R. § 825.300(b). The employer argued it was exempt from this notice provision because the employee handbook placed the burden on plaintiff to notify the employer of the need for FMLA leave in order to trigger its duty to provide the notice. The court rejected that argument, finding that the rights established by the FMLA may not be diminished by any "employment benefit program or plan" as provided under 29 C.F.R. § 825.700(a). The court noted that its decision was based on a version of the regulations in effect between January 16, 2009 and March 13, 2013, which could be significant because new regulations became effective on March 13, 2013 which revised the notice requirements.

## **V. MEDICAL CERTIFICATION AND OTHER VERIFICATION**

**Miller v. Northwest Airlines, Inc., et. al., 2013 WL 5425420 (D. Minn., Sept. 27, 2013)**

Between 2004 and 2008, the employer granted the employee numerous FMLA leave requests. The employee filed suit regarding two denied requests. The employer denied the first request due to the employee not being absent three days. The second denied request was based upon a conflicting medical certificate, where the doctor stated plaintiff could work full time, but also required 20 hours off per week. Pursuant to the employer's policy, the employer sought a second opinion concerning her injuries, and denied the FMLA request when the second opinion rendered the employee healthy. No third opinion was requested or sought by either party. In addition to working for the employer, the employee had her own home-based business. Upon finding the employee used company benefits and FMLA leave time to operate her business, the employer discharged the employee on July 24, 2008. The employee filed suit on July 25, 2011 claiming FMLA interference and retaliation. The employee alleged the employer should have



requested a third medical opinion regarding her second denied request, pursuant to company policy.

The employer responded with a motion for summary judgment, of which the employee failed to timely oppose. The court granted the motion for summary judgment holding plaintiff's actions were time-barred even if it applied the 3 year statute of limitations for cases where the employer's conduct constituted willful FMLA violations. Additionally, according to the court, the employer's policy to seek a third medical opinion is permissive and not mandatory, and complies with the FMLA regulations regarding third opinions. The court held the retaliation claim also failed because even if the employee presented evidence that she was entitled to FMLA leave, there was no evidence of a causal link between the employee's request for FMLA leave and her discharge based upon the above facts. The court also held the employer offered sufficient evidence to prove the discharge was based on legitimate, non-discriminatory reasons, thereby shifting the burden to the employee to prove otherwise. The employee failed to meet this burden.

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

**Allen v. Verizon Wireless, 2013 WL 2467923 (D. Conn. June 6, 2013)**

For two years, plaintiff made multiple requests for FMLA leave for both her mother's serious health condition and her own. While plaintiff was absent from work, she e-mailed her supervisor regarding her health on a daily basis. On January 1, 2011, the supervisor informed plaintiff that plaintiff could no longer communicate her absences via e-mail, but rather would be required to call the employer's call center. However, plaintiff's health condition made it difficult for her to call her supervisor, and the supervisor was aware that plaintiff was ill and could not advocate for herself. Another employer representative, who was the coordinator for unplanned leave, usually sent plaintiff e-mails regarding her absences, but from November 15, 2010 through January 14, 2011 no such e-mails were sent. On January 14, 2011, plaintiff was discharged by the employer for job abandonment.

Plaintiff's subsequent lawsuit alleged interference and retaliation under the FMLA. The employer moved to dismiss for failure to state a claim, but court held that plaintiff's complaint made viable allegations of FMLA interference. The employer presented a legitimate, non-retaliatory reason for denying leave because plaintiff had failed to provide necessary medical evidence within the required deadline. However, plaintiff stated a plausible claim because she was entitled to avail herself of the "good faith" exception to the medical certification deadline. The complaint's allegations also alleged that the employer set a deadline "which deviated from Family and Medical Leave Act laws." This statement could form the basis for proof that the employer imposed a deadline of fewer than fifteen days, which would also support plaintiff's interference claim. The court also denied the employer's motion to dismiss as to the FMLA retaliation claim. Noting the changes made by the employer concerning communication of absences, the court found that plaintiff plausibly suggested that the employer made it difficult for her to comply with its policy. In addition, an inference of discrimination was established by proximity between plaintiff's exercise of his FMLA leave and the adverse employment action. Accordingly, plaintiff stated a plausible FMLA retaliation claim.

**Brookins v. Staples Contract & Commercial, Inc., 20 WH Cases2d 457 (D. Mass. 2013)**

The employee began working for the employer in 2004 and was diagnosed with cancer in 2004 and 2006. She took FMLA leave on both occasions. Around 2009, she was diagnosed again with cancer. Two days after her diagnosis, the employee met with her supervisor and a human resources officer who expressed concern regarding the employee's recent unexcused absences, not knowing about the employee's medical condition. At the meeting, the employee notified the employer that the absences were the result of her illness; the human resources officer then suggested the employee apply for FMLA leave so future medical absences would not impact the employee's work history. During the FMLA discussion, the employee was told to submit a health certificate confirming the medical condition within 15 days to qualify for FMLA. However, when the employee's surgeon and oncologist refused to provide the medical certificate, the employee never contacted the doctors again nor did she reach out to inform the employer. In the following weeks, the employee missed work four times, a period which also included medical visits to three different doctors. After the expiration of the 15-day deadline, the employer gave her another seven days to return the certification. When she still failed to return it, the employer discharged the employee for unexcused absences. The employee filed suit for interference with her FMLA rights and retaliation in violation of FMLA. Defendant moved for summary judgment.

The employee did not dispute she failed to provide the required certification by the 15 day deadline. The court was not convinced that her two phone calls – one to her surgeon and one to her oncologist – indicated any diligence to warrant the exception. The court provided a list of actions that *would have indicated* good faith and diligent effort: (1) following up with phone calls after the initial refusal by her surgeon and oncologist; (2) requesting the medical certificates from her other three doctors that she met prior to the 15 day deadline; (3) mailing the certificates to any of her doctors; (4) in-person delivery of the certificate to any of her doctors; or (5) contacting defendant and requesting an extension before the expiration of the 15 day deadline. When the employee failed to product the certificate by the deadline, her medical absences were not protected under the FMLA and she was legitimately discharged from her job for repeated unexcused absences.

***Summarized Elsewhere:***

***Kinds v. Ohio Bell Tel. Co., 724 F.3d 648, 20 WH Cases2d 1781 (6th Cir. 2013)***

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

***Myrks v. City of Oklahoma City, 2013 WL 2147417 (W.D. Okla. May 15, 2013)***

Plaintiff sued her former employer, the City of Oklahoma City, asserting, *inter alia*, FMLA interference and retaliation. The city moved for summary judgment on all claims. Plaintiff contended that the city interfered with her FMLA leave. However, the district court found that plaintiff requested leave and continued to take leave after she claimed her leave was allegedly terminated. Thus, she experienced no interference with her right to take leave. Plaintiff also claimed that she was retaliated against based on her request for FMLA leave. Although the city conceded that plaintiff did engage in a protected activity, the city challenged the second element of a *prima facie* retaliation claim: namely that the city took action that a reasonable employee would have found adverse. Defendant argued that the only action it took was to advise

plaintiff that her medical certification was incomplete and that she would need additional certification to retain her FMLA leave. The court found that the employer was following the law when it advised plaintiff of her incomplete certification, but even if it was not, this type of action could not be considered materially adverse by a reasonable employee. Plaintiff also failed to show that the city acted in a materially adverse manner by constructively discharging her, since the court held that plaintiff failed to show constructive discharge in the first instance. While plaintiff's work environment may have been unpleasant at times, the court found no evidence that conditions rose to a level at which a reasonable employee would be compelled to resign. Moreover, plaintiff quit of her own volition and then asked to be reinstated mere days after resigning, which undermined her argument that she was constructively discharged. Thus, summary judgment was proper on the interference and retaliation claims.

**Ehling v. Monmouth-Ocean Hospital Service Corp., 2013 WL 4436539 (D. N.J. Aug. 20, 2013)**

Plaintiff was hired by Monmouth-Ocean Hospital Service Corp. ("MONOC") in 2004 as a registered nurse and paramedic. Plaintiff took several FMLA leaves during her employment and MONOC granted all of the leave plaintiff requested, even though she was frequently late in submitting required paperwork or failed to submit the paperwork at all. By October 2011, plaintiff had exhausted her FMLA leave, but needed additional leave. MONOC offered plaintiff a 90-day personal leave, but plaintiff never completed the required paperwork. Nonetheless, MONOC completed the paperwork for her and approved the leave. The 90-day leave expired on January 18 and plaintiff informed MONOC that she would not be able to return until March. MONOC told plaintiff that she would only be given additional leave if she completed paperwork indicating she needed a reasonable accommodation. Plaintiff never completed the paperwork and, as a result, was discharged on February 7. Plaintiff filed FMLA interference and retaliation claims against defendants.

The court determined summary judgment was appropriate as to plaintiff's interference claim, as plaintiff was granted five continuous leaves and multiple intermittent leaves despite failing to submit paperwork in a timely manner or at all in some instances. Plaintiff pointed to the fact that MONOC only approved her leaves after rejecting her paperwork on numerous occasions, but the court found this did not support an interference claim as defendants had a right to require adequate documentation. Plaintiff also attempted to use MONOC denying her FMLA paperwork as support for her retaliation claim, but the court rejected this argument, finding that could not amount to an adverse employment action. Because plaintiff pointed to no other employment decisions that resulted from her leave, the court granted summary judgment as to plaintiff's retaliation claim as well.

***Summarized Elsewhere:***

**Swegan v. Shepherd of the Valley Lutheran Retirement Services, Inc., 2013 WL 1284309 (N.D. Ohio March 25, 2013)**

**Clum v. Jackson Nat'l Life Ins. Co., 2013 WL 655146 (E.D. Mich. Feb. 22, 2013)**

C. Second and Third Opinions

*Summarized Elsewhere:*

***Humility of Mary Health Partners v. Teamsters Local Union No. 377, 20 WH Cases2d 1163, 517 F. App'x 301 (6th Cir. 2013)***

***Walker v. Trinity Marine Prods., Inc., 721 F.3d 542 (8th Cir. 2013)***

D. Recertification

***Police Benevolent Association Local 249 v. County of Burlington, 2013 WL 173793 (N.J. Super. Ct., Jan, 17, 2013)***

The employee was a correctional officer at a county jail who was covered by a collective bargaining agreement between his local union and the county. As part of that agreement, the county was authorized to require officers who had been determined by the county to be reasonably likely to have abused their sick leave privileges, to provide medical certification for any further medically related absences. The employee requested and was authorized to take intermittent leave under the FMLA and New Jersey Family Leave Act, in order to care for his son, who had been diagnosed with sickle cell disease. The employee provided medical certification to support that request. Subsequently, the employee took intermittent leave ostensibly to care for his son, and failed to provide medical justification for that particular day's absence. When he failed to do so, the employer denied him paid sick leave for that day.

When arbitration under the collective bargaining agreement resulted in a ruling in favor of the employer, the union sought judicial review. The trial court reversed the arbitration award, holding that the employer's requirement of medical certification for each use of intermittent leave violated the FMLA by interfering with the employee's right to take intermittent leave. The appellate court affirmed the decision, noting the language of 29 U.S.C. §2652(b) providing that rights under the FMLA cannot be diminished by a collective bargaining agreement or employer policy. The court's decision, however, did not address the distinction between a right to *leave* under the FMLA, and a right to *paid sick leave* pursuant to employer policies, where the only consequence the employee suffered was the denial of paid sick leave for the day in question.

*Summarized Elsewhere:*

***Graham v. BlueCross BlueShield of Tennessee, Inc., 20 WH Cases2d 830 (6th Cir. 2013)***

***Patel v. Saint Vincent Health Ctr., 2013 WL 4591271 (W.D. Pa. Aug. 28, 2013)***

***Milton v. Tex. Dep't of Criminal Justice, 707 F.3d 570, 20 WH Cases2d 289 (5th Cir. 2013)***

E. Fitness-for-Duty Certification

***Powell v. Metro One Loss Prevention Servs. Group, Inc., 2013 WL 3956377 (S.D. N.Y. July 26, 2013)***

Plaintiff was employed by defendant first as a security guard and then as field manager from 2009 to 2011. In April 2011, plaintiff called in sick several times because of groin pain. These plaintiff's absences were excused by his supervisor. On April 29, 2011, the employer's HR director informed plaintiff that he was being placed on FMLA leave and that plaintiff would need to provide a doctor's note prior to returning to work. Over the subsequent six weeks, plaintiff submitted three separate doctor's notes regarding his medical condition. Defendant,

however, did not accept these notes and informed plaintiff that additional information was necessary before plaintiff could return to work. Plaintiff asked for additional guidance on what information was necessary and requested that the employer speak directly with his physician. The employer's HR director declined to do so, and plaintiff's employment was terminated on June 8, 2011.

Plaintiff then filed suit against defendant, alleging multiple claims, including various state and federal discrimination claims. Six months later, during the pendency of the employer's motion to dismiss, plaintiff moved for leave to amend his complaint to add claims for FMLA interference and retaliation as well as disability discrimination. The employer opposed plaintiff's motion for leave to amend on the grounds that: (1) plaintiff had unduly delayed in amending his complaint; and (2) plaintiff's proposed FMLA claims were not viable; therefore it would be futile to grant him leave to amend the complaint.

The court granted plaintiff's leave to amend and permitted plaintiff to proceed with his FMLA claims. First, the court ruled that plaintiff's motion was not brought in bad faith and would not result in any undue prejudice to the employer. Therefore, the employer could not demonstrate that plaintiff's motion to amend should be denied on undue delay grounds. Second, the court ruled that plaintiff had set forth a viable claim for FMLA interference. Viewing these allegations in the light most favorable to plaintiff, the court found that defendant improperly delayed plaintiff's return to work pending a fitness-for-duty certification from plaintiff's physician. The court therefore ruled that plaintiff's proposed FMLA claim adequately pled that defendant failed to comply with FMLA regulations regarding permissible inquiries, and that as a result of defendant's failures, defendant unlawfully denied plaintiff reinstatement in violation of the FMLA.

**Gaspar v. DS Waters of America, 2013 WL 2355994 (N.D. Ill. May 22, 2013)**

Plaintiff was a truck driver for a bottled water company. He had chest pains while at work and was taken to the hospital by a co-worker. The company granted plaintiff concurrent short-term disability and FMLA leave. The company had a policy of requiring a doctor's release before returning to work. Plaintiff provided a note from his psychiatrist that he was being treated for generalized anxiety disorder, panic disorder, and depression. The psychiatrist medically cleared plaintiff to drive a semi, but advised he could work only 10 hours a day. The employer then asked plaintiff to see a doctor to renew his Department of Transportation (DOT) medical certificate. Plaintiff went to numerous doctors including an independent DOT-qualified doctor to determine whether a DOT certificate was appropriate. After numerous opinions from different specialists it was determined the employee was fit to drive, he was issued a DOT certificate, and he returned to his prior position with the ten-hour limitation as an accommodation.

Plaintiff brought claims under the FMLA alleging his employer violated the FMLA when it refused to allow him to return to work after his psychiatrist wrote a note. The employer moved for summary judgment. The Court found that the right to reinstatement under the FMLA is not absolute and the employee may be required to obtain certification from a health care provider before resuming work. Plaintiff's driver position was subject to DOT regulations requiring medical examination and certification to show he was physically qualified to operate a

commercial vehicle. The court found nothing in the FMLA’s text or legislative history indicates the right to reinstatement supersedes the DOT regulations. Therefore, the court found the employer could require the employee to obtain DOT certification before returning to work. The court rejected plaintiff’s argument his psychiatrist’s clearance precluded the employer from imposing the more stringent DOT requirements. The court granted summary judgment to the employer on the FMLA claim.

***Summarized Elsewhere:***

***Chaney v. Providence Health Care, 295 P.3d 728, 20 WH Cases2d 632 (Wash. 2013)***Error!

**Bookmark not defined.**

***Walker v. Trinity Marine Prods., Inc., 721 F.3d 542 (8th Cir. 2013)***

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

***Wiseman v. Awreys Bakeries, LLC, 20 WH Cases2d 1138 (6th Cir. 2013)***

Plaintiff took FMLA leave for a back injury and on June 18, 2007, his first day back to work at defendant’s plant, he injured his back again. When he informed defendant’s human resources director about the re-injury, he claimed he was instructed not to visit defendant’s health clinic or file an accident report, but to finish the day performing light duty work. Plaintiff reported to work the next day and claimed that he again requested to visit the health clinic because he could not work due to the injury. On the other hand, defendant contended plaintiff left work after completing an injury report and never indicated he needed FMLA leave. Plaintiff then went out on leave again and human resources requested documentation explaining the need for his absences by June 29. Plaintiff provided documentation on June 29, but human resources requested more detailed information. Plaintiff claimed that he finally received additional documentation on July 22, which was dated July 6 and released him to return to work on July 17. Plaintiff faxed the documentation to defendant on July 23 and defendant discharged plaintiff on July 24.

The district court granted the employer's motion for summary judgment based on plaintiff's failure to provide timely medical certification. The Court of Appeals reversed, finding that defendant never requested medical certification from plaintiff and, in fact, never mentioned the FMLA in its correspondence with plaintiff. Moreover, defendant's deadline for plaintiff to submit documentation was shorter than the fifteen days required by the FMLA. In addition, in viewing the evidence in the light most favorable to plaintiff, the Court found a genuine issue of material fact as to whether plaintiff provided defendant with notice of the need for leave. The Court also found factual disputes as to the seriousness of plaintiff's health condition, which the district court failed to address. Defendant argued plaintiff's absences between July 17 and July 23, 2007 were an alternate basis for summary judgment, but assuming plaintiff's account of the circumstances surrounding the documentation were true, that Court determined that was no basis for summary judgment in favor of defendant.

**Milton v. Tex. Dep't of Criminal Justice, 707 F.3d 570, 20 WH Cases2d 289 (5th Cir. 2013)**

The employee, who had been employed for seventeen years, was discharged after failing to provide medical certification for her requested FMLA leave. Approximately four months before her discharge the employee requested leave under the FMLA, indicating that she was unable to work due to her health condition. The employee was required to obtain medical certification for her leave. The employee initially provided her medical certification. However, approximately one month prior to her discharge in March 2007, the employee once again was required to provide medical certification to support her continued leave. The employer never received any medical certification in March or April of 2007. After she was administratively discharged, the employer notified the employee that the certification still had not been submitted.

The employee sued the employer, alleging interference with her rights under the FMLA. The district court had granted the employer's motion for summary judgment, and in this decision, the Fifth Circuit affirmed. The court concluded that there was no genuine dispute that the employer did not receive the medical certification in a timely manner. The court noted that, under the FMLA, employers can require employees to submit medical certification. It further recognized that "[a] certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification," and the regulations do not require employers to advise employees of missing certifications." If an employee fails to provide the required medical certification, the employer may deny the request for leave under the FMLA. There was no dispute that the employer did not receive a timely medical certification. In addition, the employer previously cautioned the employee in the request for leave that her failure to provide the proper documentation could result in disciplinary action or separation from employment. As a result, the Fifth Circuit concluded that the district court properly granted summary judgment in favor of the employer.

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

**Gonzales v. Pasco County Board of County Commissioners, 2013 WL 179948 (M.D. Fla. Jan. 17, 2013)**

The employee suffered an on-the-job back injury and was out of work on workers' compensation benefits for a little over three months. He was originally released on November 3, 2010 by his treating workers' compensation physician to return to work without restrictions. He was also advised to consult his primary care physician for continuing treatment for his lower back pain. Upon his release to work, the employee was transferred to work in another area in the county. He advised his manager that he was still in pain and, while the exact facts were disputed, it was agreed that he was placed on sick leave for several days and required to keep in touch with his manager. The employee then visited his primary care physician on November 5, 2010, who placed him on sedentary duty restrictions until he could be examined by an orthopedic specialist. The employee communicated these restrictions to his manager, who advised that he had no positions to accommodate these restrictions and placed the employee on medical leave. On November 9, 2010, the orthopedic specialist removed the prior restrictions, releasing the employee to full duty except a prohibition on driving for over 30 minutes, with a referral to a pain management specialist. The employee also requested a change in his workers' compensation physician at this time. Because the employee had remained out of work on medical leave, the employer sent the employee FMLA paperwork on December 7, 2010, with a deadline for returning the medical certification of December 23, 2010. The employee attempted to get a number of physicians to complete the paperwork, but because of the multiple appointments and referrals, none of the physicians did. On December 20 the employee visited the second workers' compensation doctor, who released him to work without limitation. The employee did not return to work after that date, nor did he contact his manager to inform him he needed additional sick leave. The employer terminated the employee effective December 27, 2010, because he had neither returned to work nor provided medical certification for continued leave.

The employee filed an FMLA retaliation claim, and later moved to amend to add an interference claim. The district court concluded on summary judgment that the employee had failed to establish a *prima facie* case of retaliation because his failure to submit the medical certification precluded his absence from being statutorily protected activity. Further, the court held that even had the employee establish a *prima facie* case, he failed to prove pretext, in that it was undisputed that he was terminated after he failed to appear for work for three consecutive days after he was released without restriction by the second worker's compensation physician. The district court also denied the motion to amend as untimely.

**Shepard v. Cascade Hardwood, 2013 WL 168897 (W.D. Wash. Apr. 18, 2013)**

Plaintiff, a full-time employee of defendant, requested leave starting on March 7, 2011 to recover from injuries she sustained in an accident. Defendant informed her that her leave would be under the FMLA. One week later, plaintiff attempted to return to work, but presented a fitness-for-duty note from her doctor that cleared plaintiff for work as of March 7, 2011, the day she left. Plaintiff submitted the remainder of her FMLA paperwork the next week, which instead cleared her for work on March 15, 2011. After meeting with her supervisor to discuss the discrepancy between the date on the original fitness-for-duty note and the subsequent week she was absent from work, plaintiff was terminated due to unexcused absences.

The employee sued the employer under the FMLA, claiming the employer failed to restore her to her former position and denied her benefits to which she was entitled. The



employee unsuccessfully moved for summary judgment as to the employer's liability. The court found that a genuine issue of material fact existed regarding which date plaintiff was actually cleared to return to work, and thus, whether she was entitled to FMLA leave during the week she was absent. Therefore, the court denied plaintiff's partial motion for summary judgment on her FMLA claims.

**Ahmed v. Salvation Army, 2013 WL 6851512 (4th Cir., Dec. 31, 2013)**

The employee sought FMLA leave in order to have surgery for a heart-related condition. The employer provided her with paperwork, including a "Certification of Health Care Provider" form. She submitted two incomplete versions of the form. Each time, the employer advised her that the forms were inadequate and her leave could not be approved without additional information. After the second instance, the employer specified what information was needed, which included whether she could perform some or all of her job functions and her expected period of incapacity. The employee began leave without providing the complete certification form. After missing three days of work, the employer informed her that she would be discharged if she did not submit a completed form. The employee remained absent for 23 days without submitting the form, until the employer terminated her employment.

The employee filed suit under the FMLA, and the district court granted summary judgment to the employer, holding that since the employee never submitted a completed certification form, the employer's duty to provide protected FMLA leave was never triggered and she was not entitled to the FMLA's protections. The court also held that the employer properly complied with the FMLA and its regulations by informing the employee that her certification was incomplete, specifying in writing what information was needed, and providing her with more than seven calendar days to cure the deficiency. Fourth Circuit affirmed the District Court's FMLA holdings in full.

***Summarized Elsewhere:***

**Surprise v. The Innovation Group, Inc./First Notice Systems, Inc., et al., 925 F.Supp.2d 134, 20 WH Cases2d 443 (D. Mass. 2013)**

**Wilson v. Cleveland Clinic Found., 2013 WL 486310 (N.D. Ohio Feb. 6, 2013)**

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

**Swegan v. Shepherd of the Valley Lutheran Retirement Services, Inc., 2013 WL 1284309 (N.D. Ohio March 25, 2013)**

The employee applied for FMLA leave, but certification was completed at a doctor's appointment 10 days later, which was after the employee's medical condition had resolved. The doctor mistakenly completed the certification describing plaintiff's condition as it was as of the date of the later appointment, and not how the condition was at the time plaintiff missed work. On the basis of the certification, defendant discharged the employee for failing to provide adequate certification. Plaintiff filed FMLA interference and retaliation claims.

The court denied summary judgment, finding that the doctor's confusion was apparent from reading the certification, which triggered the employer's obligation to provide notice of the issues with the certification to plaintiff in writing and give her seven days to cure them pursuant to 29 C.F.R. §824.305(c). The court found the employer's unreasonable reading of the certification form, and its failure to permit the employee to cure the certification created a genuine issue of material fact as to both the interference as well as the retaliation claim.

**Chaney v. Providence Health Care, 295 P.3d 728, 20 WH Cases2d 632 (Wash. 2013)**

Upon returning from FMLA leave, a hospital employee was required to take a drug test after a co-worker reported that the employee appeared tired and incoherent. The employee tested positive for methadone and the doctor administering the test suggested he obtain a fitness for duty evaluation. Based on this recommendation, the hospital required the employee to go to a third party physician for evaluation. Before the scheduled evaluation, on July 5, the employee's treating physician provided the employee with a letter stating that the employee was fit for duty. On July 16, the third party physician evaluated the employee and opined that he was not fit to return to duty due to his medication. On July 31, the hospital sent a letter to the employee stating it was unilaterally placing him on FMLA leave effective July 16, requesting that the employee have the third party physician complete FMLA medical certification, and further notifying him that his leave expired on August 27.

On August 7, after the third party physician notified the hospital that the employee's treating physician had to complete the medical certification, the hospital instructed the employee to have his treating physician complete the medical certification. On August 10, the employee's treating physician completed the forms, stating the employee "is ok to return to work as soon as Employer allows." The employee indicated he was prepared to return to work, but the hospital told him he must get the third party physician's permission to return to work. The third party physician refused to change his prior recommendation, and on August 27, the hospital discharged the employee, claiming that he failed to present a valid fitness for duty certification.

The trial court denied plaintiff's motion for a directed verdict that defendant violated the FMLA and a jury returned a verdict for the company. The Court of Appeals reversed the trial court's denial of plaintiff's motion, and the Supreme Court affirmed. The court noted that only two requirements must be met for a valid return to work certification: (1) it "need only be a simple statement of an employee's ability to return to work" and (2) the "simple statement" must "be made contemporaneously with the employee's ability to return to work." If these two requirements are met, the employer's failure to permit the employee to return to work violates the FMLA. If the employer has questions about the certification, it "may ask the treating physician for clarification, but may not delay the employees return to work while the request for clarification is being made." The court held that plaintiff was entitled to a verdict as a matter of law because the FMLA required defendant to return plaintiff to work or seek clarification. If the employer had questions, it could question the physician, but could not terminate the employee.

## **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

#### *Summarized Elsewhere:*

**Baney v. Holder, 2013 WL 1103277 (N.D. Tex. Feb. 12, 2013)**

- 1. Generally
- 2. Types of Leave
  - a. Paid Vacation and Personal Leave
  - b. Paid Sick or Medical Leave

#### *Summarized Elsewhere:*

**Rincon v. American Federation of State, County, and Municipal Employees, 2013 WL 4389460 (N.D. Cal. Aug. 13, 2013)**

- c. Paid Family Leave
  - d. Workers' Compensation or Temporary Disability Benefits
  - e. Compensatory Time
- C. Limits on the Employer's Right to Require Substitution of Paid Leave [New Topic]

**Hunt v. Central Consol. School Dist., 2013 WL 3214928 (D. N.M. Jun 12, 2013)**

Plaintiffs were former employees of defendant. Plaintiffs asserted numerous claims, including that defendant did not have the right to require plaintiffs to take paid sick leave concurrently with FMLA leave. The court noted that an employer may run paid sick leave and FMLA leave concurrently, however, the employer must provide the employee with adequate notice of its policy. Plaintiffs argued that the employer had no such policy in place, and therefore the employer violated 29 C.F.R. §825.207(a). The district court found that the employer had such a policy and employees were notified of its existence.

#### *Summarized Elsewhere:*

**Deboard v. Board of County Commissioners of the County of Comanche, et. al., 2013 WL 5676740 (W.D. Okla., Oct. 18, 2013)**

### **III. MAINTENANCE OF BENEFITS DURING LEAVE**

#### **A. Maintenance of Group Health Benefits**

1. Generally
2. What Is a Group Health Plan
3. What Benefits Must Be Provided
4. Payment of Premiums
  - a. Methods of Payment
    - i. During Paid Leave
    - ii. During Unpaid Leave
  - b. Consequences of Failure to Pay
5. When the Obligation to Maintain Benefits Ceases
  - a. Layoff or Termination of Employment
  - b. Employee Notice of Intent Not to Return to Work
  - c. Employee's Failure to Pay Premiums
  - d. "Key Employees"
  - e. Other Circumstances
6. Rules Applicable to 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**

#### **Applegate v. Kiawah Development Partners, Inc., 2013 WL 3206928 (D. S.C. Jun. 24, 2013)**

The employee worked as the financial manager for the employer, a local, family-owned business that developed residential and resort golf communities. The employee had control over 140 family investment and bank accounts. In addition to her salary, the employee was entitled to \$20,000 annually in the form of "incentive service fees." The service fee, which the employer

viewed as a bonus, was contingent upon the employee's satisfactory performance. In May 2010, the employee informed her employer she intended to take maternity leave. Immediately before the employee's leave in August 2010, the employee failed to return sensitive data and files to the employer and failed to save her work on the employer's server. In addition, the employee deleted numerous emails from her computer and failed to respond to several emails and messages from the employer. The employee also wrote multiple postdated checks for bills to be paid during her maternity leave, including sixteen checks for her own incentive service fee payments. The employer terminated the employee on September 3, 2010, in part because of the postdated incentive service fee checks.

The employee brought claims alleging FMLA interference and retaliation, and the employer filed a motion for summary judgment as to both claims. The employer argued that the employee had been terminated for conduct unrelated to her FMLA leave, specifically writing sixteen checks for service fees that she was not allegedly entitled to while on leave. However, the employer did not take any action against the employee when she wrote and cashed identical postdated checks during her maternity leave in 2008. Thus, after finding no support for the employer's argument in its policies and employment agreement or the employer's previous actions during the employee's leave, the court determined that for purposes of summary judgment, a question of fact remained as to whether the employee was entitled to the fee during her leave. The court denied summary judgment as to both of the employee's FMLA claims.

1. Generally
2. Non-Health Benefits Continued at Employer's Expense
3. Non-Health Benefits Continued at Employee's Expense
4. Specific Non-Health Benefits
  - a. Pension and Other Retirement Plans
  - b. Lodging
  - c. Holiday Pay
  - d. Paid Leave [New Topic]

## CHAPTER 8. RESTORATION RIGHTS

### I. OVERVIEW

#### *Summarized Elsewhere:*

*Powell v. Metro One Loss Prevention Servs. Group, Inc.*, 2013 WL 3956377 (S.D. N.Y. July 26, 2013)

*Felder v. Edwards*, 2013 WL 6383126 (S.D. Miss. Dec. 5, 2013)

### II. RESTORATION TO THE SAME OR AN EQUIVALENT POSITION

#### A. General

*Dollar v. Smithway Motor Xpress, Inc.*, 710 F.3d 798, 20 WH Cases2d 717 (8th Cir. 2013)

The employee was employed as a driver manager, but was transferred to a new position prior to her discharge. She suffered from depression, and her psychiatrist wrote a medical note stating that she was to remain on sick leave until July 30, 2007. The employee mailed the medical excuse to the employer, but the employer stated that it did not make any difference because the employer needed to fill a driver recruiter position immediately and would not hold the position until July 30. The employer did not offer FMLA leave to the employee or provide any materials regarding FMLA leave. The employee sued the employer for violations of the FMLA, and the district court found in her favor.

The employer argued that the employee never accepted or held the position of driver recruiter, and therefore it did not interfere with her FMLA rights. The court noted that the FMLA requires an employer to reinstate the employee her original position or to an equivalent position. The court affirmed the district court's finding that the employee was transferred to the driver recruiter position prior to her discharge. Thus, the Eighth Circuit affirmed the district court's finding of liability as to the employee's FMLA claim.

#### *Summarized Elsewhere:*

*Hoff-Pierre v. Univ. Hosp., Inc.*, 523 Fed. App'x 313 (6th Cir. 2013)

#### B. Components of an Equivalent Position

#### *Summarized Elsewhere:*

*Allen v. Babcock & Wilcox Tech. Servs. Pantex, LLC*, 2013 WL 5570192 (N.D. Tex. Oct. 9, 2013)

*Chauncey v. Life Cycle Engineering, Inc.*, 2013 WL 5468237 (D. S.C. Sept. 30, 2013)

#### 1. Equivalent Pay

*Laigon v. Philadelphia Mental Health Care Corp.*, 2013 WL 1842240 (E.D. Pa. May 1, 2013)

Plaintiff was a financial policy advisor hired by defendant Philadelphia Mental Health Care Corporation, a non-profit corporation that had a contract with the City of Philadelphia to

provide various support services. Although defendant performed all human resources functions associated with plaintiff's job, his work was supervised by two City employees. Plaintiff took FMLA leave in 2007 when he suffered a fracture to his left hand. Upon his return from leave, he requested to work a reduced schedule. His salary was commensurately reduced by twenty percent. Less than one month after his return to work, plaintiff was able to return to full-time status. At that time, the City determined that plaintiff was no longer needed on a full-time basis. One year later, the City requested that plaintiff return to full-time status, and he agreed. Defendant was never apprised of this change in status from either the City or plaintiff. Accordingly, plaintiff's salary remained at eighty percent of his prior salary.

Plaintiff alleged, among other things, that the company violated his rights under the FMLA when it failed to pay him his full salary following his return to full-time status. The court assumed, without deciding, that failure to pay plaintiff for his full hours worked after returning from FMLA leave constituted a violation of the FMLA. However, this violation could not be attributable to defendant because the company was never aware of his change in work schedule. Moreover, plaintiff failed to offer a legal or factual basis for imputing his City supervisor's knowledge to the company. Accordingly, the court dismissed plaintiff's FMLA claim against defendant.

2. Equivalent Benefits
3. Equivalent Terms and Conditions of Employment

**Karaffa v. Montgomery Township, et al., 2013 WL 1157626 (E.D. Pa. Mar. 21, 2013)**

Plaintiff worked as a police dispatcher on a rotating shift schedule. Plaintiff was diagnosed with gestational diabetes and placed on morning shift schedule for the remainder of her pregnancy. Plaintiff took her full allotment of FMLA leave after her child was born. Upon return to work, she was placed back on a rotating shift schedule. One month later, plaintiff was injured in an auto accident and took leave covered by her short-term disability policy. When plaintiff returned to work after the accident, she was placed on restricted duty at the direction of her treating physician. Plaintiff was then placed on paid leave while the employer awaited the results of an independent medical exam conducted to evaluate the work restrictions imposed by her treating physician.

Plaintiff never returned to work and filed claims for FMLA interference, discrimination and constructive discharge. Plaintiff claimed that she was entitled to return to a morning-shift-only schedule upon return from FMLA leave. The court held that plaintiff was only entitled to return to the rotating shift schedule she was on prior to the gestational diabetes diagnosis. Plaintiff also claimed that restricted work duty and constructive termination following short-term disability leave constituted FMLA violations. The court held that even if these actions constituted discrimination or constructive discharge, they lacked any causal connection to protected FMLA activities.



**Haskell v. CentraCare Health Sys.--Long Prairie, 952 F. Supp. 2d 838, 20 WH Cases2d 1701 (D. Minn. 2013)**

The employee worked part-time at a nursing home, and spent 50-60% of her time on clinical assessment duties (“MDS”) which involved interviews and data entry work. During her remaining time, the employee worked as an activities aide and ran the exercise program for residents with memory and behavior problems. More than 30 years into her tenure with the employer, the employee sought 12 weeks of FMLA leave for back surgery. During the employee’s leave, her supervisor assumed the MDS duties. Her supervisor also decided to change the employee’s hours so that the employee could focus more on resident care. When the employee called her supervisor to inform her that she was ready to return to work, the supervisor informed her that she would no longer have MDS duties and also stated that the employee would no longer be in charge of the exercise program due to her back problems. Shortly before her return, the employee wrote to the employer expressing concern about both the changes and the employer’s inability to send her an accurate job description following their initial discussion. The next day, the employer called the employee to discuss her letter. During this call, the employee informed the employer that she would not return to work. She then filed suit against her employer, claiming it violated the FMLA by failing to reinstate her to the position she held before leave. The employer moved for summary judgment.

The district court granted the employer’s motion in part and denied it in part. In response to the employee’s FMLA interference claim, the employer argued that it offered the employee an equivalent position. However, the court noted the position could not be viewed as “equivalent” simply because the employee’s title had not changed. While noting the case was a “close call,” the court found a genuine issue of material fact existed as to whether the changes to the employee’s job were “material,” and therefore, whether the employer had actually offered an equivalent position. Further, while the employer could avoid liability by showing it would have made the same decision had the employee not exercised her FMLA rights, the court could not conclude that the employer would have made the described changes regardless of the FMLA leave. The court granted the employer’s motion for summary judgment on the employee’s retaliation claim, however, finding that the employee did not suffer a materially adverse employment action.

**Vancoppenolle v. Sun Pharmaceutical Industries, 2013 WL 1337784 (N.D. Ohio Mar. 29, 2013)**

Plaintiff was a chemical testing analyst for the employer. Plaintiff believed she was being ordered to fabricate testing dates on documentation that was about to be reviewed by the FDA. When she reported these claims to the employer, it began an investigation into her allegations. Shortly after making the report, however, plaintiff went on FMLA leave, citing health problems from the stress she was experiencing due to backdating situation. Plaintiff returned to work about one month later. The employer had investigated and discovered deficiencies in plaintiff’s review of various laboratory documents. The employer gave her a revised list of job responsibilities, to which the employee objected. She claimed she was being retaliated against, and drafted a letter of resignation. A manager urged her to not to resign, and the next day, plaintiff met with her supervisors to again reiterate that she was being forced to

back date lab documentation. Ultimately, the employer determined that plaintiff's claim of falsification of testing dates could not be substantiated. Plaintiff became increasingly difficult to work with. Eventually, her managers began drafting a severance agreement because they concluded that plaintiff should leave the company. Five days after the severance agreement was drafted, plaintiff met with her supervisors for their annual review. The meeting did not go well, and the employer discharged plaintiff that same day, citing her performance, attendance problems, and her refusal to take instruction.

Plaintiff filed a lawsuit alleging FMLA retaliation and interference, and both parties moved for summary judgment. The court found an issue of material fact on the employee's interference claim, but granted summary judgment for the employer on the retaliation claim. As to the interference claim, plaintiff's job was significantly diminished in terms of her work hours, responsibilities, and duties, and the employer added a new requirement that she wash dishes at the lab. These allegations were sufficient to defeat the company's motion for summary judgment. The court noted that even though plaintiff did not suffer any loss of wages, that alone was not sufficient to show that she had been returned to an equivalent position. The employer prevailed on the retaliation claim. During her deposition, plaintiff indicated that she believed she was discharged because she refused to back date documents. Plaintiff failed to assert that her decision to take FMLA led to her termination, and this was fatal to her FMLA retaliation claim.

***Summarized Elsewhere:***

***Joyce v. Office of the Architect of the Capitol, 2013 WL 4758186 (D. D.C. Sept. 5, 2013)***

### **III. CIRCUMSTANCES AFFECTING RESTORATION RIGHTS**

***Barnes v. Spirit Aerosystems, Inc., 2013 WL 162589 (D. Kan. Jan. 15, 2013)***

The employer granted the employee's request for intermittent FMLA leave. The employee was required to tell his supervisor when an absence was due to an FMLA-approved reason. In addition, the employee was required to record his FMLA absences in the company's timekeeping system. The employee complied with the employer's leave policy for four months, but then he was absent for two consecutive days without notifying his supervisor or following the other leave procedures. Accordingly, the employer treated these absences as unexcused and issued two attendance disciplinary memoranda for the employee. The employer's attendance policy provided for the discharge of any employee who received three attendance disciplinary memoranda. Because the employee had received another attendance disciplinary memorandum on an earlier occasion, he was discharged pursuant to the policy.

The employee brought claims for interference and retaliation under the FMLA, but the court granted the employer's motion for summary judgment. The employer did not violate the FMLA by discharging an employee for failing to comply with a policy requiring notice of absences, even though the absences were protected by the FMLA. The court found that the employee was discharged solely for failing to comply with the employer's attendance policy. Therefore, the court concluded that there was no genuine dispute of material fact as to the reason of the employee's termination, and summary judgment was granted for the employer.

**Foster v. Sanderson Farms, Inc., 2013 WL 177998 (S.D. Tex. Jan. 16, 2013)**

When the employee needed surgery, he went on thirteen weeks of medical leave, which the employer later extended for an additional five weeks. A supervisor required the employee to obtain a full medical release before he could return to work. When the employee received a full release from his physician and sent it to his supervisor, he was told he could return to work the following day. That same day, however, the supervisor became aware of photos on the Internet of the employee on a hunting trip about two weeks earlier. In a meeting with his supervisor and a manager, the employee was told that the FMLA paperwork he submitted stated that he was released to work as of a date prior to the hunting trip. The supervisor also raised the issue of the hunting trip, which had taken place after the expiration of the FMLA leave, but while the employee was on extended medical leave. According to the supervisor, the employee did not admit to going on the hunting trip until he was shown the pictures. The next day, the employee provided a note from his physician, who explained that the release date from before the hunting trip was an error. The supervisor called the physician's office to confirm the information, and was told that the earlier date was a mistake. Nevertheless, the employee was discharged for failure to comply with the conditions of his FMLA leave.

The employee brought a claim against the employer for retaliatory discharge under the FMLA. The court granted summary judgment for the employer, which argued that it discharged the employee for a legitimate, non-retaliatory reason. The employee was discharged because the employer lost confidence in him based on the conflicting dates of the medical releases, the hunting trip he took while on paid medical leave, and the supervisor's perception that the employee was not honest or forthcoming about the hunting trip. The court held that the employee did not present sufficient evidence to create an issue of fact regarding the employer's reason for its decision. The employee's evidence was not sufficient because it failed to create an issue as to whether the termination decision was not rationally justified by the facts as the employer believed them to be. Rather, the employee's evidence merely showed that the employer was wrong in its belief that he had submitted conflicting medical releases. The court found that given the totality of the circumstances, the employer's decision to terminate his employment had a rational justification.

**A. Events Unrelated to the Leave**

**Madry v. Gibraltar National Corp., 526 Fed. Appx. 593 (6th Cir. 2013)**

While plaintiff was on approved FMLA leave for the birth of her child, the employer discharged her, citing a lack of work. Plaintiff brought a claim against the employer under the FMLA, but the district court granted summary judgment for the employer. On appeal, the Sixth Circuit affirmed, finding no evidence that defendant's proffered legitimate, nondiscriminatory reason for plaintiff's discharge was pretextual. The court rejected plaintiff's argument that defendant was required to show her discharge was economically required. According to the court, "[r]educing labor costs and improving efficiency are valid business reasons for conducting layoffs, even when the degree to which such actions are motivated by economic hardship is debatable."

**Rivera v. FedEx Corporation, et al., 2013 WL 6672401 (N.D. Cal., Dec. 18, 2013)**

The employee injured his knee and was absent from work on FMLA leave for approximately one month. When the employee returned to work, he requested certain workplace accommodations while he continued to recover from his injury. While the employee was out on leave, the employer reorganized its workforce and, as a result, certain positions were reassigned according to seniority. The employee was 16 out of 17 as far as seniority, and was assigned to new hours and job duties immediately upon his return from leave. The employee filed suit, alleging his reassignment was in retaliation for his FMLA leave.

In granting the employer's motion for summary judgment, the court held that the employer demonstrated that the employee would not have been employed in the same job position even if he had not taken FMLA leave. The court also found that he was selected for reassignment because of his seniority and not because of his FMLA leave.

1. Burden of Proof

**Christmas v. Arc of the Piedmont, 2013 WL 718812 (W.D. Va. Feb. 27, 2013)**

The employee formerly worked for a non-profit employer that provided services and housing to individuals suffering from intellectual and developmental disabilities. During the relevant time period, the employee was stationed at one of the employer's group homes in one of two "sleep positions," where she was on duty overnight while another employee was allowed to sleep. The employee took FMLA leave to care for her sick husband. While she was on leave, the company decided to eliminate all sleep positions at the home where the employee had worked. The decision was made based on economic factors, as the number of residents in the home had dropped from six to four. When the employee returned from FMLA leave, all of the sleep positions at other group homes were filled. The employer offered the employee a different position, but she declined the offer and later resigned entirely. Shortly after her resignation, the employee filed suit against the employer alleging, *inter alia*, interference and retaliation under the FMLA because the employer failed to restore her to her previous position upon return from FMLA leave.

The District Court granted the employer's motion for summary judgment on the employee's FMLA interference claim, explaining that the FMLA provides only a limited right to restoration and that an employer can avoid liability if it proves that it would not have retained an employee even if the employee had not been on FMLA leave. Here, the court found that the employer successfully demonstrated that it had eliminated the employee's former position for economic reasons. Thus, the employee would have lost her job regardless of FMLA leave. The court also granted summary judgment to the employer on the employee's FMLA retaliation claim. The court stated that the employee could not carry her burden of establishing that the company's reason for eliminating her position was pretext for discriminating against her. Again, the court stressed that the employer had shown that economic factors lead to the elimination of the employee's job. Thus, even if the employee stated a *prima facie* case for FMLA retaliation, the employer would be able to carry its burden of showing a legitimate, non-discriminatory purpose for eliminating the employee's position.

2. Layoff

***Summarized Elsewhere:***

***Lee v. Lexicon, Inc., 2013 WL 1445656 (E.D. Ark. April 9, 2013)***

3. Discharge Due to Performance Issues

***Worthington v. Whole Foods Market Group, Inc., 2013 WL 228126 (N.D. Ill. 2013)***

Plaintiff, a grocery store assistant manager, sued his former employer for interference and retaliation under the FMLA. On June 28, 2010, plaintiff was given a “final warning” of unsatisfactory work and placed on a ninety-day “action plan” that outlined over thirty work improvement guidelines. Plaintiff had his first meeting with his supervisor on July 13, 2010 to discuss plaintiff’s progress on the action plan. Later that same day, plaintiff was injured in an automobile accident. He requested and was placed on FMLA leave. The supervisor claimed he did not learn of plaintiff’s injury until a day or two later. The supervisor testified during his deposition that he was disappointed with plaintiff’s progress. At the meeting, however, the supervisor expressed no dissatisfaction with plaintiff’s performance or progress. The supervisor also testified that he called the executive operations coordinator for the region on July 13 to get approval to terminate plaintiff because he could no longer trust plaintiff in the role of assistant manager. There was no contemporaneous documentation of this communication. The first documentation of the termination decision was dated about five weeks later on August 20, 2010. Plaintiff was released to return to work on August 23, 2010 and returned to work on August 25. On that date, plaintiff was told his employment was being terminated.

Plaintiff claimed the employer violated the FMLA by failing to restore him to his former position when he returned from leave and discharging him for taking FMLA leave. The employer moved for summary judgment on both claims. The district court denied the employer’s motion for summary judgment. Regarding the interference claim, the district court held that a reasonable jury could find plaintiff had made adequate progress on his action plan as of his July 13 meeting because the supervisor expressed no concerns at the meeting regarding plaintiff’s progress. Though the supervisor and executive operations coordinator testified they spoke later that day and agreed to discharge plaintiff – just before the supervisor learned plaintiff had been injured and required hospitalization, the district court found the lack of contemporaneous documentation supporting the employer’s decision significant. Based on these factors, the district court held a reasonable jury could disbelieve the supervisor’s contention and could find the decision to discharge plaintiff was not made until nearer to plaintiff’s anticipated return to work and well after the supervisor had become aware plaintiff had taken FMLA leave. Similarly, the district court denied summary judgment on the retaliation claim because a reasonable jury could find the employer’s testimony contrived and, in effect, back-dated so it would appear the decision to terminate plaintiff’s employment was made completely independent of plaintiff’s request FMLA leave.

***Lichty v. Allina Health System, 21 WH Cases2d 432 (D. Minn. 2013)***

During approved intermittent leave, plaintiff, a registered nurse, was terminated after an audit of plaintiff’s medication documentation revealed unresolved medication discrepancies.

The audit began after a co-worker reported concerns with plaintiff's medication documentation to a supervisor. After her termination, plaintiff filed suit, alleging violations of the FMLA, among other claims. Defendant filed a motion for summary judgment. The court, noting that the FMLA does not impose strict liability on an employer who terminates an employee while the employee is on FMLA leave, found that the reason for plaintiff's termination was wholly unrelated to her FMLA leave and granted defendant's motion for summary judgment.

**Sankpill v. Stone Belt Arc, Inc., 2013 WL 2600453 (S.D. Ind. June 11, 2013)**

Plaintiff filed suit alleging interference with and retaliation under the FMLA after he was terminated for the misappropriation of client funds. Plaintiff was a program manager with a service provider for individuals with developmental disabilities. Plaintiff's responsibilities included the management of clients' finances. As part of those duties, plaintiff reconciled the clients' accounts each month and turned over a monthly ledger to his employer's main office. Plaintiff took FMLA leave to care for his mother. While on leave, defendant discovered a number of financial irregularities, which resulted in plaintiff's termination.

Plaintiff alleged that defendant failed to reinstate him and retaliated against him for taking FMLA leave by terminating his employment. Granting defendant's motion for summary judgment, the court held that plaintiff's failure to reinstate claim failed because defendant had an honest suspicion that plaintiff engaged in misconduct warranting dismissal. The court noted that plaintiff may be able to withstand summary judgment where he can point to evidence from which a reasonable jury would conclude that defendant did not, in fact, have an honest suspicion. Citing the "weakest of proximity evidence, the court held that plaintiff had not presented evidence sufficient to create an inference that he was discharged in retaliation for taking FMLA leave and granted defendant's motion for summary judgment.

**Nicely v. E. Kentucky Power Co-op., Inc., 2013 WL 142430 (E.D. Ky. Jan. 11, 2013)**

The employee, a janitor, was diagnosed with fibromyalgia. The employer granted the employee many absences due to his condition, and asked her to provide a medical certificate for her previous and future absences. The medical certificate provided covered the prior absences and allowed employee to miss one day per month for future issues. When the employee continued to be absent for more than one day per month, the employer requested another medical certificate, which the employee never provided. Soon after the employer's request, the employee allegedly threatened to kill a co-worker. The employer suspended the employee and, after an investigation, terminated her employment. The employee filed a suit alleging interference and retaliation under the FMLA.

The court granted summary judgment for the employer on both claims. The employer had a legitimate, nondiscriminatory reason for the employee's discharge, and the employee failed to establish pretext for her retaliation claims. Since the employer granted the requested time off and the employee presented no other evidence, she failed to establish a prima facie claim of interference. As to the retaliation claim, the court found the employer's honest belief was reasonable because it relied on particular facts before making the decision to discharge the employee. The employee's other retaliation arguments—that she was required to explain her

absences, that her performance evaluations noted her absences, and that her supervisor suggested she file for disability—were not retaliatory since they were not adverse employment actions and did not result in a change of terms or conditions of employment.

**Talbott v. Time Warner Entm't-Advance/Newhouse P'ship, 2013 WL 152179 (W.D. Tex. Jan. 11, 2013)**

The employee worked in a technical support call center. The employer maintained a minimum attendance policy that allowed periodic review of employees' attendance patterns. Discharge could result from excessive absences. After accruing twenty unexcused absences, the employee received a final written warning. The employee subsequently was absent on thirty occasions in a three month period. She attempted to certify these absences as leave under the FMLA, but did not send complete documents to the employer's FMLA administrator to support her claim. The FMLA administrator determined the employee was not entitled to FMLA leave, and the employer discharged the employee. The employee sued, claiming the employer retaliated against the employee for taking FMLA leave.

Granting summary judgment for the employer, the court applied the *McDonnell Douglas* framework to analyze the FMLA retaliation claim. The court held that the employee's absences were a legitimate, nondiscriminatory reason for discharge. The employee argued pretext existed due to the employer's failure to follow its own internal policies and the improper denial of FMLA leave. The court disagreed, noting that failure for an employer to follow its own internal policies is not conclusive evidence of pretext and that the employer's good faith reliance on its FMLA administrator rebuts the inference that it retaliated.

**Rowe v. U.S. Bank National Association, 2013 WL 3974330 (C.D. Ill. Aug. 1, 2013)**

The employee requested and was granted six weeks of FMLA leave to undergo surgery. The employee had ongoing performance deficiencies, and the employer notified her that her employment would terminate on her last day of leave. On the last day of her approved leave time, the employee called the employer's third party leave administrator to request a five-day extension of her leave. The administrator advised her that medical documentation would be needed to extend her leave, but the employee never returned the attending physician statement to the administrator, and never confirmed that her physician did so. Accordingly, the administrator informed the employee that she was ineligible for an extension of her leave, and the employee's effective termination date was the first day after her leave expired. The employee's subsequent lawsuit alleged claims of FMLA interference and retaliation.

The employer moved for summary judgment, and for numerous reasons, the court granted the motion as to each of the employee's claims. The employee was not entitled to protection under the FMLA after her effective termination date, because she would have been discharged at that time regardless of whether she had gone on leave. Furthermore, the employee was not entitled to an extension of her leave because she did not return the physician statement requested by the employer's administrator or ensure that her doctor returned the form. As to her retaliation claim, the only evidence the employee put forth to support her allegation was the temporal proximity: she was terminated the day before her leave was set to begin. The employee

also alleged that a similarly situated co-worker received more favorable treatment than she did, but failed to put forth any evidence to support the claim. Because temporal proximity alone is insufficient to survive summary judgment, and there was no other evidence that to rebut the employer's proffered reasons for the termination decision, the court granted summary judgment for the employer.

**Ebersole v. Novo Nordisk, Inc., 2013 WL 1767977 (E.D. Mo. April 24, 2013)**

The employee was a sales representative who was granted FMLA leave to undergo treatment for rheumatoid arthritis. Around the same time, the employer discovered that some sales representatives were falsifying sales call reports. About seven months after she returned from leave, the employee and dozens of other sales representatives were subsequently discharged for falsely recording calls. The employee sued the employer, alleging that she was harassed and retaliated against for exercising her rights under the FMLA.

The employee argued that she presented direct evidence of retaliation because a supervisor asked the employee about her medical issues, and a supervisor told her not to take any additional leave. The court held that the questions about the employee's medical condition were not evidence of discrimination because they were nothing more than curiosity about the employee's absence. In addition, the comment that the employee should not take any additional leave did not meet the Eight Circuit's definition of direct evidence, which must be strong and clearly point to the presence of an illegal motive.

As to indirect evidence of discrimination, the comments alleged by the employee were sufficient to state a prima facie claim, but she could not overcome the employer's legitimate non-discriminatory reason for terminating her employment. After a thorough investigation, the employer discharged multiple employees for falsifying calls. Accordingly, there was not sufficient evidence to conclude that the employee's discharge, which occurred seven months after she returned from leave, was retaliation for her exercise of FMLA rights.

**Turner v. Florida Prepaid College Board, 522 Fed. Appx. 829, 20 WH Cases2d 1688 (11th Cir. 2013)**

Plaintiff worked as a Financial Analyst for defendant beginning in 2008. Plaintiff received a performance review in 2010 which noted that her performance had declined significantly over the previous year. As a result, plaintiff was placed on a 60-day performance improvement plan and was told that her failure to improve could result in discharge. About halfway through the performance improvement plan, plaintiff's supervisor began drafting a report on her progress to indicate she had made no improvement. The next day, plaintiff requested FMLA leave; later that same day, her supervisor gave plaintiff the progress report. Shortly thereafter, plaintiff began her FMLA leave. Upon her return from leave, plaintiff was discharged.

Plaintiff filed suit, alleging FMLA interference and retaliation. The district court granted the employer's motion for summary judgment and plaintiff appealed. As to the interference claim, the district court granted the employer's motion for summary judgment because, at the



time plaintiff was discharged, she had no pending requests for leave. The Eleventh Circuit reversed because the basis for plaintiff's interference claim was the employer's failure to restore her upon her return and the record did not unequivocally demonstrate that the employer decided to discharge plaintiff before learning she was going to take leave. The Court also reversed the grant of summary judgment on the retaliation claim. While the district court determined plaintiff could not establish a causal connection because the employer decided to discharge her before learning she was taking FMLA leave, the Eleventh Circuit noted that the evidence showed that the decision maker was aware of plaintiff's leave when he recommended discharge. And the progress report that was given to plaintiff before her leave did not mention that she was going to be discharged. Further, plaintiff made a sufficient showing that her alleged performance deficiencies were pretext, as the supervisor decided to terminate the performance improvement plan early; on the same day he learned plaintiff was taking leave.

***Summarized Elsewhere:***

***Laing v. Federal Exp. Corp.*, 703 F.3d 713, 20 WH Cases2d 1 (4th Cir. 2013)**

***Murray v. JELD-WEN, Inc.*, 922 F. Supp. 2d 497, 21 WH Cases2d 1145 (M.D. Pa. 2013)**

***Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013)**

***Pearrow v. Abbot Laboratories*, 2013 WL 1305329 (W.D. Mich., Mar. 28, 2013)**

4. Other

***Forbes v. Unit Texas Drilling, L.L.C.*, 20 WH Cases2d 1548 (5th Cir. 2013)**

Plaintiff claimed that defendant, his former employer, called him when he was on FMLA leave to care for his spouse and threatened to discharge him if he did not immediately return to work. During the call, plaintiff explained his situation to his supervisor, who acquiesced and asked plaintiff to provide supporting medical documentation. While he was on FMLA leave, plaintiff's position was eliminated and, as a result, plaintiff was placed in a different position upon his return.

Plaintiff filed an FMLA interference claim relating to the phone call with his supervisor as well as an FMLA retaliation claim. The court affirmed the district court's grant of summary judgment as to both FMLA claims. Plaintiff's interference claim failed because plaintiff's employment was not terminated and plaintiff was granted FMLA leave after he explained the situation and completed the requisite paperwork. Plaintiff's retaliation claim failed because, although he was returned to a lower-level position, plaintiff could not establish a causal connection because plaintiff's former position no longer existed when he returned from leave.

***Summarized Elsewhere:***

***Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 20 WH Cases2d 1860 (5th Cir. 2013)**

***Howard v. Pennsylvania Dep't of Pub. Welfare*, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

***Vera v. Waterbury Hospital*, 2013 WL 1296273 (D. Conn. Mar. 28, 2013)**

**B. No-Fault Attendance Policies**

**Merger v. Arbor E & T, LLC, 2013 WL 164107 (S.D. Tex. Jan. 15, 2013)**

The employee was an operations manager for a workforce development provider. The employee experienced a variety of medical problems, which she alleged resulted from a hostile and discriminatory work environment. The employee's physician told her to take medical leave. The employee alleged that when she told her supervisor of her need for leave, he refused to allow her to begin her leave immediately, insisting that she first finish a newly assigned project. The employee began her leave one or two days after she requested it. When the employee was ready to return to work, she claimed that her supervisor made it unnecessarily difficult by refusing to discuss her return. The supervisor also allegedly required her to be cleared to work by the same physician who advised her to go on leave, even though he was not available at the time. Because she could not procure the required clearance before her twelve weeks of leave FMLA leave expired, the employee requested and was granted another seven days of general leave. When she eventually returned to work, her office was filled with boxes, and her personal belongings had been removed. Although she allegedly continued to perform her operations manager duties, internal emails showed that management decided that she would not return to that position. In fact, the employer had posted her position as "available" during her absence, and had begun accepting applications around the date of her return. The employee claimed that her supervisor pressured her to accept another position that constituted a demotion and pay cut. The employee accepted the other position, but was laid off shortly thereafter.

The court granted the employer's motion for summary judgment as to the employee's FMLA interference claim, but denied summary judgment as to her FMLA reinstatement claim. The court held that even if the employee could create a factual issue as to whether the employer interfered with her FMLA rights, to prevail on her claim she must also show a real impairment of her rights and resulting prejudice. The employee did not provide sufficient evidence that her FMLA rights were impaired because she requested, and was given, all the FMLA leave to which she was entitled under the law. With respect to the FMLA reinstatement claim, the court held that a factual dispute existed as to whether the employer reinstated her to the operations manager position upon her return. Therefore, summary judgment on that claim was inappropriate.

***Summarized Elsewhere:***

**Montgomery v. Wal-Mart Stores East, L.P., 2013 WL 4602523 (C.D. Ind. Aug. 29, 2013)**

**White v. Dana Light Axle Manufacturing, LLC, 725 F. 3d 608 (6th Cir. 2013)**

C. Employee Actions Related to the Leave

***Summarized Elsewhere:***

**James v. Hyatt Regency Chicago, 707 F.3d 775, 20 WH Cases2d 553 (7th Cir. 2013)**

**Nagel v. County of Orange, 21 WH Cases2d 115 (S.D. N.Y. 2013)**

1. Other Employment

***Summarized Elsewhere:***

**Dietrich v. Susquehanna Valley Surgery Ctr., 20 WH Cases2d 364 (M.D. Pa. 2013)**

2. Other Activities During the Leave

**Hamm v. Nestle USA, Inc., 2013 WL 4401328 (N.D. Ill. Aug. 15, 2013)**

The employee was granted FMLA leave for the purpose of providing care to his father. The employee and his father authorized the employer to contact father's doctors to obtain information related to the employee's FMLA use. On one occasion, the employee asked to take a floating holiday, and when the request was denied, said he needed FMLA leave to take his father to the doctor. After granting the request, the employer called the doctor's office and learned that the father did not have an appointment. The employer followed up with an investigation into the employee's use of FMLA leave, which uncovered allegations from co-workers that the employee used his leave for non-FMLA purposes, such as playing golf. In addition, when the employer once again contracted the father's doctor for more information, it learned that the employee withdrew authorization for the doctor to disclose any further information to the employer. After being discharged for suspected abuse of FMLA leave, the employee sued the employer for interference with his rights under the FMLA.

The court granted the employer's motion for summary judgment, finding it had an honest belief that the employee had used his leave for non-FMLA purposes. The employee claimed that he did not misuse his leave, and that there was an issue of material fact because the information relied on by the employer was incorrect. The court rejected this argument, noting that the ultimate inquiry is not whether the employee actually misused his leave, but whether the employer had an honest belief that the employee abused his leave. Likewise, the court rejected the employee's argument that the employer should have given more credit to his version of events, not the reports of misuse offered by his co-workers. Because the employer had substantial evidence that the employee misused his leave, and there was no evidence that the investigation was discriminatory, the employer was entitled to summary judgment.

3. Reports by Employee

**Tucovic v. Wal-Mart Stores East LP, 2013 WL 1287186 (N.D. Ind. Mar. 28, 2013)**

Plaintiff worked as a part-time cashier at the employer's "Money Center." After she was hired, the employer decided to close the Money Center at plaintiff's store. Plaintiff was told to change her "career preference" code in the employer's computer system to be considered for a new position at the store. Plaintiff did not change her preferences in the system. As a result, her choices for a new position were limited, and the only options were temporary. After the Money Center was eliminated, plaintiff took a two-week leave of absence for medical reasons. She was reinstated under the same position, but there were no duties. She was again programmed into various job openings. After changing her job preference in the computer system, plaintiff interviewed for several positions, but was not selected. She began another medical leave, but failed to return on her expected return date. The company sent her letters indicating that her leave had ended, and warning that her employment could be terminated. She responded by noting that she would not return to work until her problem was resolved. However, she did not provide proper forms and documentation to extend her leave. The company again requested proper documentation to extend her leave, but plaintiff failed to provide any. After yet another request to provide documentation, to which the employee replied that she would not return to work, the company terminated her employment, characterizing it as a resignation.

Plaintiff filed a lawsuit alleging FMLA interference and retaliation, but the court granted summary judgment for the employer. The employee alleged that the company had failed to reinstate her upon her return from her illness, and also possibly (the court was not sure from the complaint) on the basis of FMLA retaliation. The court determined that, in fact, plaintiff had been reemployed in her old position when she returned from her first medical leave of absence. The court also found that there was no basis for an FMLA retaliation claim for the simple reason that plaintiff failed to show or allege that she suffered an adverse employment action. The court noted that plaintiff's letter to the company indicating that she would not return to work was either a resignation or a termination based on her failure to return, a legitimate reason for firing her. Under either analysis, the court determined that plaintiff failed to show an issue of fact with respect to why the company fired her and granted summary judgment to the company on all claims.

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

##### **Bellone v. Southwick-Tolland Reg'l Sch. Dist., 915 F. Supp. 2d 187 (D. Mass. 2013)**

The employee, a teacher, provided several notes from doctors stating that he was unable to work due to medical reasons and requested time off. At the end of the school year, he exhausted his 12 week leave period, and the employer demanded a medical certification in order to return him to work. The employee continued to require medical leave. When school resumed in the fall, the employer hired another teacher to cover the employee's class due to the uncertainty of whether employee could return to work, and instead of restoring employee to his prior position, offered him a mixed assignment as a co-teacher. The employee failed to return to work on the agreed date, and the employer suspended him for abandoning his position. The employee further failed to request a hearing or respond to the suspension, and the employer then terminated his employment.

The Court granted the employer's motion for summary judgment, finding that the employee had not been harmed by the employer's failure to notify him of his eligibility rights because the employee was not approved to return to work before he exhausted his leave time. The court found that pursuant to 29 C.F.R. § 825.300(d)(3), the employer had shown it had a uniform policy to insist on a fitness-for-duty certification, and the employee provided no evidence it was merely a pretext for retaliation. The court then held that the failure to provide a timely designation notice and failure to return him to his prior position or a substantially similar position was not retaliatory. The court noted that the employee failed to provide any evidence supporting a causal connection between his FMLA leave and the adverse employment action.

#### 5. Fraud

##### **Lineberry v. Richards, 20 WH Cases2d 359 (E.D. Mich. 2013)**

Plaintiff, who complained of pain in her lower back and leg, obtained a work release from a physician who was also an employee of defendant. Defendant approved plaintiff's request for FMLA leave from January 27 through April 27, 2011. While on leave, plaintiff took a trip to Mexico. Plaintiff's physician approved her trip because it was not as physically demanding as work and would not conflict with her recovery. While on vacation, plaintiff's co-

workers saw Facebook updates in which plaintiff posted pictures of her holding up her infant grandchildren, holding several bottles of beer in one hand as well as descriptions activities. When plaintiff wrote her supervisor to complain that she had not received a get well card, her supervisor responded that since she was well enough to take a vacation to Mexico they all assumed she was well enough to work. Plaintiff responded via email that she had used wheelchairs at both airports, was only able to walk short distances, and was unable to stand more than 10 minutes. In a subsequent interview, at which she initially reasserted the same facts, she then admitted she had lied about the use of wheelchairs and her inability to stand over 10 minutes. Subsequently, defendant terminated plaintiff's employment for dishonesty.

On defendants' motion for summary judgment on plaintiff's claims of interference and retaliation, the court noted that there is no claim if the employer had a legitimate reason unrelated to the exercise of FMLA rights. The district court rejected plaintiff's claims that her termination was set in motion prior to the discovery that she had lied about her trip to Mexico. The district court noted that, alternatively, defendants were entitled to summary judgment under the "honest belief" doctrine as there were particularized facts upon which defendants could reasonably rely to justify termination.

**D. Timing of Restoration**

**IV. INABILITY TO RETURN TO WORK WITHIN 12 WEEKS**

**Hallman v. Abercrombie and Fitch Stores, Inc., 2013 WL 5441753 (C.D. Cal. Sept. 27, 2013)**

Plaintiff, an assistant manager of a retail clothing store, alleged that she was terminated in retaliation for taking FMLA leave. On August 2, 2011, plaintiff's doctor informed defendant that plaintiff could not perform her duties because of severe stress. As a result, defendant placed plaintiff on FMLA leave. On October 23, 2011, plaintiff did not return to work after twelve weeks of FMLA leave. Defendant sent plaintiff a letter on November 7, 2011, requesting that plaintiff either return to work or provide a doctor's note stating that she could not return to work by November 14, 2011. Plaintiff did not return to work or provide any information, so defendant terminated her employment. On November 29, 2011, plaintiff's doctor contacted defendant.

Plaintiff filed suit, alleging retaliation in violation of the FMLA, among other claims. The court found that there was nothing in the FMLA that prevented defendant from terminating plaintiff's employment when she failed to return from leave. Plaintiff argued that defendant's letter stated she could either return to work or provide a doctor's note. However, since plaintiff did neither of these things, the court concluded that defendant performed in accordance with the letter. The court found no FMLA violation, and granted defendant's motion for summary judgment.

**Peterson v. HealthEast Woodwinds Hospital, 2013 WL 2420457 (D. Minn. June 3, 2013)**

Upon the employee's commencement of FMLA leave, the employer and its short-term disability benefits provider informed the employee by letter that she would have to present a certification of fitness for duty from her medical provider before returning to work. While on leave, a co-worker agreed to act as the employee's liaison to the company. Despite having

various conversations with her liaison, however, the employee never indicated with any specificity when or whether she was able to return to work. Three days after the expiration of the employee's FMLA leave, the liaison left the employee a voicemail inquiring as to her status, but the employee never returned his call. Ten days after the employee's leave expired, the employer contacted her by letter regarding the expiration of her leave. Rather than respond to the letter, the employee applied for long term disability benefits, which were subsequently granted. The employee did not contact the employer for nearly a month following the expiration of her FMLA leave, and when she finally did, it was to inquire about her employment status. At no point during the conversation did the employee indicate a willingness or ability to return to work. The employer discharged the employee three days later.

The court granted summary judgment to the employer on the employee's FMLA claims. The court held that the employee's FMLA interference claim failed because she received all of the leave permitted by the FMLA, and the employee's rights to restoration of employment were not abridged because she never indicated an ability to return to work. The court further held that the employee's FMLA retaliation claim failed because there was no evidence that the employee was ever medically cleared to return to work, she never contacted the employer about returning to work, and she was granted long term disability benefits on the basis of her alleged inability to work. The court found, therefore, that the employee failed to set forth a prima facie case of FMLA retaliation and, even if she had been able to do so, there was no evidence in the record indicating that the employer's justifications for its actions were pretextual.

***Brown v. Montgomery Surgical Ctr., 2013 WL 1163427 (M.D. Ala. March 20, 2013)***

The employee, a surgical center technician, applied for FMLA leave due to her back-related problems. The employer granted her request for leave. Nine weeks and one day into her FMLA leave, the employee notified the employer that she wanted to return to work, and provided a doctor's note stating that she was restricted from lifting more than 25 pounds and required that she alternate sitting and standing during the performance of her job duties. The employer did not reinstate her. After the employee's 12 weeks of FMLA leave was exhausted, the employer filled the employee's position.

The employee sued the employer, alleging interference and retaliation in violation of the FMLA, and failure-to-accommodate and retaliation in violation of the Americans with Disabilities Act ("ADA"). The federal district court granted the employer's motion to dismiss for failure to state a claim. The employee argued that the employer violated the FMLA by failing to reinstate her with a reasonable accommodation. The court rejected this claim, explaining that the right to leave under the FMLA is wholly distinct from the right to reasonable accommodations under the ADA (as amended by the ADAAA). As the court explained, the FMLA requires reinstatement of an employee to his or her former position or an alternate one with equivalent pay, benefits and working conditions after such employee's qualifying FMLA leave, however, such reinstatement right is not absolute. If, for example, an employee is unable to perform the essential functions of her position at the conclusion of FMLA leave, the employee has no right under the FMLA to reinstatement to another position. In short, the FMLA imposes no obligation to reinstate an employee to her position with accommodated duties, and an employee does not engage in protected activity under the FMLA by asking to return to work with

reasonable accommodations. The court noted that its decision was consistent with decisions of the Eleventh, Third and Eighth Circuits.

**Vangas v. Montefiore Medical Center, 925 F. Supp. 2d 574 (S.D. N.Y. 2013)**

Plaintiff was diagnosed with cancer and took qualifying FMLA leave. After employee had been on FMLA leave for more than four months, she requested to work from home and the employer denied the request. An HR employee for the employer stated she would send the employee a second set of FMLA certification papers. The employee told her supervisor that another employee had extended her FMLA leave and she had her doctor complete the second FMLA certification and submitted it to the employer. After experiencing medical complications, the employee informed her supervisor she did not know if she would be able to return to work. Another supervisor then informed the employee her FMLA leave was limited to 12 weeks, which had previously expired and asked the employee if she was able to return to work. The employee stated she had not been cleared to work, and defendant terminated her employment.

The court held that defendant was entitled to summary judgment on plaintiff's FMLA interference, equitable estoppel and breach of contract claims. The employee argued that the employer interfered with her purported "second" FMLA leave, relying on another case which held that inadequate notice of an employer's FMLA policies can support a claim for violation of the FMLA in appropriate circumstances, even if the employee's leave exceeds the twelve weeks. However, the district court rejected the employee's argument, finding that defendant's policy did not mislead the employee into requesting additional leave. The court then held that any lack of notice did not interfere with plaintiff's rights because she could not establish that she could have returned to work at the end of her FMLA leave.

The court also rejected the employee's claim that the employer was equitably estopped from asserting the defense that the employee had exhausted all of her leave because the employee could not establish detrimental reliance – she could not have returned to work any earlier or found another job. Finally, the court rejected the employee's claim for breach of contract, stating that to hold "that all requests for certification create a binding obligation on the employer" would obviate an obvious purpose of the FMLA, "which is to allow an employer to prevent an employee from taking leave without having a qualifying reason."

**Edmonds v. City of Hattiesburg, 2013 WL 603894 (S.D. Miss. Feb. 19, 2013)**

The employee, who suffered from a serious health condition, applied for and was granted FMLA leave by his employer. The employee was medically unable to return to work at the end of his twelve-week FMLA leave, and it appeared that he would be unable to return indefinitely. The employee then voluntarily resigned his employment in writing for health reasons, and applied for disability benefits. The employee later filed a lawsuit against the employer under the FMLA, but the employee failed to clarify how the employer violated his rights under the FMLA. The court assumed that the employee intended to allege that the employer violated his rights when it denied additional FMLA leave and then failed to restore the employee to his position. The court granted summary judgment to the employer on both claims. The court first ruled that the employer did not violate the FMLA when it denied the employee's FMLA leave because the

employee had exhausted all of his FMLA leave. The court also held that the employee's failure to restore claim failed because the employee voluntarily resigned, and, even if the employee had been reinstated, he was unable to perform the essential functions of his job.

**Walker v. Trinity Marine Prods., Inc., 721 F.3d 542 (8th Cir. 2013)**

The employer believed that the employee had a serious health condition, and consequently placed her involuntarily on FMLA leave. The employee received a medical certification that found her fit to return to work and presented it to the employer, who asked her to obtain a second opinion. When the employee presented a second opinion to her employer that also deemed her fit to work, the employer asked her to consult a third physician. By the time the employee presented to the employer her third physician's assessment, which reached the same conclusion as the first two, the employee had exhausted her available FMLA leave. As a result, the employer terminated her employment, and the employee brought claims against the employer for FMLA interference and for unlawfully discharging her after she attempted to return to the position she held prior to taking leave.

The Eighth Circuit affirmed the lower court's decision dismissing the employee's claims. The employee argued the employer interfered with her right to FMLA leave when she actually needed it by placing her on involuntary leave when she did not suffer from a serious health condition. The court rejected this argument because the employee never requested or was denied FMLA leave as a result of taking the leave that the employer required. In addition, the employee also unsuccessfully brought an equitable estoppel claim that the employer interfered with benefits to which she was entitled under the FMLA by refusing to permit her to return to work after receiving multiple medical certifications. The court rejected this position because the employee did not identify any actual or monetary losses, as required to support an equitable estoppel claim. Finally, the employee argued that the employer discriminated against her by discharging her after she attempted to return to her position by submitting the certifications of her fitness for work. Noting that the FMLA does not have a provision protecting employees who are "regarded as" having a serious health conditions, the court held that the employee did not have a serious health condition and did not engage in any other conduct protected by the FMLA.

**Hall-Hood v. Target Corp., 2013 WL 3030477 (D. Nev. June 14, 2013)**

The employee requested and was granted leave under the FMLA due to a serious medical condition. When the employee was ready to return to work, she was informed that her position as Executive Team Leader was no longer available. The employer told her to apply for another position, or remain on unpaid medical leave indefinitely. Ultimately, the employee was discharged. The employee filed suit against the employer—purportedly alleging retaliation under the FMLA.

The employer moved to dismiss the employee's complaint on the grounds that it was speculative and did not adequately inform the employer of the claims against it. Interpreting the employee's claim as one for "interference" in accordance with Ninth Circuit precedent, the Nevada district court found that the employee adequately alleged a claim under the FMLA. Indeed, given the circumstances, the court held that it could "easily infer a causal link" between



the FMLA leave and the adverse action. Moreover, the court rejected the proposition that an FMLA plaintiff should be required to affirmatively allege that she was capable of and attempted to return to work. Finally, the court also denied the employer's alternative motion for a more definite statement, noting that it amounted to a request for a heightened pleading standard.

**Paris v. Sanderson Farms, Inc., 21 WH Cases2d 626 (5th Cir. 2013)**

Plaintiff was first a personnel clerk, then an employee records clerk, for defendant. Defendant's policy allowed employees to take up to thirteen weeks of leave per year. Employees who failed to return to work after the thirteen weeks were exhausted were subject to discharge. Plaintiff took FMLA leave beginning October 19, 2009 to undergo a surgical procedure. She returned to work on November 16, 2009. Plaintiff was admitted to the emergency room on December 17, 2009, and was granted extended leave until March 18, 2009, after the thirteen weeks were exhausted in February. Plaintiff was told to return to work or file new FMLA certification paperwork by April 9, 2009. When plaintiff had not returned by April 12, 2009, and had not filed FMLA paperwork, her employment was terminated. Plaintiff filed suit alleging, among other claims, FMLA retaliation. The district court granted summary judgment in favor of the employer and plaintiff appealed.

The employer argued that plaintiff's failure to request an extension of leave or return to work by April 9, 2009 constituted a non-discriminatory motive for her discharge. Plaintiff offered several possible issues of pretext: The parties' dispute over her effective termination date, defendant's failure to contact her between April 9 and 13, an earlier attempt to extend her leave, an inconsistency in defendant's story as to why she was discharged and defendant's general attitude towards FMLA leave. But plaintiff offered little evidence other than her own testimony. As such, the court affirmed the grant of summary judgment for the employer.

***Summarized Elsewhere:***

**Rincon v. American Federation of State, County, and Municipal Employees, 2013 WL 4389460 (N.D. Cal. Aug. 13, 2013)**

**Patel v. Saint Vincent Health Ctr., 2013 WL 4591271 (W.D. Pa. Aug. 28, 2013)**

**Simmons v. University of Michigan, 20 WH Cases2d 872 (E.D. Mich. 2013)**

**Turner v. EASTCONN Regional Education Service Center, 2013 WL 6230092 (D. Conn. Dec. 2, 2013)**

**Chase v. U.S. Postal Service, 2013 WL 5948373 (D. Mass. Nov. 4, 2013)**

**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

#### **Big Ridge, Inc. v. Federal Mine Safety and Health Review Comm'n, 715 F.3d 631 (7th Cir. 2013)**

The Federal Mine Safety and Health Administration (MSHA) demanded records from thirty-nine mine operators. When the operators refused, MSHA imposed monetary penalties. The operators challenged MSHA's authority to make record demands and impose monetary penalties. After an administrative law judge and the Federal Mine Safety and Health Review Commission both found that the demands and penalties were lawful, the operators petitioned the Seventh Circuit for review. The operators challenged the document demands on the grounds that they conflicted with the FMLA confidentiality provisions, 29 C.F.R. 825.500(g).

The Seventh Circuit held that the document requests did not conflict with the FMLA. In the Court's view, the records would be kept confidential despite being produced to MSHA. The production of such documents would not violate the miners' privacy because MSHA agents are required by the Privacy Act to prevent unwarranted disclosure of their contents. For the FMLA regulations to supersede the MSHA's record-inspecting power, the text of the FMLA would have to state explicitly that Congress intended to limit the powers it previously granted to MSHA, which it did not. Further, the FMLA contains a specific exception to the confidentiality provision, which permits sharing of records with government officials investigating compliance with other laws. Thus, the Seventh Circuit found that the FMLA did not limit MSHA's authority to inspect and copy records that were reasonably related to mine-related injuries and illnesses.

#### A. General Principles

#### B. Federal Laws

##### 1. Americans With Disabilities Act

#### **Summarized Elsewhere:**

#### **Latowski v. Northwoods Nursing Center, 2013 WL 6727331 (6th Cir. Dec. 23, 2013)**

- a. General Principles
- b. Covered Employers and Eligible Employees
- c. Qualifying Events
  - i. Serious Health Conditions and Disabilities

**Johnson v. JPMorgan Chase & Co., 922 F. Supp. 2d. 658 (S.D. Ohio 2013)**

Plaintiff was a financial services advisor who suffered from chronic pain due to a neck injury. While still employed, plaintiff filed a lawsuit alleging the employer failed to accommodate his disability. One of the issues in the suit was whether plaintiff provided sufficient evidence that his neck condition was a disability that required accommodation, before the 2008 amendments to the ADA went into effect. Plaintiff argued, in part, that he clearly was disabled under the ADA because the employer granted him FMLA leave. The court rejected this argument, granting summary judgment for the employer. Although plaintiff was granted FMLA leave, the court reasoned that this did not equate to having a disability under discrimination law. Because the FMLA requests only had limited information about plaintiff's condition, they were not sufficient to put the employer on notice of his disability under the ADA.

***Summarized Elsewhere:***

**Howard v. Pennsylvania Dep't of Pub. Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

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

**Freeman v. Philadelphia Housing Authority, et al., 2013 WL 3761274 (E.D. Pa. July 18, 2013)**

Plaintiff was discharged when he did not return to work five and a half months after the expiration of his FMLA leave. Plaintiff filed FMLA interference and retaliation claims against his former employer and two individual defendants. Both plaintiff and defendants filed motions for summary judgment. The court granted the individual defendants' motions because they were not "employers" for purposes of FMLA liability. Plaintiff presented no evidence that they had the authority to hire and fire employees, give plaintiff any work rules and assignments, set plaintiff's conditions of employment, control plaintiff's employee records, designate plaintiff's FMLA leave, or terminate his employment. In addition, plaintiff's claims against one of the individual defendants was brought over one month beyond the two year statute of limitations and plaintiff presented no evidence that this defendant knew or showed reckless disregard for whether his conduct was prohibited by the FMLA.

The court also granted the employer's summary judgment motion. Plaintiff claimed that he was denied FMLA entitlements because the employer violated notice obligations, did not properly administer other medical leave of absence under the employer's policies, and stalled his requests to return to work with an accommodation of a desk job until after the FMLA leave expired. The court held that the employer complied with its notification obligations by timely sending the notice of employee rights, obligation and responsibilities as well as a notice granting and designating FMLA leave. In addition, the court found that an individual defendant's verbal statement that he had "up to a year to come back to work" did not mislead him about his FMLA

leave. The court further held that the employee had no entitlement under the FMLA to notification about his leave under the employer's policies. Lastly, the court held that the FMLA does not require employers to make accommodations to reinstate an employee after FMLA leave. The court also held that the employee could not bring a successful retaliation claim because he did not return to work after the expiration of his twelve weeks of FMLA leave. Alternatively, the court found plaintiff failed to present a prima facie case of retaliation because an employee who is discharged after their FMLA leave expires as a result of his inability to perform the essential functions of his job fails to establish an adverse employment action.

- iii. Light Duty
  - e. Medical Inquiries and Records
  - f. Attendance Policies
- 2. COBRA
- 3. Fair Labor Standards Act

***Summarized Elsewhere:***

***Grote v. Beaver Express Service, LLC, 2013 WL 4402822 (D. Kan. Aug. 15, 2013)***

- 4. 42 U.S.C. § 1983

***Diaz v. Michigan Dept. of Corrections, et al., 703 F.3d 956, 20 WH Cases2d 9 (6th Cir. 2013)***

Plaintiffs brought suit under 42 U.S.C. § 1983 to enforce FMLA rights to self-care leave against state officials in their individual capacities. The district court granted defendants' motions to dismiss, and plaintiffs appealed. Plaintiffs argued that they had a right to self-care leave under the FMLA but Sixth Circuit case law, which held that a plaintiff could not bring a private suit against a state official for FMLA violations relating to self-care leave, left them with a right without a remedy. Thus, plaintiffs maintained they should be able to use § 1983 to enforce their rights against state officials in their individual capacities. The court rejected plaintiffs' arguments, finding that existing case law has held that public employers may not be individually liable under the FMLA. In addition, because precedent held that an employee may not sue state officials for monetary damages for violations of the self-care provisions of the FMLA, plaintiffs had no right that could be enforced through § 1983. Furthermore, the court held that even if plaintiffs could seek damages from state officials for the alleged FMLA violations, plaintiffs were still prevented from enforcing that right through § 1983 because the FMLA's comprehensive remedy provisions indicate Congress' intent to exclude other remedies, including those available through § 1983.

One plaintiff also sought prospective relief in the form of reinstatement. The court held that, although precedent bars a plaintiff from seeking monetary damages against state officials for FMLA self-care leave violations, prospective relief, such as reinstatement, may be granted. The court reasoned that injunctive relief against individuals in their official capacities operated

as an exception to Eleventh Amendment sovereign immunity. Therefore, the court reversed and remanded the district court's decision on the reinstatement claim.

5. Title VII of the Civil Rights Act

***Summarized Elsewhere:***

***Horen v. Cook*, 2013 WL 5583723 (6th Cir. Oct. 10, 2013)**

***Smith v. City of Marion*, 2013 WL 5434133 (D. S.C. Sept. 27, 2013)**

***Latowski v. Northwoods Nursing Center*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013)**

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]

***Summarized Elsewhere:***

***Schultz v. Wells Fargo Bank, Nat'l. Assoc.*, 2013 WL 4782157 (D. Or. Sept. 5, 2013)**

C. State Laws

1. State Leave Laws

***McClain v. Cenveo Corp.*, 2013 WL 5230269 (E.D. Cal. Sept. 16, 2013)**

The employee was discharged after accruing too many absences pursuant to the employer's points-based attendance policy. Under the policy, employees would receive a full point for unexcused absences, a half-point for absences accompanied by a doctor's note, and no point for a FMLA absence. An employee who accrued 12 points would be discharged. Plaintiff exceeded the 12-point maximum, but one of his absences was for a visit to a doctor who prescribed FMLA leave. The employer suspended plaintiff, requesting he submit documentation to excuse his absences and bring his total points below the 12-point threshold. After plaintiff failed to submit any documentation, he was discharged.

Plaintiff sued, claiming that defendant had failed to provide a reasonable accommodation under California's Fair Employment and Housing Act ("FEHA"). The court denied defendant's motion for summary judgment. Defendant argued that the only "accommodation" plaintiff requested was leave time, and that plaintiff provided no evidence that leave time had been denied

to him when proper documentation was submitted. The court granted defendant's motion as to each of plaintiff's absences where neither plaintiff nor his doctor could provide evidence that they were related to his medical condition. However, the court denied defendant's motion as to the absence when plaintiff visited his FMLA doctor. On that basis, the court held that there was a genuine issue of material fact as to whether plaintiff's final absence qualified for FMLA leave.

- a. General Principles
  - b. Effect of Different Scope of Coverage
    - i. Employer Coverage
    - ii. Employee Eligibility
  - c. Measuring the Leave Period
  - d. Medical Certifications
  - e. Notice Requirements
  - f. Fitness-for-Duty Certification
  - g. Enforcement
  - h. Paid Family Leave Laws [New Topic]
2. Workers' Compensation Laws
    - a. General Principles
    - b. Job Restructuring and Light Duty
    - c. Requesting Medical Information
    - d. Recovery of Group Health Benefit Costs
  3. Fair Employment Practices Laws

***Summarized Elsewhere:***

***Smith v. City of Marion, 2013 WL 5434133 (D. S.C. Sept. 27, 2013)***

4. Disability Benefit Laws
5. Other State Law Claims [New Topic]

***Pyszka-Pigg v. Saint Anthony's Health Ctr., 2013 WL 1144621 (S.D. Ill. Mar. 19, 2013)***

Plaintiff, a nurse, notified her employer that she would need to take leave for surgery starting on November 21, 2011, and that recovery would last six weeks. The employer notified

the employee that she was eligible for FMLA leave, and the employee's doctor provided the employee with a letter stating she could return to work with some physical restrictions on December 3, 2011. The employee argued that she provided all the necessary documentation required to process her FMLA claim and that she was told she could not return to work until she was able to work with no restrictions. The employer discharged the employee on December 13, 2011.

The District Court granted the employer's motion to dismiss the employee's claim of retaliatory discharge under the FMLA. The court ruled that the employee's claim of retaliatory discharge under the FMLA was not cognizable under Illinois law. The court noted that the Illinois Supreme Court has not ruled on the issue of whether retaliatory discharge overlaps with the FMLA. The court held that the FMLA only affects the private relationship between an employee and an employer, and therefore does not meet the meaning of public policy required to succeed under a retaliatory discharge theory.

**Lee v. Rite Aid Corporation, 2013 WL 141585 (E.D. Wash. Jan. 11, 2013)**

Plaintiff, who started as a full-time employee of defendant, took medical leave for three months due to a complicated pregnancy. After returning to work, she requested several days off for both personal and ongoing pregnancy-related reasons. To accommodate plaintiff's frequent requests for leave, defendant changed plaintiff's position, which also reduced her number of hours. As a result, plaintiff resigned. Plaintiff believed that the reassignment was retaliation for the medical leave she took due to her pregnancy, but she did not work enough hours in the prior year to be eligible to state a claim under the FMLA or her state's leave law. Accordingly, she brought a common law claim for wrongful discharge in violation of public policy against defendant.

The court granted defendant's motion for partial summary judgment on the public policy wrongful discharge claim. Plaintiff was unable to demonstrate that other means of promoting the public policy were inadequate, as required to state a common law claim for wrongful discharge in violation of public policy. The court found that the state leave law, the state discrimination law, and the FMLA were adequate to protect the public policy against pregnancy-related discrimination in the workplace. Plaintiff's ineligibility to bring a claim under state law and FMLA was irrelevant, and the court held that plaintiff's common law wrongful discharge claim was barred.

***Summarized Elsewhere:***

**King v. Permanente Medical Group, Inc., 2013 WL 5305907 (E.D. Cal. Sept 19, 2013)**

**D. City Ordinances [New Topic]**

**III. INTERRELATIONSHIP WITH EMPLOYER PRACTICES**

***Summarized Elsewhere:***

**Brewer v. City of Dayton, 2013 WL 2378041 (S.D. Ohio May 30, 2013)**



A. Providing Greater Benefits Than Required by the FMLA

**Rincon v. American Federation of State, County, and Municipal Employees, 2013 WL 4389460 (N.D. Cal. Aug. 13, 2013)**

Between August 2006 and July 2011, the employee took three long-term medical leaves of absence, each of which lasted between 6 and 13 months. In September 2010, the employee applied for FMLA leave for the first time. The employer denied her request because, although the employee suffered from a qualifying illness, she had not worked the requisite statutory minimum of 1,250 hours during the preceding 12 months. The employer based its calculation on a standard 35-hour workweek, which applied to all company employees. The employee claimed that her working hours far exceeded the necessary statutory minimum (by her own calculations). Irrespective of the denial of FMLA leave, the employer allowed the employee to stay on paid medical leave until July 2011, when it discharged her. By this time, the employee had exhausted all forms of leave, and the employer was unable to return the employee to work since it was unable to accommodate her medical restrictions or provide her with indefinite medical leave.

The court granted summary judgment for the employer as to the employee's FMLA interference and retaliation claims. The court found that the employer granted the employee well in excess of 12 weeks of leave per 12-month period, and thus, the employee's rights under the FMLA were not abridged. The court further held that an employer may count paid leave taken pursuant to a short-term disability or similar policy against the employee's entitlement toward FMLA leave, since such leaves can run concurrently. For these same reasons, the employer's failure to designate portions of the employee's medical leave as FMLA leave did not prejudice the employee, either substantively since she received all of her legally entitled leave, or financially since she was being paid at the same time. Finally, the court rejected the employee's argument that the denial of her September 2010 application for FMLA leave interfered with her rights under the law. Although there may have been a dispute about the calculation of working time, there was no dispute that the employee received all of the leave time to which she was entitled under the statute, and then some. Under the same reasoning, the court also found in favor of the employer as to the employee's FMLA retaliation claims.

**Simmons v. University of Michigan, 20 WH Cases2d 872 (E.D. Mich. 2013)**

Plaintiff performed a very physical position for defendant until he was injured in a car accident in 2006. Defendant granted plaintiff various medical leaves for more than two years before discharging plaintiff because he refused to perform his job without restrictions, despite being fully released by an independent medical examiner. Plaintiff's union then brokered a last chance agreement for him that resulted in reinstatement. Defendant provided plaintiff with another year of medical leave, followed by two periods of FMLA leave, despite plaintiff's failure to work 1250 hours during the 12 months preceding either FMLA leave. At the end of the second FMLA leave, plaintiff was still unable to perform the duties of his job and he was discharged again. Plaintiff sued claiming defendant violated the FMLA by failing to reinstate him to his position at the end of his FMLA leave.

The court granted summary judgment for defendant finding that plaintiff's failure to work 1250 hours in the 12 month period preceding his last two leaves under the FMLA rendered him unqualified to have received those leaves, and therefore unable to make a viable FMLA entitlement claim based on the leaves. The court rejected plaintiff's argument that because defendant treated the leave as FMLA leave, his failure to work the 1250 hours should not matter. The court also found that plaintiff's entitlement claim failed because he still had restrictions that prevented him from performing the job at the end of his leave.

*Summarized Elsewhere:*

**Johnson v. City of Blaine, 2013 WL 4516339 (D. Minn. Aug. 26, 2013)**

**Paris v. Sanderson Farms, Inc., 21 WH Cases2d 626 (5th Cir. 2013)**

**B. Employer Policy Choices**

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

**Bosley v. Cargill Meat Solutions Corp., 705 F.3d 777 (8th Cir. 2013)**

The employee, who suffered from depression, missed work for an entire month due to her illness. She informed a co-worker of the reason for her absence, but the co-worker only told their supervisor that the employee was absent because she was "sick." The employee did not use the employer's call-in procedure to report her illness, even though she admitted that she could have done so. Unable to determine why the employee was not at work, the employer discharged the employee about one month into her absence. When the employee returned to work about one week later, she learned that her employment had been terminated, and brought a lawsuit asserting FMLA interference and retaliation.

The district court granted summary judgment for the employer as to both claims, and the Eighth Circuit affirmed. At the outset, the court noted a change in terminology—what were formally known as FMLA "interference" claims will henceforth be called "entitlement" claims. As to the employee's entitlement claim, the court held that the employee failed to satisfy her notice obligation. The court rejected the argument that the co-worker served as her "spokesperson" to put the employer on notice pursuant to 29 C.F.R. § 825.303, because the co-worker only told the supervisor that the employee was sick—not that she was absent because of her depression. Furthermore, the employee did not demonstrate that "extraordinary conditions" would excuse immediate notice under 29 C.F.R. § 825.303(a), and in any event she did not give notice "as soon as practicable" by first contacting the employer a month after her absence began. The court also rejected the employee's argument that the employer was on constructive notice of her need for FMLA leave, distinguishing a case from the Seventh Circuit and casting doubt on the existence of "constructive notice" in the FMLA context. *Byrne v. Avon Prods., Inc.*, 328 F.3d 379 (7th Cir. 2003). Finally, the court held that the employee's discharge could not have been retaliation because her employment was terminated before she met her FMLA notice obligation.

3. Substitution of Paid Leave

*Summarized Elsewhere:*

**Rincon v. American Federation of State, County, and Municipal Employees, 2013 WL 4389460 (N.D. Cal. Aug. 13, 2013)**

4. Reporting Requirements

**Barnes v. Spirit Aerosystems, Inc., 2013 WL 5495883 (10th Cir., Oct. 4, 2013)**

The employee alleged that his employer interfered with his right to take approved intermittent FMLA leave when it discharged his employment. Finding no dispute that the employee had failed to comply with the employer's attendance and notice-of-absence policies, nor any evidence to contradict the legitimacy of these policies and the employer's explanation for his discharge, the Tenth Circuit affirmed summary judgment in favor of the employer. The employee also alleged that his employer retaliated against him for exercising his right to take FMLA leave when it terminated his employment. As with the employee's interference claim, the court held that the employee had failed to meet his evidentiary burden to present evidence that the employer's proffered explanation – failure to comply with its attendance and notice-of-absence policies – was pretextual. Accordingly, it affirmed summary judgment in favor of the employer.

5. Fitness-for-Duty Certification

*Summarized Elsewhere:*

**Powell v. Metro One Loss Prevention Servs. Group, Inc., 2013 WL 3956377 (S.D. N.Y. July 26, 2013)**

6. Substance Abuse

**Shirley v. Precision Castparts Corp., 726 F.3d 675, 20 WH Cases2d 1860 (5th Cir. 2013)**

The employee worked as a machine operator for the employer for twelve years. As a result of various workplace injuries he sustained, plaintiff was prescribed medication to manage his pain, and over time, plaintiff developed an addiction to the medication. Plaintiff checked into a rehabilitation center to begin treatment for his addiction, and the employer granted plaintiff's request for medical leave. Plaintiff checked out of the rehabilitation center two days later. Plaintiff subsequently returned to work, but was informed by a human resources representative that his early departure from the treatment center violated the employer's drug-free workplace policy. The employer gave plaintiff a second chance to complete treatment, but plaintiff left after one day, also in violation of the employer's policy. The employer then terminated plaintiff for violating its drug-free workplace policy.

The Fifth Circuit affirmed the district court's entry of summary judgment in the employer's favor. The court stated that an employee is not entitled to reinstatement as an absolute right following a leave under the FMLA. The FMLA does not grant the right of job restoration to employees who would have lost their job even if they had not taken FMLA leave. Plaintiff lost his right to restoration because he violated the company's drug-free workplace policy. The reason employer terminated plaintiff was unrelated to his FMLA leave request. The

court disagreed with plaintiff that the reason for his termination was pretext. The court explained that plaintiff failed to show that the reason for his termination was unreasonable, that the employer was reluctant to generally abide by the FMLA, that plaintiff's request for FMLA leave was treated with hostility or that the employer applied its drug-free workplace policy in a discriminatory manner. The court also considered the fact that the employer gave plaintiff a second chance to complete treatment for his addiction.

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**

*Summarized Elsewhere:*

**Brewer v. City of Dayton, 2013 WL 2378041 (S.D. Ohio May 30, 2013)**

##### **A. General Principles**

**Humility of Mary Health Partners v. Teamsters Local Union No. 377, 20 WH Cases2d 1163, 517 F. App'x 301 (6th Cir. 2013)**

Plaintiff, a consortium of three Ohio hospitals, fired an employee for excessive absenteeism. The employee had been granted FMLA leave eight times between 2003 and 2009 for Crohn's disease and rheumatoid arthritis. In 2010, the employee requested FMLA leave, but the employer asked two independent doctors to review the paper record, without examining the employee. Based on those physicians' findings, the employer denied the employee's request and fired her for excessive absenteeism. Claiming that the FMLA excused each absence, the employee filed a grievance with her union (defendant), and the matter went to arbitration. The arbitrator concluded that the employee had been fired without just cause and ordered her reinstated. Specifically, the arbitrator concluded that the physicians who reviewed the employee's file "lacked sufficient medical information" and "never should have been consulted in the first place."

The employer filed a lawsuit challenging the arbitrator's decision. The district court declined to disturb the arbitrator's decision, and the Sixth Circuit affirmed. The Sixth Circuit rejected the employer's argument that the arbitrator did not "arguably construe" the CBA. According to the Court, the arbitrator examined the CBA's "just cause" provision and the FMLA regulations, which the CBA expressly incorporated and provided that the FMLA regulation "shall prevail" whenever interpretation of the CBA may be required. "More importantly, [the arbitrator] found that the Health Center had no right to order independent medical evaluations in the first place. Citing 29 C.F.R. § 825.307(b)-(c), the arbitrator explained that only employers 'who have reason to doubt the validity of a medical certification' may request second or third

opinions. Having accepted [the employee's] diagnosis for six years ... the Health Center had 'no evidentiary basis' suddenly to become skeptical (or worse) about [the employee's] request."

**B. Fitness-for-Duty Certification**

*Summarized Elsewhere:*

**Police Benevolent Association Local 249 v. County of Burlington, 2013 WL 173793 (N.J. Super. Ct., Jan, 17, 2013)**

## CHAPTER 10. INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

### I. OVERVIEW

#### *Geatti v. Min-Sec Companies*, 2013 WL 5488720 (M.D.P. Sept. 30, 2013)

The employee began working for the employer as a security monitor in 2003. Over the course of his employment, he was disciplined on multiple occasions and was cited for violating numerous workplace policies and procedures. His offenses included reporting to work late, failing to maintain the security of inmates at the company's treatment center and falling asleep while on duty. In September 2010, the employee was suspended without pay and then placed on a last chance agreement. On October 19, 2010, the employee was discharged for failure to secure facility keys.

The employee filed suit alleging violations of the FMLA among several other claims. The Magistrate Judge entered a report and recommendation recommending that summary judgment be granted to the employer based upon the employee's failure to provide any record evidence in opposition to the employer's motion for summary judgment. The District Court adopted the report and recommendation and granted the employer's motion for summary judgment.

### II. TYPES OF CLAIMS

#### *Baldwin v. Duke Energy Bus. Svcs. LLC*, 2013 WL 6056578 (W.D. N.C. Nov. 15, 2013)

The employee, a Senior Application Analyst for an energy company, experienced some medical issues and took twelve weeks of FMLA leave as a result. After his leave expired, the employer permitted him to work from home for three months because a medical restriction precluded him from sitting for more than 30 minutes at a time. Prior to taking FMLA leave, however, the employee had some performance issues. His supervisor sought information from him regarding his restriction to determine if the employer could provide an accommodation that would allow him to work at the office. After his medical certification expired, he requested to work from home for an additional four weeks. The employer denied his request because it could offer accommodations for him to work in the office. The employer told the employee that he was expected to show up to work on a designated date, and he replied that he needed to defer to his attorney. Because he failed to show up to work as expected, his employment was terminated.

The employee sued the employer for retaliation under the FMLA, among other claims. The employee contended that he was subject to retaliation because he received a negative performance appraisal, received heightened scrutiny of his work, and was required to report on a daily basis to his supervisor while working from home. The court held that the timing of his performance issues pre-dated his request for FMLA leave, and therefore the employee could not establish a causal link between the protected activity and the adverse employment action. The court further held that evidence that one of the supervisors stated they needed to "keep the heat on" the employee to provide medical records to justify his need to work from home was not related to his FMLA, which had ended months before. Finally, the court held that the employer

failed to show that “but for” his taking FMLA leave, he would not have been discharged or given a less than stellar evaluation. Accordingly, the court granted the employer’s motion for summary judgment and dismissed the FMLA retaliation claim.

**McKenna v. Permanente Medical Group, Inc., 2013 WL 3766769 (E.D. Ca. July 16, 2013)**

Plaintiff was discharged within weeks of applying for and being granted intermittent FMLA leave for her own serious health condition. The employer’s termination notice focused on plaintiff’s absenteeism, but also mentioned her recent discipline for violating its behavior guidelines and sexual harassment policy. Plaintiff raised several federal and state claims, including interference under the FMLA.

The employer moved for summary judgment as to the FMLA claim and the district court denied the motion. The court held that a trier of fact could find the timing of the discharge relative to plaintiff’s most recent request for intermittent FMLA leave to be circumstantial evidence that her pattern of using FMLA leave was taken into consideration in the termination decision. In addition, while the employer approved FMLA leave for plaintiff over a seven year period, it expressed concern over her “excessive absenteeism” during periods of time when she was taking FMLA leave. The court further found that the termination of her employment for excessive absenteeism shortly after she again applied for and was granted FMLA leave provided additional circumstantial evidence supporting the FMLA claim.

***Summarized Elsewhere:***

**Worthington v. Whole Foods Market Group, Inc., 2013 WL 228126 (N.D. Ill. 2013)**

**Sankpill v. Stone Belt Arc, Inc., 2013 WL 2600453 (S.D. Ind. June 11, 2013)**

**A. Interference With Exercise of Rights**

**Ranade v. BT Americas, Inc., 2013 WL 5818019 (E.D. Va. Oct. 28, 2013)**

Plaintiff’s health care provider requested she limit her schedule to no more than four hours of work per day, five days per week, and the employer immediately granted her request to work on that basis. Eventually, the employee exhausted her FMLA leave, and several months later she was discharged for poor performance.

Plaintiff brought claims against the employer for FMLA interference and retaliation. The court granted the employer’s motion for summary judgment. Plaintiff argued that the employer violated the FMLA by denying her a “flex schedule” totaling 20 hours per week and by adjusting the accommodation it made initially. The court recognized that plaintiff accepted the reduced schedule offered by her employer, but performance issues followed as a result: the employee had problems keeping track of the time she worked, and a client complained about its ability to communicate with her. As a result of these issues, the employer gave plaintiff the option of full-time leave or full-time work, and plaintiff received clearance from her doctor to return to work full-time. The court found that the employer’s response to the issues was reasonable, and dismissed plaintiff’s interference claim as a result.

The employer also prevailed on the employee's FMLA retaliation claim. The employee argued that she received positive evaluations prior to taking leave, but did not receive assignments upon her return. However, the evidence showed that the employee continued receiving assignments even though she was removed from client accounts because of poor performance. Additionally, the six month gap between her FMLA leave and her discharge did not constitute *prima facie* evidence of a causal connection for retaliation, in absence of other evidence.

**Brock-Chapman v. National Care Network, LLC, 20 WH Cases2d 181 (N.D. Tex. 2013)**

The employee, a sales executive for a healthcare software company, requested intermittent FMLA leave to care for her ailing husband. The employer preferred that the employee take full-time FMLA leave, however, and required her to take a week of paid time off to consider her options. The employee eventually went on intermittent FMLA leave, working part-time until her husband's death. Less than a month after returning to work, she was placed on a performance improvement plan that lacked objective metrics and required "significant improvement" within 30 days. The employer's standard improvement plan required improvement within 90 days. In addition, the employee was required to work 40 hours per week from the office, even though she previously had done some of her work at home. The employee was discharged for failing to adequately improve her performance on the plan.

Plaintiff sued under the FMLA, claiming interference and retaliation. The court denied the employer's motion for summary judgment. As to the interference claim, the court held that the employer may have violated the FMLA by discouraging the employee from taking intermittent FMLA leave, if there was also prejudice to the employee. The court found a genuine issue of fact existed as to all three of the employee's FMLA interference allegations: (1) whether the employee suffered prejudice in the form of economic harm resulting from being required to take a week of paid time off; (2) whether the forty hours per week in the office was equivalent to the position the employee held before her FMLA leave; and (3) whether her FMLA leave was a factor in the performance improvement plan that eventually lead to her dismissal. With respect to her retaliation claim, the court found a genuine issue of fact as to whether the reason for the employee's termination was pretextual, based on the contrast between the employer's typical performance improvement plan and the one given to the employee.

**Smith v. Aptar Group, Inc., 2013 WL 655523 (N.D. Ill. Feb. 21, 2013)**

Plaintiff, a training coordinator at a manufacturing facility, sued her former employer for interference and retaliation under the FMLA. Beginning in February 2011, plaintiff took several days of FMLA leave to recover from various conditions, including a kidney stone procedure and chronic migraines. In her amended complaint (her original FMLA complaint was dismissed for failure to state a claim), plaintiff alleged that because she exercised her FMLA rights, her direct supervisor wrote plaintiff up, stopped paying plaintiff for time spent on lunch breaks, revoked plaintiff's ability to alter her schedule, scheduled plaintiff to shorter shifts, and excluded plaintiff from training projects she ordinarily would have been involved in. Plaintiff also alleged her paychecks were short on at least two occasions and her supervisor deleted her time clock entries such that she was paid for two fewer hours, counted FMLA leave days as "no/call/no show" absences, and deducted attendance points for taking FMLA leave. Finally, plaintiff alleged she



was temporarily discharged and missed several days of work due to one of several of her supervisor's alleged miscalculations of her available FMLA leave.

With regard to plaintiff's interference claim, the district court found that plaintiff met her initial burden pleading a *prima facie* case of interference because, after she requested FMLA leave, plaintiff was effectively denied benefits to which she was entitled as a result of her supervisor's aforementioned conduct. The district court explained that while retaliation and interference claims under the FMLA share some similarities, the difference between the two claims is that FMLA retaliation requires some proof of discriminatory or retaliatory intent, while an interference claim requires only proof that the employer denied the employee rights to which she was entitled under the Act. The district court found plaintiff sufficiently pled a retaliation claim because her supervisor's alleged statements – specifically his alleged statement that “even if he gets fired, he always wins”, and openly counting down in front of other employees the FMLA days plaintiff had left until he could dismiss her – established the causal connection between plaintiff exercising her rights and the material adverse employment actions against her.

**Benimovich v. Fieldston Operating, LLC, 20 WH Cases2d 878 (S.D. N.Y. 2013)**

Plaintiff worked for the employer as Payroll and Accounts Payable Manager. In the fall of 2009, plaintiff began discussing a possible knee replacement surgery that would require FMLA leave. In May 2010, the employer hired someone to replace plaintiff without telling her that she was being replaced. In August 2010, plaintiff informed the employer that she would have surgery, requiring two months of FMLA leave. The employer did not deny the leave. While plaintiff was on leave, she discovered that she had been replaced and asked to come back to work. On the day she returned, defendant informed her she was being discharged for poor work performance. Plaintiff filed FMLA claims for retaliation and interference.

The court denied the employer's motion for summary judgment in its entirety. The court allowed the interference claim to survive because the employer's failure to document the termination decision gave rise to a fact question about the timing of the decision. The court concluded that plaintiff had established a *prima facie* retaliation claim given the close temporal proximity between plaintiff's exercise of her FMLA rights and her termination. Although the employer put forth a legitimate, non-discriminatory reason for plaintiff's termination, the court held that deposition inconsistencies, lack of formal work evaluations and plaintiff's explanations regarding the justification for termination provided sufficient evidence upon which a reasonable jury could find the employer's explanations to be pretextual.

**Chauncey v. Life Cycle Engineering, Inc., 2013 WL 5468237 (D. S.C. Sept. 30, 2013)**

Plaintiff was an organization development manager for defendant when she was granted intermittent FMLA leave for cervical stenosis. Rather than taking intermittent leave, plaintiff went on full-time leave, and offered to send her supervisor updates regarding her status. On several occasions, the supervisor e-mailed plaintiff to ask about the location of information in the office, but the supervisor expressly stated she should do no other work. Plaintiff returned from leave, but was eventually discharged because of performance issues. Plaintiff filed suit and claimed defendant interfered with her FMLA rights and retaliated against her for exercising those rights. On defendant's motion for summary judgment, the magistrate judge recommended

dismissal of the retaliation claim, but found that an issue of fact existed as to whether the employer had interfered with plaintiff's rights by requiring her to check in weekly and by asking her to perform tasks while on leave. Both parties filed objections to the magistrate's report and recommendation.

The district court held that a check-in requirement, on its own, does not violate the FMLA. *See* 29 C.F.R. § 825.311(a) Plaintiff volunteered to send updates while on leave, and sent more than the employer subsequently requested, and therefore this did not constitute interference. In addition, contacting plaintiff to identify where certain information was stored did not require her to work in violation of the FMLA, particularly because her supervisor explicitly advised her not to do anything other than say where the information could be found. However, the court also held that a genuine issue of material fact existed as to whether defendant interfered with plaintiff's right to be restored to her position with equivalent benefits, because defendant denied plaintiff a salary increase and changed some of her duties upon her return. Finally, disagreeing with the magistrate judge, the court denied defendant's summary judgment motion as to the retaliation claim, concluding that plaintiff had demonstrated an issue of fact as to whether pretext existed in the stated reasons for her discharge.

**Croy v. Blue Ridge Bread, Inc., 20 WH Cases2d 1798 (W.D. Va. 2013)**

Plaintiff worked in defendant's marketing department for several years before being diagnosed as HIV positive. In early April 2011, plaintiff was discharged for failing to properly submit several product request forms. Plaintiff filed suit alleging, among other things, interference and retaliation under the FMLA. Specifically, plaintiff claimed that between February 28, 2011 and March 10, 2011, he worked reduced hours and that those hours should have been designated as FMLA leave. Plaintiff further alleged that defendant interfered with his rights by telling him, after he had missed several days of work, that he must either return to work or begin taking vacation time. Finally, plaintiff alleged that defendant discharged him in retaliation for requesting reduced-schedule leave.

The district court rejected plaintiff's interference claims, concluding that he could not show that he suffered any adverse action as a result of defendant's alleged conduct. First, plaintiff was paid for a full day's work when he actually worked a reduced schedule, and he was not docked any leave time. Similarly, plaintiff did not actually miss any work after being told that he would have to start using vacation time. However, the court concluded that plaintiff raised a sufficient issue of pretext on his retaliation claim. Defendant argued that it was unaware of plaintiff's medical condition, but plaintiff testified that he explicitly informed his superiors of the condition. In addition, other employees, including supervisors, had committed similar infractions when submitting product request forms, but were not formally disciplined.

**Sparks v. Sunshine Mills, Inc., 2013 WL 4760964 (N.D. Ala. Sept. 4, 2013)**

Plaintiff worked as an equipment operator at defendant's pet food manufacturing facility. The company did not have a written disciplinary policy, but purportedly it would give employees three write-ups before discharge. In June 2010, plaintiff twisted his ankle at work, saw a physician, and returned to work with no restrictions. On July 27, 2010, plaintiff received a third

write-up for a production error that compromised the pet food. Plaintiff claimed in the days that followed, he advised several supervisors that he would likely need to undergo surgery. However, after he committed yet another production error, he was discharged. Plaintiff filed suit, alleging defendant interfered with his FMLA rights and discharged him in retaliation after he notified the company of his need for future FMLA leave.

The court granted defendant's motion for summary judgment. The court noted that employees are protected from interference prior to the occurrence of an event triggering leave. However, the court concluded that plaintiff's alleged statement to his superiors – that “the way it was looking, it was very possible that [he] was going to have to have surgery” – was insufficient to put defendant on notice of his intent to take FMLA leave. Based on the statement, the employee might not have needed surgery at all, or if he did, it might have been a same-day procedure not requiring FMLA leave. Accordingly, plaintiff's interference claim failed as a matter of law. The court further held that plaintiff could not demonstrate that the legitimate, non-discriminatory reasons for his discharge (production errors) were pretextual, because he could not show that similarly-situated employees had been treated more favorably.

**Hepner v. Thomas Jefferson University Hosps., Inc., 2013 WL 2334148 (E.D. Pa. May 29, 2013)**

Plaintiff, after suffering a work-related injury, requested and received light duty. After ninety days of light duty, the employer, pursuant to a policy, placed the employee on involuntary medical leave because he was unable to return to full duty. Plaintiff claimed he could have returned to full duty after six weeks. He was not permitted to do so, and defendant terminated his employment after eight weeks for performing outside work during his leave and participating in a running event. Plaintiff denied the former accusation, but admitted the latter, claiming the exercise aided recovery from his injury.

Plaintiff brought multiple claims against defendant, including interference and retaliation under the FMLA. Defendant filed a motion to dismiss under Rule 12(b)(6), which the court denied in part. As to the interference claim, the court held that plaintiff stated a claim for relief because he pled that defendant was hostile to his FMLA absences and attempted to chill his use of FMLA leave. But his pleadings were inadequate to show that he was harmed by the employer's failure to designate his leave as FMLA leave or to notify him of his rights and obligations under FMLA: he never pled any harm from such failure. Therefore, the court dismissed his interference claim without prejudice, and permitted plaintiff to file an amended complaint. As to the retaliation claim, the court held that plaintiff stated a claim for relief. The alleged adverse actions were the involuntary leave and discharge. These occurred soon after plaintiff attempted to exercise his FMLA rights. The court held that the timing of these events established a close temporal proximity between the adverse employment action and plaintiff's alleged exercise of his FMLA rights. Therefore, the court found that plaintiff properly pled his retaliation claim.

**Quinlan v. Elysian Hotel Co. LLC, 916 F. Supp.2d 843, 116 FEP Cases 1731 (N.D. Ill. 2013)**

Plaintiff sued her former employer alleging, among other things, interference under the FMLA. The court granted the employer's motion for summary judgment. Other than reciting

the elements required to prove an FMLA interference claim, plaintiff's response brief did not address any facts supporting her claim. Plaintiff asserted that, while she was on maternity leave, her supervisor contacted her 25 to 30 times for work related matters and assignments. However, the court held that plaintiff's failure to develop her FMLA interference claim in her response brief with any argument or citations to the record constituted waiver of the claim. As a result, the court granted defendant's motion for summary judgment.

**Carrasco v. Huntington National Bank, 2013 WL 587375 (S.D. Ind. Feb. 13, 2013)**

Plaintiff, a bank teller, sued her employer, alleging it interfered with her FMLA rights by terminating her employment a few weeks before her FMLA leave was scheduled to begin. Plaintiff had contacted the employer's human resource department to request FMLA leave for her pregnancy, but received no response. Later, plaintiff requested FMLA leave through the employer's third-party leave administrator, which approved her request. Shortly before plaintiff's leave was to begin, but after she violated company policy multiple times and was placed on several performance improvement plans, plaintiff's employment was terminated.

The district court granted defendant's motion for summary judgment. The district court noted that in the termination context, the employee bears the burden of showing that she was entitled to FMLA leave by proving that she would not have been terminated had she not exercised her FMLA rights. However, the court ruled that plaintiff was not performing up to her employer's legitimate expectations. The undisputed facts demonstrated that plaintiff had repeatedly violated company policies despite receiving several warnings and being placed on performance improvement plans. Indeed, she was terminated a few weeks after she again violated company policy shortly after being placed on her most recent performance improvement plan. The only fact plaintiff presented that might suggest she was fired for exercising her FMLA rights was the temporal proximity of her termination to the beginning of her scheduled leave. But this timing alone was insufficient to raise a question of fact. Because the undisputed facts showed that plaintiff was terminated for legitimate reasons unrelated to her FMLA rights, the district court granted defendant's motion for summary judgment.

**Gordon v. U.S. Capitol Police, 923 F. Supp. 2d 112, 20 WH Cases2d 453 (D. D.C. 2013)**

Plaintiff, a police officer, asserted her employer interfered with her FMLA rights and retaliated against her for exercising those rights in violation of the FMLA. Defendant moved to dismiss the complaint for failure to state a claim.

The court dismissed plaintiff's interference claim. The court noted that plaintiff requested leave on two occasions, and defendant granted both requests for leave. Plaintiff alleged that defendant discouraged her from using her FMLA leave by vowing to "find a problem with her FMLA request, becoming "irate," and by hesitating before granting her request. The court noted that to succeed on an interference claim an employee must show that an employer actually denied the employee entitlements under the FMLA. The court held that, on these facts, plaintiff failed to show that her employer denied her FMLA benefits.

Plaintiff also alleged that her employer retaliated against her by revoking her police powers for four days, preventing her from working two days of scheduled overtime, demanding a lengthy medical exam and a doctor's note, and delaying her duty status conference by two days. The court ruled that these allegations were insufficient to support a retaliation claim. The court noted that plaintiff did not allege that she suffered any change in salary or benefits during the four-day revocation period and that she further failed to allege that defendant's action were pretextual. The court also noted that the denial of overtime does not necessarily constitute an adverse employment action and, in any event, plaintiff did not allege that the action was pretextual. In addition, the court explained that requests for medical information do not rise to the level of an adverse employment action and plaintiff did not allege that the exam produced any injury or harm. Finally, the court noted that a fitness for duty examination, absent further evidence of humiliation or harm, does not rise to the level of an adverse employment action. Thus, the court dismissed plaintiff's retaliation claim.

**Gaskins, et al. v. Rock-Tenn Corp., 2013 WL 5964394 (S.D. Ohio, Nov. 8, 2013)**

Plaintiffs, who were shipping/receiving coordinators at a cardboard manufacturing company, were allegedly discharged for safety violations. One of plaintiffs had a daughter with cystic fibrosis who needed a double-lung transplant. Because transplant surgery can occur at any time, plaintiff applied for intermittent FMLA leave in anticipation of his daughter's surgery. The employer granted the request. A few months later, plaintiff again requested intermittent FMLA leave, explaining that transplants are unpredictable. Plaintiff informed the employer that he hoped that the transplant would occur a few months later. Once again, the employer approved the request. Plaintiff never went on FMLA leave, however, and he was discharged several months later for a safety violation. Plaintiff claimed that the employer interfered with his FMLA rights and discharged him in retaliation for requesting intermittent FMLA leave.

The court granted summary judgment for the employer on both claims. On the interference claim, the court noted that the employer approved the FMLA leave request, but plaintiff never acted upon it. The court held that plaintiff could not bring an interference claim based on his belief that the employer might have rescinded its approval of FMLA leave before it is even used. As for the retaliation claim, the court held that plaintiff could not prove the causal element. Even though plaintiff claimed that his supervisors repeatedly asked him about his anticipated FMLA leave, he admitted that it was motivated by the need to schedule other employees in his absence. The court further noted that the seven month lag from the time he requested his FMLA leave and his discharge greatly reduced any negative inference. Finally, the court stated that plaintiff could not establish that the reason for his discharge was pretextual.

**James v. Hyatt Regency Chicago, 707 F.3d 775, 20 WH Cases2d 553 (7th Cir. 2013)**

Plaintiff, a banquet steward, suffered an eye injury leading to a detached retina and later received corrective surgery. On April 24, 2007, plaintiff provided his employer with a doctor's note indicating that he could return to "light duty" on May 10, 2007. The next day, plaintiff requested FMLA leave, providing paperwork that represented he was unable to work in any capacity. The employer granted the request and retroactively applied to cover his absence due to the injury. On August 2, 2007, plaintiff submitted a release allowing him to return to work as of

August 5, 2007, with the restriction of being “visually impaired.” After purportedly being told by human resources that he could not return to work with restrictions, plaintiff continued to submit paperwork stating that he was unable to work in any capacity. On September 25, 2007, plaintiff submitted a note from a different doctor saying he could return to work with the restrictions of “no heavy lifting or excessive bending.” Plaintiff’s employer attempted to contact him in September and December, seeking additional information on the conflicting paperwork. Plaintiff did not respond. In January, the employer reached out to plaintiff’s original doctor directly for clarification. The doctor said plaintiff could return to work but could not complete any task requiring vision better than 20/200. After meeting with plaintiff, the employer allowed him to work in the same position he previously held.

Plaintiff filed suit, alleging that the employer’s failure to return him to his position upon receiving the April 24, 2007 note constituted FMLA interference and retaliation. The Seventh Circuit affirmed the district court’s grant of summary judgment for the employer on both claims. As to the interference claim, the Court found that plaintiff failed to show that the employer wrongfully denied him FMLA benefits. The April 24, 2007 note called for plaintiff to return to “light duty” and there is no “light duty” under the FMLA. In addition, plaintiff represented to his employer through disability paperwork and additional doctor notes that he was completely unable to work in any capacity. As to the retaliation claim, the Court found that the refusal to reinstate him after receiving the April 24 note was not a materially adverse action. The Court also noted that the employer’s repeated attempts to contact plaintiff to clarify the inconsistencies in his doctor’s notes were met with silence, but nonetheless plaintiff was able to return to the same position, shift, and seniority level that he held prior to his injury. Thus, plaintiff failed to provide evidence that he was retaliated against in any way by his employer.

**Alford v. Providence Hosp., 20 WH Cases2d 1349 (D. D.C. 2013)**

Plaintiff began working for defendant in 1983 and began to require a wheelchair for mobility in 1991. After injuring her hand and taking FMLA leave, she was cleared to return to work on March 31, 2010. Plaintiff injured herself again on April 2, 2010 and took additional FMLA leave which was exhausted on April 14, 2010. Still unable to work, the employer granted plaintiff an additional 60 days of unpaid leave, but she was able to return on May 7, 2010. Plaintiff requested leave again in December 2010, which the employer granted. Even though plaintiff was released to return to work with a lifting restriction on December 14, plaintiff failed to return. Plaintiff’s job did not require lifting, but she was unable to lift her wheelchair out of her car due to the restriction. Defendant discharged plaintiff on January 7 because she was still unable to return to work and could not return in the foreseeable future due to the lifting restriction. Plaintiff filed suit, alleging FMLA interference and retaliation.

The court granted the employer’s motion for summary judgment as to both claims. The interference claim failed because plaintiff was able to take all of the FMLA leave she requested. The court held that once plaintiff exhausted her FMLA leave in May 2010, the FMLA no longer protected her job. In addition, while plaintiff claimed she was entitled to the balance of the 60 day unpaid leave the employer granted in May, the court determined plaintiff had no such entitlement under the FMLA. While plaintiff contended the employer should not have considered her lifting restriction in deciding to discharge her, the court found it was relevant as

to her ability to report to work. Plaintiff's retaliation claim failed because her discharge was nine months after she took FMLA, which is too long to demonstrate a causal connection. Even if the employee could demonstrate cause, the court held the employer had a legitimate, nondiscriminatory reason for the discharge; she could not lift her wheelchair and was thus unable to come to work.

**Sproul v. Washoe Barton Med. Ctr., 2013 WL 1792187 (D. Nev. April 26, 2013)**

Plaintiff, who worked at defendant's medical center, was injured on the job and sought FMLA leave and worker's compensation benefits in 2007. Plaintiff claimed that her supervisor stated that the company did not like worker's compensation cases and that she should not file any worker's compensation claims. Plaintiff further claimed that the day she returned from leave, she received her first notice of corrective action in nine years. She also alleged that her supervisor began treating her differently after her medical leave, giving her two more notices of corrective action, resulting in a demotion in 2008 and her discharge in 2009. Plaintiff then filed an FMLA claim against defendant and defendant moved to dismiss.

Defendant first argued that plaintiff's claims were barred by the two-year statute of limitations, based on plaintiff's leave in 2007. However, the district court rejected this argument. It held, "the actionable harms occurred in 2008 (demotion) and 2009 (termination) and would not have occurred but for the initial notice in 2007." The district court also held that plaintiff sufficiently pled her interference claim to survive defendant's motion to dismiss. The court stated, "an FMLA interference claim can rest upon an allegation that an employer 'chilled' FMLA rights by attaching negative consequences to the use of FMLA rights." The court found that the supervisor's alleged comments and the timing of the notices of corrective action "are sufficient to support a prima facie case of FMLA interference (though not of FMLA retaliation)." The court found plaintiff sufficiently alleged that defendant's "second and third notices of corrective action ... were motivated by his animus against Plaintiff for having taken medical leave and fil[ing] a workers compensation claim." Thus, the court did not dismiss plaintiff's interference claim.

**Harlston v. Metropolitan St. Louis Psychiatric Center, 2013 WL 5671344 (E.D. Mo. Oct. 17, 2013)**

The former employee filed a lawsuit *pro se* against the employer. The employee sought damages for pain and suffering allegedly caused by the termination of his employment while he was on FMLA leave following a work-related injury. The employer filed a motion to dismiss, arguing the employee was actually alleging a state law action for wrongful termination and therefore failed to establish that the district court had subject matter jurisdiction over the claim. The district court noted that the employee used the words "wrongful termination" in his complaint. However, reading the employee's claims liberally because of his *pro se* status, the court found that he also claimed he was discharged while on FMLA-protected leave. Therefore, the court construed the employee's complaint as alleging interference with his rights under the FMLA. Accordingly, because it had subject-matter jurisdiction over the FMLA claim, the court denied defendant's motion to dismiss.

**Perisic v. Pizza Hut of Ft. Wayne, Inc., 2013 WL 654759 (N.D. Ind. Feb. 21, 2013)**

In December 2009, the employee requested time off to be with his wife after she had surgery. The store manager and the employee reported conflicting stories about what they discussed when the employee requested time off. In late December 2009, the employee took the previously requested time off and, in early January 2010, he returned to work without incident. Then, in February 2010, performance issues began to arise. In March, the employer notified the employee that his next incident would result in termination. Later in March, the employee violated company policy and the employer fired him. The employee filed retaliation and interference claims under the FMLA. The court granted the employer's motion for summary judgment on the retaliation claim and denied the employer's motion for summary judgment on the interference claim.

The court determined that the employee's retaliation claim failed, whether based on the direct or indirect method. The direct method retaliation claim failed because the employee did not establish that the employer had any intent to retaliate. Suspiciously timed adverse actions are not enough to support a claim of retaliation. The indirect method retaliation claim failed because the employee did not demonstrate any evidence that the employer treated him differently than any other employee. Furthermore, he did not show that he was performing his job in a satisfactory manner. With respect to the interference claim, the court noted that three of the five required elements for an interference claim under the FMLA were indisputable. The two elements at issue were whether the employee provided sufficient notice of his intent to take leave and whether the employer denied the employee to benefits to which he was entitled. The only evidence on these points was the conflicting testimony of the manager and the employee concerning the conversation that took place when the employee asked for time off. Viewing the evidence in the light most favorable to the non-movant, the court found that a reasonable jury could have believed the employee's testimony over the manager's testimony, thus a genuine issue of material fact precluded the court from granting the employer's motion for summary judgment.

**Lassalle v. Port Authority of New York & New Jersey, 2013 WL 6094339 (D. N.J. Nov. 19, 2013)**

The employee worked for a port authority. Although he applied for transfers to several different positions within the port authority, he was not hired. When the employee's department was reorganized, he was moved into a different group in the employer's organization, but he kept the same salary and the same title. Nevertheless, the employee complained a few months later that he had suffered retaliation and racial discrimination. He asked for, and was granted, a transfer to another group. Eventually, he was discharged after he purchased, without authorization, computer software that allowed a user to view and record without being detected a target computer's files and activities. The employee thereafter filed a lawsuit against the employer, alleging interference with his rights under the FMLA.

The court stated that to prove FMLA interference, the employee needed to show that he was entitled to take FMLA leave and that the employer denied him the right to take that leave. The Court held, however, that the employer's reason for discharging him was nonretaliatory and



nondiscriminatory, and therefore, the employee's FMLA interference claim failed as a matter of law.

**Maack v. School Board of Brevard County, 2013 WL 6050749 (M.D. Fla. Nov. 15, 2013)**

The employee worked as an electrician for a school district. The employee had ongoing attendance issues, and he also experienced a variety of medical issues in his final years of employment. Eventually, the employee received a written memo for excessive absenteeism and was asked to submit a physician's note for any future absences. Nevertheless, the employee continued to take unapproved and extended absences, but was not immediately discharged. Eventually, the employee was issued a letter of reprimand for his failure to report to work. He was also referred to an Employee Assistance Program, but after evaluation, he declined the psychologist's recommendation that he be placed on anti-depressants and undergo additional counseling. When he returned to work again, the employee claimed that he gave his department supervisor a doctor's note restricting him to eight hours of work per day, but the department supervisor denied ever receiving any note. After this, the employee worked for only 3 hours on one day, left an hour early on another day, and then was absent for a whole day without notification. The next day, the employer sent the employee a letter that accepted his resignation as a result of his continued absences.

The employee filed a lawsuit against the employer for FMLA interference and retaliation, but the court granted summary judgment for the employer. As to the interference claim, the court held that he failed to present evidence that he was entitled to FMLA leave. The employee did not show that he suffered from a "serious health condition" that rendered him unable to perform the functions of his job. Additionally, he did not provide notice to the employer that was sufficient to indicate the time and duration of the FMLA leave. Although he had been diagnosed with several medical ailments, he did not show that any of the conditions made him unable to perform his job functions or caused his absences, or that the employer was aware of his need for leave. Various doctors' notes stated that he could perform his job functions, and the employee had stated the same on several occasions. The employee's retaliation claim also failed. The employee did not engage in FMLA-protected activity because he never gave the employer any indication that his absences were potentially FMLA-qualifying. He also could not establish the causation requirement. Finally, even if the employee had established a prima facie claim of retaliation, his absences created a legitimate, non-discriminatory reason for his discharge.

**Slade v. Alfred Univ., 2013 WL 6081710 (W.D. N.Y. Nov. 19, 2013)**

The employee worked for a university as a Research Account Specialist. The employee had been taking time off from work with little or no advance notice. As the conduct continued, the employer placed the employee on a three-month probationary period, then issued a final warning, and finally placed her on an additional 60-day probationary period. The employee continued to have absences after this final effort, but employer met with the employee and extended her probation for a third time. Immediately after the meeting, however, the employee sent her supervisor an email to announce that she was leaving for the day to take a pet to a veterinarian appointment. As a result, the supervisor decided to reverse his decision and discharged the employee instead. The supervisor sent a letter to the employee listing the

absences that were unexcused. Several of the absences, however, were for medical reasons and had been approved in advance.

The employee brought claims for FMLA interference and retaliation, and the employer unsuccessfully moved for summary judgment. For the interference claim, the employer argued that the employee did not have a serious health condition, that she did not provide sufficient notice of her need for FMLA leave, and that had she not been prejudiced by the misclassification of certain absences in the final termination letter. The court disagreed, holding that there were several disputed issues of material fact. First, medical records given to the employer indicated that the employee was diagnosed with sinusitis and migraines and that many of her absences resulted from her migraines. Second, the medical records given to the employer may have triggered its duty to inquire further as to whether the absences were covered by the FMLA. Finally, three of the eight absences listed in the termination letter may have been covered by FMLA. Thus, the court denied summary judgment for the employer on the FMLA interference claim. The court also denied summary judgment on the retaliation claim, questioning whether her supervisor should have known that some of her absences qualified for FMLA protection. Additionally, the misclassification of her absences in the letter suggested that the reason for her discharge may have been pretext for retaliation.

**Stoler v. Institute for Integrative Nutrition, 2013 WL 6068598 (S.D. N.Y. Nov. 18, 2013)**

Plaintiffs filed a class action lawsuit for FMLA interference, FMLA retaliation, and various claims arising under other statutes. For their FMLA claims, the employees alleged that the employer: (1) asked for an employee's future maternity plans; (2) created a maternity projection chart that predicted whether an employee was likely or fairly likely to have children in a few years; (3) demoted or discharged employees when they became engaged, married, pregnant, or took FMLA leave; (4) discharged employees and replaced them with single, childless employees who were "less likely" to have children.

The employer moved to dismiss the employees' claims, but the court denied the motion. There was evidence that the employer and director had made statements that could be construed as either coercing the employees to leave their employment, or as discouraging the employees from taking FMLA leave after the birth of their children. Additionally, the employer had demoted or discharged employees once they announced their intention to go on maternity leave. The employer argued that merely requesting maternity leave was not the same as asking for FMLA leave. The court disagreed, holding that such a request did not vitiate the employee's need for leave or the employer's duty to provide it. The employer also argued that one of the named plaintiffs was not a covered employee, but the court found otherwise by calculating her eligibility at the time the leave was to commence, rather than when it was requested. In addition, based on the facts, each employee properly plead a case of retaliation, because they claimed they were demoted, moved to different offices, suffered pay decreases, had work falsely criticized, had responsibilities taken away, had bonuses decreased, were demoted and replaced by employees without children, or were discharged. These claims adequately alleged retaliation under the FMLA.

**Affer v. Van Dyke Dodge, Inc., 2013 WL 5476247 (E.D. Mich. Oct. 2, 2013)**

Plaintiff sued his former employer alleging interference with his rights under the FMLA. Plaintiff alleged that he suffered from depression and had informed his supervisor of this fact in May 2010. In late June 2010, plaintiff called his supervisor and said she was “really sick” and needed time off. Although plaintiff’s supervisor claimed he never approved this request, plaintiff testified that he thought his supervisor was “okay” with him taking time off. During this time off, plaintiff remained at home, drinking heavily. After failing to report to work for three days, one of plaintiff’s co-workers warned him that he was going to be discharged. Plaintiff was ultimately hospitalized for depression and alcohol abuse. He underwent outpatient therapy for five days after leaving the hospital. During his hospital stay, plaintiff’s girlfriend called plaintiff’s supervisor to let him know that plaintiff was worried about his job and that it was affecting his progress in getting better. Plaintiff’s supervisor told the girlfriend that he wanted to see plaintiff when he was better. Plaintiff returned to work after his outpatient therapy and was informed he was discharged, effective earlier that month, for failing to call or show up at work for three days. Plaintiff’s supervisor alleged that he did not inform plaintiff of his termination on an earlier date because he did not want to “upset him.”

After plaintiff filed suit under the FMLA, the employer moved for summary judgment on the basis that plaintiff did not suffer from a serious health condition and did not provide adequate notice of his intent to take leave. Defendant also contended that plaintiff was discharged for failing to call or show up for work for three days, not as a result of his leave. The court denied defendant’s motion. The court recognized that plaintiff was not entitled to FMLA leave during his three-day absence because he failed to provide adequate notice to his employer of a serious health condition and was not receiving inpatient care or continuing treatment from a health care provider during that time. As such, defendant was entitled to terminate plaintiff under its three-day “no call/no show” policy. However, the court ultimately denied defendant’s motion for summary judgment because there was a genuine issue of material fact regarding whether plaintiff was in fact a “no call/no show” on the dates he was absent and whether he was discharged for those absences.

**Darlington v. Cintas, 2013 WL 5347294 (S.D. Ga. Sept. 23, 2013)**

Plaintiff, proceeding *pro se*, filed a lawsuit against the employer. Her complaint attempted to assert a claim for denial of FMLA leave. Plaintiff was on FMLA leave from December 8, 2010 through January 13, 2011, and again from January 28, 2011 through April 13, 2011. Plaintiff’s supervisor wanted her to return to work on April 13, 2011, but her doctor had not yet released her to return to work. Plaintiff’s supervisor informed plaintiff that if she did not return to work on April 15, 2011, she would be discharged for job abandonment. Plaintiff was terminated effective April 15, 2011. The court dismissed plaintiff’s claim for FMLA interference because plaintiff was allowed to take twelve weeks of leave within a twelve-month period under the FMLA. Therefore, her FMLA interference claim failed as a matter of law.

**McCall v. City of Philadelphia, 2013 WL 5823873 (E.D. Pa. Oct. 29, 2013)**

When plaintiff's wife underwent an emergency c-section for the birth of their twins, plaintiff called in sick for three days. He claimed that he was ill and provided a doctor's note to that effect. According to plaintiff, he was instructed by his supervisor to call in sick prior to FMLA approval to avoid being written up for insubordination and abuse of sick leave. The employee sought and was granted intermittent FMLA leave due to his wife's incapacity following the childbirth. However, the three days when plaintiff called in sick were never designated as FMLA leave. Later on, the employee asked for those three days to be reclassified as FMLA leave, but he failed to provide any supporting documentation. Approximately a year later, plaintiff approached defendant's human resources director and explained that those three days were protected FMLA leave. The human resources director declined to go back and investigate those days. Plaintiff used FMLA leave on several other occasions during his employment for his severe bilateral knee arthritis, his depressive disorder, and other authorized reasons. Eventually, plaintiff was disciplined on several occasions for unauthorized absences. Ultimately, Plaintiff was discharged when he failed to provide medical documentation following an FMLA leave in 2010 and 2011.

Plaintiff brought suit alleging retaliation under the FMLA. Both plaintiff and defendant filed motions for summary judgment. The court granted summary judgment for defendant on the interference claim, but did not grant summary judgment on the retaliation claim. Plaintiff had not raised an interference claim in the complaint or prior to his summary judgment motion, so the court granted summary judgment for defendant. Plaintiff failed to put defendant on notice until two years after initiating the lawsuit that he intended to seek relief on the FMLA interference claim, despite having filed four separate iterations of his complaint, resulting in undue delay and prejudice to defendant. For Plaintiff's retaliation claim, the court noted that defendant presented a legitimate, non-discriminatory reason for its actions because plaintiff called in sick and provided a doctor's note stating that he was absent from work due to his *own* illness, and not that of his wife. However, plaintiff had pointed out weaknesses, implausibilities, and inconsistencies in defendant's explanation. Therefore a reasonable factfinder could reject defendant's explanation. The court denied both motions for summary judgment on the retaliation claim, finding a triable issue of material fact as to whether defendant's proffered legitimate reason for its actions toward plaintiff was pretextual.

**Penaloza v. Target Corp., 120 FEP Cases 1021 (11th Cir. 2013)**

Plaintiff, proceeding *pro se*, appealed the district court's decision, which granted summary judgment for the employer. Plaintiff had filed claims against her former employer alleging FMLA interference and retaliation. The Eleventh Circuit affirmed the district court's ruling. On the FMLA interference claim, the Eleventh Circuit found that the employer gave plaintiff over 12 weeks of leave before her discharge, and therefore, plaintiff could not show that she was denied any benefit to which she was entitled under the FMLA. As to the FMLA retaliation claim, the Eleventh Circuit held that plaintiff did not present any evidence to show a causal connection between her FMLA request and her discharge, other than temporal proximity, which standing alone is insufficient to establish causation.

***Akin-Taylor v. Kaiser Foundation Health Plan Inc.*, 2013 WL 4456152 (N.D. Cal. Aug. 16, 2013)**

The employee sued her employer for disciplining and discharging her in violation of the FMLA. The employee claimed that her employer violated the FMLA when it reprimanded her for bringing her son to work with her on a Saturday when day care was not available and when she took a day off work to celebrate her son's twenty-first birthday.

Defendant filed a motion to dismiss, arguing the claim was time-barred and that the employee failed to establish that she went on leave for a qualifying reason under the FMLA. The district court rejected defendant's argument that the claim was time-barred, finding that the employee's allegations were sufficient to allege a willful violation of the FMLA and, therefore, subject to the three year statute of limitations period. The last event constituting the alleged violation – her termination of employment – occurred within that period, and therefore the statute of limitations did not bar her claim. Nevertheless, the court granted the employer's motion to dismiss because the employee failed to allege that she was reprimanded for taking leave for a qualifying reason under the FMLA. Although the statute allows covered employees to take family leave for certain reasons, the ones she alleged were not covered. The court also noted that she did not allege that she was denied FMLA leave during the period when she was covered by the statute. Accordingly, the court dismissed her claim under the FMLA.

***Green v. Wal-Mart Stores, East, L.P.*, 2013 WL 3223629 (S.D. Ohio June 25, 2013)**

The employee, a store manager, took FMLA leave on three occasions throughout her employment. After each period of leave, she was reinstated to the same position, and no one at the store made any negative or inappropriate comments about her use of the leave. The employee also accrued many unexcused absences, however, which ultimately led to discipline. Eventually, she received "coaching" for performance-related issues, such as for working beyond the prescribed amount of time without taking a meal break. At least one coaching occurred after the employee informed her manager that she would need FMLA leave the following month for a planned medical procedure. Moreover, in the midst of the investigation into employee's infraction for working too long before taking a break, she informed the employer that she would need intermittent FMLA leave to care for her husband. Before that leave commenced, the employee was discharged. The employee filed suit, alleging interference with her FMLA rights and retaliation for taking or requesting leave.

The court denied the employer's motion for summary judgment as to both claims. As to interference, the employee alleged that some of her absences were FMLA-covered and, therefore, the coaching was retaliatory. The employer acknowledged that some absences were incorrectly counted when she was coached, but argued that the employee had enough unexcused absences to justify its actions. The court agreed with the employee, concluding an issue of fact existed as to whether the employer used her FMLA absences against her when it decided to coach her. As to the retaliation claim, the court found an issue of fact existed as to causation and pretext because the employee demonstrated that she was treated differently before she started requesting leave. Specifically, she had worked for fourteen years without discipline, and the employer began coaching her around the time she requested FMLA. Moreover, it coached her in

part for absences that were covered by the FMLA. Accordingly, the court denied the employer's motion for summary judgment as to both claims.

**Mezu v. Morgan State University, 2013 WL 3934013 (D. Md. July 29, 2013)**

The employee, a professor, requested FMLA leave to care for her daughter, who needed to undergo brain surgery. In her lawsuit, the employee alleged that the employer delayed in responding to her FMLA request, but when it finally did, it denied the request and forced her to take sick leave instead. She also alleged that the employer did not pay her and cancelled her benefits for several weeks after she eventually returned to work. Both parties moved for summary judgment, but the court denied both motions.

The employer presented a number of arguments, all of which the court rejected. At the outset, the court concluded that the daughter's condition qualified as a serious health condition because it required emergency brain surgery and follow up care. To argue otherwise, the employer offered deposition testimony from the daughter's spouse (who at that time was in divorce proceedings with the daughter) that the daughter did not need anyone to care for her. Taking the evidence most favorable to the employee at the summary judgment stage, the court concluded the daughter required her mother's assistance for at least some period of time. The employer also argued that the employee did not provide sufficient notice of her need for leave. The court recognized that there were some initial problems with the submitted certification, but the employee had corrected those deficiencies and given proper notice. The court also noted that the employee's request was dealt with differently by the employer compared to requests made by other employees. Finally, the court found that the employee had offered sufficient evidence of economic harm, in the form of lost pay and benefits, to support her interference claim. Based on these findings and the disputed issues of material fact, the court denied both motions for summary judgment. As to the retaliation claim, the court denied the employer's motion for summary judgment. The employer claimed that it temporarily ended the employee's pay and benefits by "mistake," but the court did not find that explanation convincing.

**Szostek v. Drexel University, 2013 WL 4857989 (E. D. Pa. Sept. 11, 2013)**

The employee, a commercial driver, was granted six months of intermittent FMLA leave because of symptoms related to depression and anxiety. Under the employer's policy, after six months the employee was required to recertify his medical leave. The employee alleged that he was never notified of the need to recertify. Having taken FMLA leave on previous occasions, he claimed that he thought his approval would extend for a year. In addition, while on leave, the employee sustained an injury and was absent from work as a result. According to the employer's records, the employee exhausted his FMLA time before returning from workers' compensation leave, and therefore, the employer did not request FMLA recertification. Following the expiration of that leave, the employer began counting his absences against him. The employee later tried to report the time as FMLA leave, but he did not do so through the employer's new third-party leave administrator, as was required. Ultimately, his employment was terminated for violation of the leave policy and for providing false information to his supervisor. The employee filed a lawsuit alleging retaliation and interference in violation of the FMLA, and the employer moved for summary judgment.

The employee's retaliation claim failed because he did not demonstrate a causal link between his FMLA leave and his discharge. First, the temporal proximity was not sufficient because eleven months had passed between the request for leave and his discharge. Second, the court concluded that the employee was not treated unfavorably, despite his assertion to the contrary. Accordingly, the employee failed to establish a prima facie claim of retaliation. Even if he could do so, however, the employer offered a legitimate, non-discriminatory reason for its actions, and the employee could not demonstrate that this reason was pretext. As to the interference claim, the employee argued that the employer interfered with his FMLA rights by requiring him to notify both the employer and its third party administrator regarding when he needed to take FMLA leave. The court disagreed, and found no genuine issue of material fact with respect to the FMLA interference claim. Accordingly, the court granted the employer's motion for summary judgment.

**Osborne v. Suminoe Textile of America Corporation, 2013 WL 2897053 (D. S.C. June 13, 2013)**

The employee injured his back while at work, and a supervisor drove him to the hospital. The next day, the employee reported that he was unable to work, but would visit his doctor a day later. During his visit, the doctor gave him a note that excused him from work for several days. In total, the employee was absent from work for five days. Upon his return, the employer terminated his employment. The employee filed suit, alleging his discharge violated the FMLA. The employer filed a motion to dismiss, which the court granted in part and denied in part.

At the outset, the court concluded that the employee had a serious health condition because he was unable to work for five days after injuring his back, and he was treated by a medical provider twice during that period. Additionally, there was sufficient evidence to find the employee provided proper notice of the need for the leave. Finally, despite the fact that the employee was permitted to take the requested leave, the court found that he offered sufficient evidence of interference because he was discharged at the conclusion of his leave, rather than being reinstated. For similar reasons, the court denied the employer's motion as to the employee's retaliation claim. However, the court granted the employer's motion to dismiss to the extent the employee sought punitive damages because punitive damages are not available under the FMLA.

**Douglas v. Lofton, 2013 WL 5940749 (N.D. Ill. Nov. 6, 2013)**

The employee was a teacher at a school. The employee attended an administration meeting, during which the principal allegedly moved suddenly and aggressively towards her, causing her to develop a headache. She left work before the school day ended and after completing required paperwork. The following day, the employee's doctor diagnosed her as having had a mild heart attack. Another treating physician diagnosed her with post-traumatic stress disorder and severe depression. The employee was absent from work for a period of nine days, and upon her return, the principal gave her notice of a pre-disciplinary hearing, citing infractions associated with her absence. As a result, the employee served a one-day suspension, which was followed by a two-month absence while she was under a doctor's care. When she

returned, the principal held a pre-disciplinary meeting regarding her failure to complete work while she was on leave. The employee alleges that the principal entered her classroom, “mumbled a threat, and sat down,” which caused her to experience a fainting episode and panic attack. Medical personnel took her from her classroom to the hospital. Thereafter, the city board of education notified the employee that if she did not return to work within ten days, it would discharge her for job abandonment. The employee subsequently retired.

The district court granted defendants’ motion to dismiss the employee’s FMLA interference claim without prejudice, noting that she received FMLA time off on multiple occasions. Moreover, the employee took leave even after she received notice of suspension, and therefore, failed to show how defendants took actions which interfered with her rights or discouraged her from exercising these rights.

**Deboard v. Board of County Commissioners of the County of Comanche, et. al., 2013 WL 5676740 (W.D. Okla., Oct. 18, 2013)**

The employee claimed the employer interfered with her FMLA rights and retaliated against her for exercising those rights by moving her out of her office where she supervised other employees and reclaiming her keys to various offices. The employer moved for summary judgment and presented undisputed facts that it had approved all of the employee’s FMLA leave requests and often provided leave time in excess of FMLA requirements. The relevant retaliation undisputed facts included: (1) the employer’s actions did not entail a significant change of plaintiff’s employment status; (2) the employee’s duties did not change; and (3) the terms, conditions, pay, or benefits of her employment did not change.

The court granted summary judgment in favor of the employer on the interference claim largely based upon these undisputed facts. Additionally, the court held the employer’s policy of requiring accrued vacation, sick, and/or annual leave to run concurrently with FMLA leave did not interfere with FMLA rights because the FMLA permits an employer to substitute an employee’s accrued paid vacation leave, personal leave, or family leave for FMLA leave. Regarding the retaliation claim, the court determined the employee’s move was not retaliatory because her terms, conditions, pay, and benefits did not change and the employer indisputably moved the employee as a precautionary measure in the event she needed to take additional emergency medical leave.

**Michaud v. City of Casselberry, 2013 WL 828584 (M.D. Fla. Mar. 6, 2013)**

The employee brought an FMLA claim against the employer, and the employer filed a motion to dismiss. According to the complaint, the employee had worked for the employer for more than five years and had requested leave under the FMLA. The employer allegedly interfered with his FMLA leave in several ways. The employer argued that the employee appeared to be asserting two different types of FMLA claims—an interference claim and a retaliation claim. Therefore, the employer contended that the employee needed to assert the claims in two separate counts. However, the court determined that the employer’s cited case law did not support the imposition of such a requirement.



The employer also argued that the employee had failed to state any type claim under the FMLA because he never alleged that he was denied FMLA leave (as required to assert an interference claim) and he did not establish the requisite causal connection between his FMLA leave and his termination (as required for a retaliation claim). The court determined that the employee properly plead an FMLA interference claim because he had alleged that he was ordered to return to work before fully recovering from heart surgery and exhausting his FMLA leave. Additionally, the court ruled that the employee properly stated an FMLA retaliation claim because the employee had alleged that his pay was cut in retaliation for having made FMLA requests. The court therefore denied the employer's motion to dismiss the FMLA claims.

**Tillman v. Ohio Bell Telephone Co., 2013 WL 5539612 (6th Cir. Oct. 8, 2013)**

In 2006, plaintiff was diagnosed with lumbar degenerative disc disease, a chronic disorder which caused him two to three days of severe pain per month. Plaintiff's intermittent FMLA leave days routinely fell on Fridays, often preceding holiday weekends. Additionally, plaintiff often notified supervisors in advance of his FMLA days despite his doctor's statement that one cannot predict when lumbar disease flare ups will occur. In late 2008, the employer hired an investigation firm to conduct surveillance on plaintiff. Plaintiff was captured on video doing personal errands which would have caused him pain had he been experiencing a flare-up of his lumbar disease. A doctor concluded that plaintiff's activities were inconsistent with the symptoms on which FMLA leave was granted to plaintiff. Plaintiff suggested that FMLA leave was warranted because the narcotic pain killers he was taking precluded him from operating the employer's heavy machinery. A disciplinary review board discharged plaintiff, finding that he fraudulently misrepresented his injury.

On both the interference and retaliation claims, the court found that the employer had a legitimate non-discriminatory reason for discharging plaintiff, namely that he misrepresented the nature of his medical needs in requesting leave and that the employer's reasonable and honest belief in that reason precluded any finding of pretext. As such, the Sixth Circuit upheld the summary judgment ruling granted by the district court. On the interference claim, the court found that the necessity of an employer's honest belief in a legitimate reason unrelated to the exercise of FMLA benefits. An honest belief that the employee is abusing FMLA leave, while not providing the *scienter* necessary for a finding of retaliation, may still interfere with the employee's exercise of FMLA rights. As such, the employer's intent is irrelevant in determining whether the discharge interfered with the exercise of FMLA rights. While Sixth Circuit precedent was mixed on the issue, the court acknowledged that three other circuits (the Seventh, Third, and Tenth) had recognized the honest belief defense in interference cases. However, rather than ruling on the honest belief issue, the court found that plaintiff had failed to demonstrate entitlement to FMLA leave. As such, it upheld the grant of summary judgment on his interference claim without ruling on the honest belief theory's validity.

***Summarized Elsewhere:***

**Mercer v. Arbor E & T, LLC, 2013 WL 164107 (S.D. Tex. Jan. 15, 2013)**

**Anderson v. Discovery Commun., LLC, 20 WH Cases2d 947 (4th Cir. 2013)**

**Hollenbach, et. al. v. Burbank, et. al., 2013 WL 1842453 (D. Utah May 1, 2013)**

**Pope v. Blue Ridge Electric Membership Corp., 2013 WL 1728011 (W.D. N.C., Apr. 22, 2013)**

**Brown v. Vilsack, 923 F. Supp. 2d 118 (D. D.C. 2013)**

**Fantroy v. Publix Super Markets, Inc., 2013 WL 6768369 (M.D. Fla., Dec. 19, 2013)**

**Branstetter v. General Parts Distribution, LLC, 2013 WL 6780672 (D. Or., Dec. 19, 2013)**

**Hathorn v. Sodexo, Inc., 2013 WL 5516140 (W.D. Okla. Oct. 2, 2013)**

1. *Prima Facie* Case [New Topic]

**Hager v. Arkansas Dept. of Health, 735 F.3d 1009 (8th Cir. 2013)**

Plaintiff, a state employee, sued her former supervisor for interference and retaliation under the FMLA. Plaintiff alleged she saw a physician regularly for her cataracts, but on one occasion, her supervisor instructed her to cancel the doctor's appointment so they could discuss a report. Her supervisor became aware of her leave request immediately prior to the appointment. Plaintiff explained the reason why she need to go to the doctor, and stated she could not cancel the appointment. Four days later, plaintiff was discharged by her supervisor without explanation. Plaintiff's complaint did not allege that she provided notice of her need for leave within 30-days, or notice as soon as practicable under the circumstances.

Plaintiff claimed the supervisor violated the FMLA by denying her leave to which he was entitled, and by discharging her four days after the leave request. The district court denied the supervisor's motion to dismiss the employee's FMLA claims. On appeal, the Eighth Circuit held the district court erred in denying the supervisor's motion to dismiss. With regard to the interference claim, the Eighth Circuit found plaintiff did not state a FMLA interference claim because she did not allege that she provided the supervisor with 30 days' prior notice or notice as soon as practicable. As to plaintiff's allegations of retaliation, the Eighth Circuit found plaintiff failed to plead a *prima facie* claim because she had not sufficiently alleged she exercised FMLA rights. Specifically, she failed to plead that she gave notice of intent to take FMLA leave, or that she was qualified to that leave. Accordingly, the district court erred in denying the supervisor's motion to dismiss plaintiff's FMLA claims.

**Potts v. United Parcel Service, 2013 WL 4483080 (N.D. Tex. Aug. 22, 2013)**

Plaintiff was a driver. Two months after taking intermittent FMLA leave, he was involved in an accident that was determined to be an "avoidable runaway accident," and defendant terminated his employment. Pursuant to the collective bargaining agreement between plaintiff's union and the employer, an "avoidable runaway accident" is grounds for termination. Plaintiff grieved the decision to terminate his employment through the grievance procedure in the collective bargaining agreement, and it was upheld by a panel. Plaintiff then filed suit against his employer alleging, among other claims, retaliation for exercising his FMLA rights.

The court granted defendant's motion for summary judgment. The court held that plaintiff failed to establish the third element of a *prima facie* FMLA retaliation case, i.e., that he was treated less favorably than an employee who had not requested FMLA leave or the adverse decision was made because he sought protection under the FMLA. The court rejected plaintiff's argument that temporal proximity of two months between filing for FMLA protection and the employer's decision to terminate him was sufficient to show a causal connection. The court

noted that in addition to temporal proximity, plaintiff must raise a fact issue showing that the protected activity and the adverse employment action are “not completely unrelated.” The court found that plaintiff presented no evidence establishing that the decision makers were aware of his FMLA leave. The court concluded that not only did plaintiff fail to make a *prima facie* showing on his FMLA retaliation claim, even assuming he could make a *prima facie* showing, he offered no evidence to rebut defendant’s legitimate, nondiscriminatory reason for his termination.

**Watson v. Ciena Healthcare Mgmt., Inc., 2013 WL 5435279 (E.D. Mich. Aug. 16, 2013), report and recommendation adopted as modified by Watson v. Ciena Healthcare Mgmt., Inc., 2013 WL 5432177 (E.D. Mich. Sept. 27, 2013)**

Plaintiff took FMLA-protected leave for high blood pressure and hypertension from November 6 to 11, 2009 after undergoing a company physical. Plaintiff’s employment was terminated on December 8, 2009 after undergoing another physical and informing defendant that her doctor did not release her to return to work. Plaintiff filed FMLA interference and retaliation claims. The court denied defendant’s motion for summary judgment as to the interference claim and granted the motion as to the retaliation claim.

In refusing to dismiss the interference claim, the court stated that whether sufficient notice of an employee’s intention to take FMLA leave has been given to the employer is often a question of fact precluding summary judgment for the employer. In this case, although the employee did not mention FMLA to her employer, she did ask about disability coverage and told the human resources manager about the results of her physical exam indicating she had high blood pressure and could not return to work. The court found it reasonable to infer that the human resources manager was given enough information to reasonably conclude that leave was needed for a serious health condition.

On the other hand, the court dismissed the retaliation claim, finding scant evidence of a causal connection between her medical leave in November and discharge in December. Although the court agreed with plaintiff that the employer’s proffered reason for terminating plaintiff – that she failed to complete a physical exam – is pretextual, the court found that the only factually-supported alternative reason is that she was fired on the basis of an actual or perceived disability in violation of the American with Disabilities Act, not the FMLA. The court concluded that there was a dearth of evidence, direct or circumstantial, that the employer retaliated against plaintiff because she took a five-day leave a month earlier, “and no rational trier of fact could find retaliation on this record.”

**Malin v. Hospira, Inc., 2013 WL 2436483 (N.D. Ill. May 31, 2013)**

Plaintiff, an IT employee, brought suit against her former employer for interference and retaliation under the FMLA. In mid-June 2006, plaintiff experienced medical issues, requiring hospitalization and surgery. She requested and received FMLA leave and short-term disability benefits as of June 19, 2006, which the employer granted through August 24, 2006. On August 24, plaintiff’s short-term disability benefits ended. According to plaintiff, the employer’s FMLA coordinator told plaintiff in a threatening manner in mid-August 2006 that she had to return to

work by August 25. However, plaintiff's FMLA leave was extended through September 10, 2006, such that she received the full 12 weeks of leave to which she was entitled under the FMLA. While plaintiff was on leave, the IT department announced a reorganization on July 12, 2006. Although she was listed in June 2006 as a possible candidate for promotion, plaintiff was ultimately not selected for promotion. The reorganization was part of an ongoing process, set in motion well before plaintiff requested FMLA leave. And the decision not to promote plaintiff during the reorganization was made prior to her supervisor learning plaintiff was taking FMLA leave. The reorganization also created a management position, above plaintiff's current position, which remained unfilled for almost a year. Plaintiff applied for the position after returning to work, but the employer never considered her or any other internal candidate for the position. An external candidate was hired for the management position in July 2007.

Plaintiff claimed the employer violated the FMLA by discouraging her from taking the full 12 weeks of unpaid leave to which she was entitled under the Act and failing to promote her during the reorganization or in July 2007 when the employer hired the outside candidate for the new management position created by the reorganization. The employer moved for summary judgment on both the FMLA interference and retaliation claims and the district court granted summary judgment on both counts. Regarding the interference claim, the district court held the employer did not violate the FMLA by discouraging plaintiff from taking FMLA leave because she was not prejudiced by the alleged discouragement; she was able to take the full amount of leave. Similarly, the district court granted summary judgment on the retaliation claim because the decision not to promote plaintiff during the reorganization was made before she requested FMLA leave, and the decision not to promote her to the management position was made over a year after her request for leave. Based on these facts and plaintiff's failure to identify direct evidence (i.e. a smoking gun admission by the employer it failed to promote plaintiff because she took FMLA leave) or circumstantial to permit an inference that a causal connection existed with respect to the employer's decisions, the district court held the decisions were made completely independent of plaintiff's request for FMLA leave.

**Baier v. Rohr-Mont Motors, Inc., 2013 WL 2384269 (N.D. Ill. May 29, 2013)**

Plaintiff, a sales manager, sued his former employer for interference and retaliation under the FMLA. On September 28, 2011, plaintiff experienced chest pains, was diagnosed with a damaged aortic valve, admitted to the hospital and underwent open heart surgery several days later. The surgery was to be followed by rehabilitation lasting approximately twelve weeks. Plaintiff requested FMLA leave to recover and rehabilitate, but the employer never provided him with documents for his FMLA leave request. Nonetheless, plaintiff took four weeks of leave. He returned to work with restrictions limiting his hours and lifting and acknowledged he needed more rehabilitation. The employer allowed plaintiff to attend one rehabilitation appointment but insisted he work extensive hours, usually up to twelve hours per day. Less than two weeks after his return, the employer told plaintiff he would be demoted, a move that would entail a 50% pay cut. His supervisor initially said the reason for the demotion was because plaintiff "was not a happy person" and "untrainable," but the supervisor later stated the goal was to get plaintiff to resign. Plaintiff was discharged the next day.

Plaintiff alleged the employer violated the FMLA by denying him FMLA leave to which he was entitled, threatening him with demotion and discharging him two weeks after he returned from leave. The employer moved to dismiss both the FMLA interference and retaliation claims. The district court denied the employer's motion. With regard to the interference claim, the district court found plaintiff met his initial burden of pleading a *prima facie* case of interference because he alleged his rehabilitation was scheduled to last approximately twelve weeks, he requested FMLA leave to "recover and rehabilitate," he only took four weeks of leave, and the employer failed to provide plaintiff with documents relating to his request for FMLA leave. From these facts it could be inferred plaintiff was denied the full twelve weeks of leave and/or intermittent leave upon his return to work to which he was entitled. Similarly, the district court found the employer's motion to dismiss the retaliation claim premature because the timing of and circumstances surrounding plaintiff's discharge suggest it was related to his request for FMLA leave.

**Combs v. Quest Specialty Coating LLC, 20 WH Cases2d 982 (E.D. Mich. 2013)**

The employer's motion for summary judgment on the issue of interference with FMLA leave was denied. The employee took days off for a variety of reasons, including days for unexcused personal reasons, late arrivals/early departures, and time off due to pain in his knee for which he had previously taken an FMLA leave. The employer claimed that the employee was not entitled to leave for the subsequent absences, but the court rejected the employer's unsupported argument that the missed time was unrelated to the surgery. In fact, the employee's doctor had imposed work restrictions when he returned from leave for his knee surgery. Because questions of fact also surrounded the issues of the absences for his prior injury, notice of leave and the medical reasons for leave, summary judgment was not appropriate.

**Ridgeway v. Royal Bank of Scotland Grp., 2013 WL 1985016 (D. Conn. May 13, 2013)**

Plaintiff filed suit against Royal Bank of Scotland Group and its subsidiary RBS when he was terminated from the subsidiary after taking FMLA leave for medical treatment. The subsidiary filed a motion for summary judgment on plaintiff's FMLA and other claims. Plaintiff filed a cross-motion for summary judgment on all claims. Plaintiff first asserted that the subsidiary interfered with his FMLA rights by providing him with misinformation regarding his entitlement to leave prior to his December 2009 surgery. Plaintiff also argued that the subsidiary should be equitably estopped from arguing that he was not entitled to FMLA leave starting in January 2010 and that the subsidiary interfered with his FMLA rights by failing to reinstate him after his leave expired.

The court noted that the Second Circuit had not articulated the FMLA interference standard. Looking at the weight of authority in other federal courts within the circuit, the court held that a *prima facie* case of FMLA interference exists when: (1) the employee is an "eligible employee" under the FMLA; (2) the employer is an employer as defined in the FMLA; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of his intention to take leave; and (5) the employee was denied benefits to which he was entitled under the FMLA. The court also held that intent was not material in an interference claim, so it was inappropriate to apply the *McDonnell Douglas* burden-shifting analysis. Under the articulated standard, the court concluded that plaintiff could have been misinformed about his

FMLA benefits. Plaintiff also raised a triable issue of fact as to whether he was prejudiced by the incorrect information, as plaintiff showed evidence that if he had not been misinformed of his FMLA rights, he would have moved his medical leave to a time when he could have taken leave and avoided termination. As to his failure to reinstate claim, plaintiff showed evidence that he detrimentally relied on the representation that he was eligible for FMLA leave in January 2010, and that he would have been able to return to work at the expiration of his 12-week leave. Thus, there were also triable issues of fact as to whether the subsidiary was equitably estopped from challenging plaintiff's entitlement to FMLA leave in January 2010. The court denied defendant's motion for summary judgment on the interference claim and denied plaintiff's cross-motion for summary judgment on the same claim.

The court granted defendant's motion for summary judgment on plaintiff's retaliation claim, finding it was not unreasonable for defendant to believe that plaintiff was unable to return to work following the 12-week leave period based on the information it received from plaintiff's doctors. Moreover, while plaintiff claimed the subsidiary decided to terminate him after he contacted the Connecticut Department of Labor regarding his leave, there was evidence that the subsidiary had made the decision to terminate him months before. As there was no evidence of discriminatory intent, summary judgment for defendant was proper on the retaliation claim.

**Sills v. BFI Waste Services, LLC, 2013 WL 812011 (D. Md., March 1, 2013)**

Plaintiff sued his former employer for interference with his FMLA rights after he was discharged in connection with absences related to his medical condition. Defendant filed a Motion to Dismiss the FMLA claim for failure to state a claim. The court noted that in order to establish a claim that an employer interfered with FMLA rights, a plaintiff must show that: (1) he was an eligible employee; (2) his employer was covered by the statute; (3) he was entitled to leave under the FMLA; (4) he gave his employer adequate notice of his intention to take leave; and (5) the employer denied his FMLA benefits to which he was entitled. The court found that plaintiff failed to allege that he worked the requisite 1,250 hours in the twelve months preceding the date of the leave. Thus, plaintiff did not establish a *prima facie* case and the claim was dismissed without prejudice.

**Evans v. Century Link Corporation, 2013 WL 1284874 (D. Utah March 8, 2013)**

Plaintiff claimed that defendant failed to promote her and later terminated her employment. Plaintiff filed suit, bringing multiple claims, including FMLA interference. Plaintiff later moved for leave to amend her *pro se* complaint, and defendant moved to oppose plaintiff's motion to amend her complaint and to dismiss her original complaint.

The court, in reviewing plaintiff's original and proposed amended complaints, determined that the complaints did not contain any facts or circumstances indicating that defendant had interfered with plaintiff's rights under the FMLA or that her discharge was discriminatory under the FMLA. The court further noted that plaintiff had failed to allege that she had requested FMLA leave, that she was denied FMLA leave, that she was terminated as retaliation for or to interfere with her use of FMLA leave, or that defendant was subject to the statutory jurisdiction of the FMLA. Thus, the Magistrate Judge recommended that plaintiff's FMLA claim be dismissed for failure to state a claim upon which relief may be granted.

**Hardwick v. Amsted Railway Co., Inc., 929 F. Supp. 2d 1129, 20 WH Cases2d 778 (D. Kan. 2013)**

Plaintiff, a machinist, was granted FMLA leave over a period of approximately a year and a half to accommodate his medical treatment needs. Plaintiff's supervisors considered the idea of transferring plaintiff to another position in order to better accommodate defendant's business needs, but ultimately did not do so after plaintiff was cleared to work more hours at his current position. Defendant terminated plaintiff's employment after plaintiff received a "no call/no show" which, in conjunction with other prior attendance violations, made him eligible for termination under defendant's attendance policy. Plaintiff brought multiple claims, alleging that defendant had interfered with his right to take FMLA leave by considering transferring him to the other position and by terminating his employment, and that the termination was made in retaliation for plaintiff's use of his FMLA rights.

The district court granted defendant's motion for summary judgment as to plaintiff's FMLA interference and retaliation claims. The district court first found that plaintiff had not alleged a denial of FMLA rights sufficient to state a claim for FMLA interference. The court also held that defendant had not actually transferred plaintiff to another position, and therefore, defendant's contemplation of transferring plaintiff did not constitute an adverse employment decision. In addition, the court determined that defendant had articulated a legitimate, nondiscriminatory reason for terminating plaintiff and, as plaintiff had failed to demonstrate any evidence of pretext as to that reason, plaintiff's claim for retaliation failed.

**Guidry v. Gulf Coast Teaching Family Servs., 2013 WL 1739376 (E.D. La. Apr. 22, 2013)**

Plaintiff, an assistant program director at a non-profit agency, took 10 days of FMLA to care for her father. She claimed she was continually called by the office while on leave. Four months later, a supervisor learned that plaintiff had refused to pay employees for certain hours worked. Plaintiff admitted the allegation and received a written reprimand as a result. Plaintiff claimed there were no other employees that she had refused to pay, but several days later, additional employees came forward with the same allegations. The employer put plaintiff on administrative suspension during an investigation and discharged her once the allegations were confirmed. Plaintiff filed suit claiming interference and retaliation under the FMLA, arguing that the decision to terminate her was made because she took FMLA leave.

The court granted summary judgment for defendant, reasoning that plaintiff did not present any evidence to support her allegations. Absent some showing that the phone calls from work resulted in a denial of her the leave, the court could not conclude that the employer violated the FMLA. The court explained that plaintiff could not rely solely on her pleadings and arguments to dispute defendant's proffered reason for her discharge. The employee's failure to identify specific facts establishing a genuine issue for trial led the Court to grant the employer's motion for summary judgment.

**Edwards v. National Vision, Inc., 2013 WL 2249051 (N.D. Ala. May 17, 2013)**

Plaintiff filed a lawsuit for interference under the FMLA against her former employer, a national vision retail outlet. The court granted summary judgment for the employer, holding plaintiff was not an eligible employee under the FMLA because she had only worked 790 hours in the preceding 12 months. The court rejected plaintiff's argument that the employer intentionally reduced her hours in the months before her planned surgery in order to prevent her from becoming eligible for FMLA leave. There was no evidence to support plaintiff's theory, and her own speculation and conjecture would not suffice.

**Montgomery v. Wal-Mart Stores East, L.P., 2013 WL 4602523 (C.D. Ind. Aug. 29, 2013)**

Plaintiff had been employed at defendant since September 2004. In December 2011, plaintiff saw two doctors for pain in his right knee. On December 23, 2011, plaintiff's doctor provided written certification that plaintiff was scheduled for knee surgery and would need to be out of work for six to eight weeks. The date of plaintiff's upcoming surgery was unclear, however. On December 29, 2011, plaintiff's employment was voluntarily terminated because he did not report to work for three days in a row and did not provide defendant with any documentation explaining his absences. Plaintiff filed suit against defendant, alleging multiple claims, including violations of the FMLA.

Defendant moved to dismiss plaintiff's complaint in its entirety under Federal Rule of Civil Procedure 12(b)(6). Plaintiff was proceeding *pro se* and, therefore, the court recognized that *pro se* pleadings are liberally construed. However, the court ruled plaintiff's general allegation that he was denied FMLA leave was insufficient to adequately plead his FMLA interference claim. Specifically, the court found that plaintiff's complaint was insufficient because it provided no facts: (1) stating why plaintiff believed he was entitled to FMLA leave; or (2) that he even requested FMLA leave from the employer.

**Carr v. Mike Reichenbach Ford Lincoln, Inc., 2013 WL 1282105 (D. S.C. Mar. 26, 2013)**

Plaintiff, formerly a controller at the employer's dealership, brought an action against her former employer, alleging violations under FMLA. In granting defendants' motion for summary judgment as to the FMLA claims, the court found that plaintiff failed to establish either an interference claim or retaliation claim under the FMLA.

The court first found that plaintiff was unable to meet all the elements of an FMLA interference claim. According to the court, plaintiff had not worked for defendants for twelve months at the time of her termination. The court also noted that 29 C.F.R. § 825.302(b) requires some type of notice to the employer of an intent to take leave. The court held that plaintiff did not provide defendants with notice of her intention to take FMLA leave. Indeed, the court found that plaintiff never requested any form of leave from defendants, did not obtain an actual diagnosis of her condition until well after defendants told her she would be terminated, and testified that she would have only missed two days of work had she been employed. Thus, the court ruled that defendants were entitled to summary judgment.



The court also ruled that plaintiff's retaliation claim failed as a matter of law. The court found that plaintiff never requested any form of leave from defendants, was never denied any form of leave from defendants, did not obtain a diagnosis until well after she was informed of her termination, and testified that she would have only needed two days off had she been employed. Thus, the court held that plaintiff never engaged in any protected activity.

**Nally v. New York, 2013 WL 2384252 (N.D. N.Y. May 30, 2013)**

Plaintiff asserted interference and retaliation claims under the FMLA, in addition to other claims. At issue on the interference claim were plaintiff's absences to care for her husband, which she took under various employer time-off policies and under a voluntary work schedule reduction plan. She asserted that she was entitled to FMLA leave, but that the employer had failed to provide her with the appropriate paperwork to establish the leave and that FMLA leave was discouraged. The court granted defendant's motion for summary judgment. The court found that there was no evidence that plaintiff was entitled to leave because there was no evidence at all of her husband's condition. Further, the court also found that plaintiff had not put the employer on notice of her need for FMLA leave. In fact, plaintiff was advised by the employer that she would need to provide a medical certification if she sought FMLA leave and was given a copy of the certification form and other materials, but she did not provide the employer with a completed form and expressly opted instead for leave under other policies. Finally, the court held that the employer did not discourage her from taking FMLA leave because she never requested FMLA leave. Therefore, the court dismissed plaintiff's interference claim.

The court also granted the employer's motion for summary judgment on the retaliation claim, holding that the employee could not establish the first element of the claim – the exercise of rights protected under the FMLA. The court explained that plaintiff failed to establish that she was entitled to FMLA leave, and therefore, she did not engage in protected conduct. Thus, the court held that her retaliation claim failed as a matter of law.

**Holmes v. Bd. of Cnty Com'rs, 2013 WL 2368394 (W.D. Ok. May 28, 2013)**

Former deputy clerk filed suit against defendant, alleging interference and retaliation under the FMLA, among other claims. Plaintiff had back surgery in 2008, and following her return to work she began showing signs of intoxication or impairment. These included slurred speech and other behavior suggesting an altered state or being "out of it." On August 18, 2010, defendant received a note from plaintiff's doctor, requesting that she be excused from work for a week for medical reasons. A week later, defendant received another doctor's note requesting continued leave. Defendant then sent a letter to plaintiff's doctors, notifying them that it required a complete release for plaintiff to return to work, certifying that she was free of narcotic medications. Plaintiff was then placed on unpaid administrative leave, until she was terminated approximately 9 months later for refusal to participate in a fitness for duty exam.

The U.S. District Court for the Western District of Oklahoma granted defendant's motion for summary judgment on plaintiff's FMLA claims. As to her interference claim, the court found that plaintiff failed to establish that she suffered prejudice as a result of defendant's alleged interference with her rights. Although plaintiff claimed that defendant had not appropriately advised her of her rights under the FMLA, it was undisputed that she received the full 12 weeks

of FMLA leave. As to her retaliation claim, the court found that plaintiff had not established any protected activity, as it was undisputed that she did not request FMLA leave "in any explicit sense." Even if she had alleged protected activity, the court found that she had presented no evidence of pretext. Accordingly, the court ruled that her FMLA claims failed.

**Smith v. CVS Caremark Corp., 2013 WL 2291886 (N.D. Tex. May 23, 2013)**

A former customer service representative and her husband brought claims against her former employer and related entities, alleging interference and retaliation claims under the FMLA. In April 2009, plaintiff requested and received FMLA leave for maternity leave. In November 2009, plaintiff again requested intermittent FMLA leave to care for her husband due to an illness. Defendants granted her leave request through May 15, 2010. In April 2010, defendants requested additional certification from her husband's doctor to cover the amount of intermittent leave plaintiff was taking. Plaintiff provided the requested new medical certification, and in May 2010, defendants approved and extended her intermittent leave through November 15, 2010. Each of plaintiff's requests for FMLA leave were granted in full. On June 22, 2010, defendants terminated plaintiff for performance issues, which included being rude to fellow employees and customers, and failing to log out of her phone multiple times, resulting in numerous customer calls going unanswered for hours.

The Texas court granted defendants' motion for summary judgment. First, the court held that the former employee's husband lacked standing to bring FMLA claims against defendants because he was never in an employer-employee relationship with them. Next, the court held that the former customer service representative's interference claim failed because she could not show that she was prejudiced. The court noted that all of her FMLA leave requests were ultimately granted by defendants. The court then granted defendants' summary judgment on the retaliation claim, finding that plaintiff could not establish that she was treated differently than employees who had not requested FMLA leave, or that she was discharged in part because she took FMLA leave. The court also found that defendants' requirement that plaintiff provide a new medical certification did not constitute an adverse employment action.

Finally, the court held that even if plaintiff established a prima facie case of retaliation, her claim would still fail because she could not establish that defendants' legitimate, non-retaliatory reason for terminating her – performance problems – were pretext. While there was temporal proximity between plaintiff's FMLA leave and her termination (as she was terminated while taking intermittent leave), that alone was insufficient to establish pretext.

**McBride v. Tyson Foods, Inc., 2013 WL 2285929 (W.D. Ark. May 23, 2013)**

A former maintenance department employee brought FMLA interference and retaliation claims against his former employer. Plaintiff's claims arose from an injury he suffered on the job in July 2011. While attempting to repair a belt that had untracked on a box taper machine, plaintiff's hand was pulled into the machine and the palm of his hand was cut. Plaintiff went to the emergency room. Upon his return to the plant, plaintiff was given a notification of disciplinary action, stating that he was being placed on a three-day suspension so that the company could investigate the accident. The company determined that plaintiff had not disconnected the equipment from the power source before attempting to unhang the belt on the

box taper, which was a violation of the company's safety policies. The company found that plaintiff had been trained on these policies and had intentionally disregarded them. As a result, when plaintiff returned from his three-day suspension, the company terminated his employment.

The district court granted defendant's motion for summary judgment. The court found that plaintiff could not establish a *prima facie* case of interference because there was no evidence that he had requested FMLA leave or that he was on FMLA leave following his work injury. As to his retaliation claim, plaintiff argued that even though he never requested FMLA leave, his employer knew that his injury would require FMLA leave if he was retained. The court held that the fact that he went to the emergency room following his injury was insufficient to establish that he exercised his FMLA rights. The court explained that "[s]imply seeing a doctor for an injury does not implicitly qualify as FMLA leave or notify the employer that FMLA leave will be required at a future date." Accordingly, plaintiff never engaged in protected activity and, therefore could not state a *prima facie* claim of retaliation. Finally, the court held that even if plaintiff could establish a *prima facie* claim, he could not establish that defendant's reason for his termination – his failure to follow prescribed safety rules – was pretext for retaliation.

**Barbieri v. Wynn, 2013 WL 257290 (D. Nev. Jan. 29, 2013)**

Plaintiff, proceeding *pro se* and *in forma pauperis*, filed his fourth amended complaint alleging retaliation in violation of the FMLA. The court found plaintiff stated sufficient facts for a claim of retaliation in violation of the FMLA. In the complaint, plaintiff alleged that his employer granted FMLA leave, but that the leave subsequently was denied. He also alleged he had to resubmit his paperwork and that defendant retaliated against him. The court found that plaintiff stated sufficient facts to proceed with an FMLA retaliation claim with these allegations.

**Hung v. Permanente, 2013 WL 154085 (Cal. Ct. App. Jan. 15, 2013)**

Plaintiff was employed by defendant as an outpatient pharmacist from 1976 to 2008. Prior to her request for FMLA leave, the employer disciplined plaintiff for providing incomplete and inaccurate prescription information to a patient and for unprofessional conduct in calling in sick on nine dates. Upon her return from leave, plaintiff was suspended for ten days after an investigation revealed she had committed another drug furnishing error and had failed to submit a mandatory report that would document the incident. When the employer advised her that it intended to discharge her for cause, she chose to voluntarily retire instead.

Plaintiff filed suit alleging that defendant retaliated against her for exercising her FMLA rights. The trial court granted the employer's motion for summary judgment. On review, the California Court of Appeals applied, without adopting, the *McDonnell Douglas* analytical framework. It assumed that the proximity of the appellant's FMLA leave to her discharge established a *prima facie* case under *McDonnell Douglas*. However, it found that the employer's "competent, admissible evidence of legitimate, non-retaliatory reasons, unrelated to [appellant's] FMLA leave" sufficiently rebutted plaintiff's *prima facie* case. The court found that plaintiff's "vague evidence" of the employer's reaction to another employee's request for leave was insufficient to draw an inference that the employer was biased against the exercise of FMLA rights. The court also found that the fact that the human resources representative who approved the FMLA leave also was present at the earlier disciplinary meeting did not, without more, give

rise to a triable issue whether the discharge decision was retaliatory. On this basis, the court affirmed summary judgment for the employer.

**Wright v. Shore Memorial Hospital, 21 WH Cases2d 920 (D. N.J. 2013)**

The employee was a registrar for a hospital, and in that position she served as the first point of contact with many patients. On one occasion, a patient who had been diagnosed HIV-positive complained to the employer that the employee had made several inappropriate comments about the disease. Although the employee denied saying anything inappropriate, she was ultimately discharged based on the employer's subsequent investigation. Approximately two years before the employee's discharge, she had sustained injuries from a motor vehicle accident, and as a result she requested a number of intermittent FMLA leaves and a change in her work schedule. Based on these facts, the employee filed suit against the employer, alleging both interference and retaliation claims under the FMLA.

The court granted summary judgment for the employer on both claims. Although the employee's direct supervisor may have expressed dissatisfaction with her multiple requests for FMLA leave, the employee did not have a cause of action for interference because she suffered no prejudice as a result of the remarks. Rather, the employer granted every request for FMLA leave and never prevented her from exercising her FMLA rights. The court also concluded that the employee was not retaliated against because the adverse employment action taken against her was not causally related to her FMLA leave. The employee's discharge occurred nearly three months after her last FMLA leave ended. She had not made intervening leave requests, and she failed to offer "evidence of any pattern of antagonism" toward her stemming from her protected leave. Even though the employer told the employee that she had used all of her FMLA leave for the current period and that a new FMLA period was to begin a month after her termination, the court concluded that the employer had no indication the employee would request additional FMLA leave. Without such an indication, the court found that the employer could not have retaliated against her for future speculative requests for leave.

**Poorbaugh v. Bd. of County Commissioners, 2013 WL 5799910 (D. Colo. Oct. 28, 2013)**

The employee, a nurse for defendant's Public Health Department, suffered from chronic asthma. Upon moving into the Public Health Office where her job was located, the employee began to experience exacerbated asthma symptoms and, shortly after the move, had a severe asthma attack. Over the next several months, the parties attempted to agree on a reasonable accommodation that would not exacerbate her asthma, but they ultimately failed to do so. Also during that time, the employee complained that she was being harassed by her supervisor. The employee eventually went on FMLA leave due to her asthma symptoms and a sinus infection. When her FMLA leave expired, the employer placed her on paid administrative leave and attempted to revisit the interactive process regarding her request for a reasonable accommodation. Instead of putting forth potential accommodations, the employee tendered a letter of resignation, wherein she stated that she felt harassed because of her disability and that she believed her health was in danger. After her resignation, she filed a lawsuit against her employer, claiming interference and retaliation under the FMLA.

The employer moved for summary judgment, and the district court granted the motion in its entirety. With regard to her FMLA interference claim, the court noted that the employee had actually taken all of the FMLA leave to which she was legally entitled. Therefore, she could not prove an element of her prima facie case: that she suffered an adverse action that interfered with or prevented her from exercising her FMLA rights. The employer even reinstated the employee once her leave was exhausted, but shortly after the reinstatement, the employee voluntarily resigned. The reasons provided for her resignation were unrelated to the exercise of her FMLA rights. The employee's FMLA retaliation claim failed for similar reasons. The only facts the employee cited as adverse actions—workplace harassment—were unrelated to her FMLA leave and, in fact, occurred before she took leave. It is axiomatic that a retaliatory action cannot occur before its precipitant.

***Metroka-Cantelli v. Postmaster General*, 2013 WL 5939776 (N.D. Ohio Nov. 5, 2013)**

The employee, a postal worker, was employed on a year-to year basis, but had been rehired for the past six years. The employee became pregnant in mid-2010 and contacted the employer's human resources department to inquire about FMLA leave. The employer's FMLA coordinator spoke with the employee and sent her an FMLA request packet. The employer's policy required the FMLA packet to be completed and returned within 15 days of the coordinator sending it out, but the employer did not receive a completed packet from the employee. On May 5, 2010, the employer notified the employee that she would be separated from the employer upon completion of her appointment.

The employee filed a lawsuit under the FMLA, and the employer moved for summary judgment. The court held that the employee did not demonstrate a *prima facie* case of discrimination or retaliation under the FMLA because she could not establish that she engaged in a statutorily protected activity. The employee did not make a proper FMLA request before the employer declined to renew her contract, and she did not take FMLA leave. Future intent to take FMLA leave does not amount to engaging in a statutorily protected activity. However, the court denied the employer's motion for summary judgment on the employee's FMLA interference claim. The employee was indisputably entitled to take FMLA leave. In addition, she also fulfilled the notice requirement by informing her employer of her intention to take FMLA leave upon the birth of her child. Moreover, the FMLA's accompanying regulation, 29 C.F.R. § 825.220(b), broadens interference claims to include those in which an employer reduces an employee's hours or terminates an employee so as to avoid its FMLA responsibilities. Although the employer argued that it had a legitimate reason for the employee's discharge due to a reduction in its transitional employee workforce, the employee's interference claim survived because she rebutted the claim with documentary evidence that the employer was seeking to hire transitional employees soon after her termination.

***Tate v. Louisiana Department of Transportation and Development*, 2013 WL 796015 (E.D. La. Mar. 4, 2013)**

Plaintiff, an employee of the Department of Transportation and Development, alleged a variety of violations by her employer in a series of amended complaints. In her Fourth Amended

Complaint, Plaintiff alleged that her employer demanded medical information in violation of the FMLA, that she was followed home and watched while she was on FMLA leave, and that she was the only employee out of 350 who was harassed for taking family leave.

In response, defendants argued that plaintiff had not made any allegations as to how they violated the FMLA. Defendants argued that plaintiff had been allowed leave time under the FMLA and had remained in the same position for almost six years. The court agreed that plaintiff had failed to allege sufficient facts to support her allegations because she had failed to meet the second and third prongs of a *prima facie* claim. The court ruled that plaintiff did not establish that she suffered an adverse employment decision, was treated less favorably than an employee who had not requested FMLA leave or that the adverse decision was made because of her request for leave. Accordingly, the court dismissed plaintiff's FMLA claim.

**Clark v. Jackson Hospital & Clinic, Inc., 2013 WL 5347450 (M.D. Ala. Sept. 23, 2013)**

After admitting to diverting controlled substances and self-administering them while on duty, the former employee requested and was granted FMLA leave in order to enter intensive treatment for her drug addiction. In the letter approving the employee's FMLA leave, the hospital-employer explained its policy requiring completion of a Fitness for Duty Medical Certification (the "Certification") before returning to work. Upon expiration of the FMLA leave and a subsequent 30-day general leave of absence, the employee did not complete the Certification. The employer then terminated her employment, explaining that she could not return to her former position due to the frequent administration of controlled substances in that unit. The employer also concluded that the employee was not qualified for positions in other units.

The employee contended that upon her return from leave her employer failed to restore her to the position she held when the leave commenced or to an equivalent position. In reviewing defendant's motion for summary judgment on plaintiff's FMLA interference claim, the court found that the employee failed to satisfy a condition of her entitlement to restoration by not completing the Certification and thus granted defendant's motion for summary judgment as to her interference claim. However, the court denied the employer's motion on the FMLA retaliation claim. First, the court found that the employee satisfied her *prima facie* case. Next, although the employer pointed to the employee's failure to complete the required Certification as justification for its termination decision, the employee had presented sufficient evidence that such an explanation could be deemed to be pretextual. Specifically, the employee's termination letter, information submitted to unemployment benefits tribunal, and discovery responses presented alternative reasoning for the adverse employment action.

***Summarized Elsewhere:***

**Borwick v. T-Mobile West Corp., 119 FEP Cases 1194 (10th Cir. 2013)**

**Wilson v. Cleveland Clinic Found., 2013 WL 486310 (N.D. Ohio Feb. 6, 2013)**

**Bravo v. Union Cnty., 20 WH Cases2d 1339 (D. N.J. 2013)**

**Jacobs v. York Union Rescue Mission, Inc., 2013 WL 433327 (M.D. Penn. Feb. 5, 2013)**

**Goff v. State Military Department, 2013 WL 5352755 (M.D. Ala. Sept. 24, 2013)**

**Speight v. Sonic Restaurants, Inc., 120 FEP Cases 1175 (D. Kan. 2013)**

**Colpoys v. County of Erie, 2013 WL 5437635 (W.D. N.Y. Sept. 27, 2013)**

**Esparza v. Bank of America, N.A., 2013 WL 5208024 (N.D. Tex. Sept. 17, 2013)**

2. Interference Claims [New Topic]

**Allen v. Babcock & Wilcox Tech. Servs. Pantex, LLC, 2013 WL 5570192 (N.D. Tex. Oct. 9, 2013)**

Plaintiff, a Training Specialist for defendant, was diagnosed with Chronic Beryllium Disease. Within a year after being hired, plaintiff's health began to decline and she missed an excessive amount of work. She went on FMLA leave and was subsequently placed on Short Term Disability. Several months later, she voluntarily returned to work. However, the employer told her that she was temporarily restricted from performing any work that involved critical decision making because one of her prescribed medications was a narcotic. The employer then assigned plaintiff to a different division. After three months, she voluntarily discontinued her use of the narcotic and was transferred back to her original position. However, when plaintiff's absences escalated once again, she was placed on Short Term Disability for a second time. While away from work, her physician indicated on a form submitted to defendant that plaintiff would "never" return to work. Based on the physician's statement and the employee's absenteeism, defendant terminated plaintiff's employment.

Plaintiff filed a lawsuit alleging that defendant interfered with her rights under the FMLA by not assigning her to her original position when she returned from leave. Plaintiff also claimed that she was improperly denied FMLA leave during the three months immediately preceding her discharge. The district court granted defendant's motion for summary judgment, holding plaintiff was properly denied leave during the three months immediately preceding the termination of her employment. At that time, she had not worked the requisite 1,250 hours over the previous 12 months. The court also found that it was appropriate for the employer to reassign plaintiff when she returned from leave, because she was unable to engage in "critical decision making" due to her medications. Accordingly, the right to restoration under the FMLA did not arise because she was unable to perform the essential functions of her position or an equivalent position. The Court also found that the temporary position to which she was assigned properly offered her equivalent benefits, pay, and other terms and conditions of employment.

**Cash v. Bank of America, N.A., 21 WH Cases2d 1074 (N.D. Ga. 2013)**

Plaintiff, a drive-thru teller for a bank, was diagnosed with obsessive compulsive disorder. Plaintiff was granted intermittent FMLA leave, and then temporarily switched to a part-time schedule. Subsequently, the employer became aware that plaintiff was being rude to bank customers. Plaintiff was discharged for her inappropriate behavior, but plaintiff's supervisor gave her two days to decide whether she wanted her separation to be coded as a termination or retirement. That same day, plaintiff turned in her keys and cash box, and was escorted from the banking center. However, the following day, she applied for FMLA leave with the employer's third party leave administrator. The supervisor informed the administrator that plaintiff had not been discharged yet. However, five days later, plaintiff's supervisor called back to report that plaintiff's employment was terminated. Approximately one month later, upon

receiving proof of the termination date, the administrator denied Plaintiff's FMLA claim. Plaintiff filed a lawsuit alleging interference with the exercise of her FMLA rights, and defendant moved for summary judgment.

The district court granted summary judgment for defendant, holding that plaintiff could not demonstrate that she was denied a right to which she was entitled under the FMLA. According to the Court, plaintiff had been discharged at the time she requested FMLA leave, and the right to take leave could not be exercised after the termination of an employment relationship. The Court also found that plaintiff was aware that she had been discharged at the time she requested leave, and the fact that the decision was not officially coded in defendant's computer system until a later point in time did not change the date her employment had ended.

**Kelley v. Amazon.com, Inc., 2013 WL 6119229 (E.D. Wash. Nov. 21, 2013)**

Plaintiff, a call center employee, experienced migraines and pain from a medical condition, and she frequently went on FMLA leave. Her employment was terminated after she repeatedly failed to meet a customer satisfaction metric and was placed on numerous performance plans. The employee's subsequent lawsuit alleged that her employer used her FMLA leave as a factor in the decision to terminate her employment.

The court granted summary judgment for the employer. Plaintiff argued that defendant gave her low performance reviews in retaliation for her FMLA leave requests. However, the court found that defendant's performance reviews were based on an objective performance evaluation metric, and defendant provided coaching and guidance to plaintiff in an effort to improve her performance. There was no evidence that defendant gave plaintiff poor performance reviews in retaliation for taking FMLA leave. Plaintiff also alleged that the temporal proximity between her FMLA leave and her termination could lead to an inference of unlawful interference with FMLA rights. The court noted that defendant granted plaintiff's requests for FMLA leave and never discouraged her from taking leave. The court found that the employee's poor performance undermined any inference that could be drawn from the temporal proximity between her FMLA leave and her discharge.

**Castellano v. Charter Communications, LLC, 2013 WL 6086050 (W.D. Wash. Nov. 19, 2013)**

Plaintiff, a specialist at a call center, alleged that her employer interfered with her FMLA rights after she was diagnosed with multiple sclerosis. Following her diagnosis, her doctors faxed her medical certification to her employer three times. Her employer asked several times for further clarification and required numerous notes to be submitted from her doctors. Plaintiff alleged that defendant interfered with her FMLA leave by losing her medical certification, requiring unnecessary and repetitive medical paperwork, and imposing unreasonable deadlines for medical paperwork.

The court granted summary judgment for the employer, reasoning that it could legally seek clarification and authentication of plaintiff's medical certification. Defendant never denied plaintiff leave while it sought clarification and authentication of her medical certification.



Furthermore, even if plaintiff proved that defendant lost her medical certification and imposed unreasonable deadlines, this conduct would not amount to interference with her FMLA leave.

**Williams-Grant v. Wisconsin Bell, Inc., 2013 WL 5447952 (E.D. Wis. Sept. 30, 2013)**

Plaintiff began using FMLA leave in 2003 or 2004. In December 2008, one of plaintiff's supervisors became suspicious that plaintiff was misusing her FMLA leave. Plaintiff would request FMLA leave on Saturdays or days before her scheduled day off, but she would not request leave when working the shift paid a premium wage differential. Upon investigation, defendant learned that plaintiff was using leave to take a class at her church and to drive two hours to visit a private residence. A doctor reviewed the investigative reports and concluded that plaintiff could have performed her work duties on the days she took FMLA leave. Defendant terminated her employment for FMLA fraud and her failure to be forthcoming during the company's investigation.

Plaintiff sued defendant for interference of her FMLA rights and retaliation for use of FMLA leave, and the court granted summary judgment in favor of defendant. The court found that defendant had an "honest suspicion" that plaintiff was misusing her FMLA leave, which is sufficient to defeat plaintiff's claims. Thus, the court granted summary judgment to defendant for plaintiff's interference claim. The court granted summary judgment for the employer as to the retaliation claim on the same basis, noting plaintiff allowed her to take leave for 6 years, there was no suspicious timing, and the employer's honest suspicion of FMLA misuse was a legitimate, nondiscriminatory reason to discharge plaintiff.

**Bradley v. Little Rock Wastewater Util., 517 Fed. Appx. 530 (8th Cir. 2013)**

The employee had a history of poor performance evaluations and other performance related deficiencies. The employee also missed two full days of work and did not contact the employer with an explanation. The employee was placed on light duty in February 2009, and on July 21, 2009, the employer noticed that the employee was performing restricted tasks and requested that he produce a doctor's note releasing him to full duty. The employee failed to produce a note, and the employer met with the employee the next day to place him on administrative leave. At the meeting, the employee was belligerent and refused to leave the facility. The employee finally left after the employer called the police. The employer discharged the employee for insubordination. The employee claimed that the employer interfered with his FMLA rights because it considered his diabetes related absences when it terminated his employment.

The Eighth Circuit affirmed dismissal of the employee's FMLA interference claim. The court ruled that the employer discharged the employee for insubordination. The court found that the employee's discharge for insubordination was a legitimate reason unrelated to the exercise of any FMLA rights. The court noted that there was no evidence that the employer considered the absences when it made the termination decision.

**Carter v. Chicago State Univ., 2013 WL 3975009 (N.D. Ill. Aug. 1, 2013)**

Plaintiff was employed by defendant as an Associate Professor. Plaintiff requested FMLA leave for more than seven weeks, and defendant hired a part-time professor to cover plaintiff's courses. When plaintiff returned, defendant required plaintiff to prepare course outlines instead of teaching the courses that were reassigned to the part-time professor. After plaintiff's FMLA leave ended, plaintiff also received a record that incorrectly stated that plaintiff's sick day balance was zero. In addition, a month after plaintiff returned from leave, defendant conducted an appointment process to appoint the Chair of the Department. Plaintiff and another employee were tied with votes – but the Dean of the college did not support plaintiff – and even though the other employee withdrew from consideration, leaving only plaintiff as a candidate, defendant did not promote plaintiff. Instead, defendant stated that it had a policy of not appointing candidates that did not have a Ph.D. The Department then held another election because the individual appointed during the previous election resigned. Finally, plaintiff also received summer course assignments that varied depending upon the year. Plaintiff claimed that Defendant interfered with his FMLA rights and that he was retaliated against for exercising his FMLA rights.

The court granted in part and denied in part the Defendant's motion for summary judgment. The court held that plaintiff's interference claim failed. The court first ruled that Defendant restored plaintiff to the same position when he returned from leave. The court found that the outline assignment was reasonable, and indeed, plaintiff admitted that it was reasonable. The court then ruled that the payroll record that mistakenly listed plaintiff's sick day balance as zero did not prejudice plaintiff because plaintiff still had the requisite number of sick days as he had before he took FMLA leave.

The court then ruled that plaintiff presented sufficient evidence under the direct method of proof to create a genuine dispute of material fact as to whether defendant retaliated against him in the Chair appointment process. The court held that a jury could reasonably infer that defendant's actions were motivated by retaliatory animus. The court also found that plaintiff provided sufficient evidence under the indirect method to create a genuine dispute of material fact as to whether faculty without a Ph.D. were similarly situated and treated more favorably. The court noted that other faculty members without a Ph.D. were appointed to Chair positions. However, the court granted the employer's motion for summary judgment as to the second appointment process because the court found that plaintiff did not apply for the position.

**Hagler v. True Mfg., Inc., 20 WH Cases2d 1552 (E.D. Mo. 2013)**

The employee, an assembly line worker, requested FMLA leave for depression. The employee took FMLA leave from January 26 through February 2, 2010, which the employer described as a single block of time. The employee's doctor completed a health form stating that the employee was unable to work from February 3 through February 22, 2010. The health form, however, contained no diagnosis or reason for the employee's inability to work. The employee then completed a document, provided by defendant, describing that the leave was going to be taken intermittently. Defendant's human resources staff determines whether leave is taken intermittently or in a single block. Defendant's policy required any employee on intermittent

leave to call in each day to report their absence, while any employee on leave for a single block of time did not have to call in every day. Defendant created this policy specifically for the employee. Defendant's policies also provided that an employee who fails to report their absence for two consecutive days will be terminated for job abandonment.

The employee failed to call in for two consecutive days, and defendant terminated her employment. Defendant knew the employee was not coming in on the two days she was absent. The employee claimed that defendant interfered with her rights under the FMLA by unilaterally mischaracterizing her leave as "intermittent" instead of a single block of time, and that defendant's call in policy was unnecessary and resulted in her termination. The employee also claimed that defendant retaliated against her for her attempt to exercise rights under the FMLA.

The district court denied both parties' motions for summary judgment on the employee's interference claim. The court held that summary judgment was not proper on the employee's claim of interference based on defendant's alleged unilateral designation of the employee's leave as intermittent. The court ruled that the employee was not entitled to summary judgment because a genuine issue of material fact existed regarding the improper classification of the employee's leave. The court noted that defendant presented evidence of confusion over the employee's condition and whether the employee's leave was a continuation of her prior leave. The court also noted that defendant conditionally granted the employee's leave pending certification from her healthcare provider. Finally, the court also ruled that there was no authority for the employee's argument that the FMLA prohibits an employer from requiring an employee to call in her absence according to the employer's policy when the employee had already given advance notice of the absence.

The district court then ruled that defendant was not entitled to summary judgment. Defendant argued that the conditional granting of leave and reporting procedures for intermittent leave complied with the FMLA. The court held that it was reasonable that the employee would take similar leave as the prior leave. The court then ruled that defendant could not establish the absence of genuine issue of fact because the evidence demonstrated a genuine dispute as to whether the leave the employee took was designated as a single block of time or intermittent.

Finally, the district court ruled that summary judgment was improper on the employee's retaliation claim because, like the employee's interference claim, there was a genuine issue of material fact as to whether defendant's justification for the discharge was pretextual and applied uniformly with regard to employees on intermittent leave.

***Curry v. Goodwill Industries of Kentucky, Inc., 20 WH Cases2d 986 (W.D. Ky. April 8, 2013)***

The court denied the employer's motion for summary judgment on both interference and retaliation claims under the FMLA. The employer terminated the employee, a former salaried store manager, the same day the employee submitted her FMLA paperwork for surgery. The Division secretary had already expressed her dislike of the leave because she would be required to fill in for the employee during the leave period. The employer argued that the termination resulted from a number of problems, including falsification of time sheets, in spite of a lack of

previous disciplinary action. The court rejected the employer's arguments, noting that if the termination was based in whole or in part upon the FMLA protected leave, the employer had denied a benefit to which the employee was entitled. The court also rejected the employer's argument that the individual who decided to discharge the employee was not aware of the request for FMLA leave. The court found there were genuine issues of material fact regarding the decision maker's knowledge and, even if he did not know about the FMLA leave request, the employee presented evidence that another individual who had influence over the decision was aware of the request.

**Shreeve v. D.O. McComb & Sons, Inc., 2013 WL 5707196 (N.D. Ind. Oct. 21, 2013)**

Plaintiff brought FMLA interference and retaliation claims against his former employer because he was discharged while on approved FMLA leave. During his leave, plaintiff filed a grievance with his employer alleging a hostile work environment and harassment. During the investigation of plaintiff's grievance, his coworkers reported various complaints about plaintiff, including that he posed a threat to the safety of other employees, was insubordinate, and did not competently perform his job duties. On the basis of this information, defendant terminated plaintiff while he was still on leave. Although plaintiff received a lackluster performance review the year before, no one had filed complaints about him before this investigation.

Defendant moved for summary judgment. Plaintiff argued defendant interfered with his FMLA rights because he had been denied the benefit of reinstatement and the right to remain employed while on leave. The court granted the employer's motion with regard to the interference claim, finding that (1) only *employees* have the right to reinstatement under the FMLA and, once he was discharged, plaintiff was no longer an employee; and (2) an individual does not have the right to continual employment while on FMLA leave and, therefore, plaintiff was simply "masquerading" a retaliation claim as an interference claim. The court denied the employer's motion with regard to plaintiff's retaliation claim. While the employer contended it discharged plaintiff due to the information it had discovered during the investigation, the court found that this was a fact-based inquiry that should go to a jury. In addition, because no complaints had been filed against plaintiff before his FMLA leave, a reasonable jury could find that retaliation was at least one reason for his termination.

**Werner v. Nott Co., 2013 WL 2443867 (D. Minn. Jun. 5, 2013)**

Plaintiff was employed as sales representative by the employer beginning in July 2006. She was diagnosed with Multiple Sclerosis in 2009 and allegedly reported the diagnosis to her employer. Plaintiff claimed that when she went to human resources to discuss issues with her MS, she was discharged and her supervisor told her the reason for the discharge was that she talked too loudly during a conversation with a sales person. Plaintiff brought state and federal disability discrimination law claims against her former employer in state court and the employer removed the action to federal court. Plaintiff then filed a motion to amend her complaint to add an FMLA interference claim. She based this claim on her allegations that she reported her diagnosis to her employer, that her physician told her she needed to work less and not work overtime, and that her supervisor nonetheless told her she would be required to work overtime as needed.

The employer opposed plaintiff's motion to amend, arguing that plaintiff's attempt to plead an FMLA claim was futile. The employer argued that plaintiff had failed to allege that she gave reasonable notice of her need for FMLA-qualifying leave. The court found that plaintiff had sufficiently stated an FMLA interference claim. The court found that plaintiff's allegations that her employer discouraged her from working a limited, no-overtime schedule was sufficient to state a claim, and that plaintiff's request for no overtime could qualify as a request for leave for purposes of her FMLA interference claim.

**Crawford v. JP Morgan Chase, 2013 WL 4670639 (W.D. Wash. Aug. 30, 2013)**

Plaintiff worked for the employer as a mortgage loan officer for over ten years. Plaintiff's mother suffered a serious injury and, following that injury, plaintiff began to leave work almost daily to care for his mother. Plaintiff believed that he was receiving criticism and disapproval for his absences, and he alleged that he complained to HR that his supervisor was interfering with his FMLA rights. Plaintiff never formally applied for FMLA leave, but he and his supervisor agreed to a flexible scheduling arrangement that allowed plaintiff to care for his mother. Approximately one month after plaintiff began working the flex-time arrangement, plaintiff violated company policy by backdating a loan lock extension request. A subsequent investigation revealed that plaintiff backdated other loan lock extensions. The employer discharged plaintiff for backdating loan lock requests.

Plaintiff filed suit, claiming that the employer terminated him because he missed work to care for his mother. Plaintiff also claimed the employer wrongfully refused to provide him with FMLA leave. The district court granted the employer's motion for summary judgment. The Court held that plaintiff could not survive summary judgment on his retaliation claim because he could not show that the employer's reason for discharge was pretext. Plaintiff admitted to altering the date on loan lock requests, and that action was a violation of company policy. Plaintiff failed to show that the employer used the violation of company policy as pretext to terminate him for caring for his mother. The court also granted summary judgment to the employer on plaintiff's interference claim because plaintiff did not suffer any harm. Plaintiff received all of the leave he requested, so even if the employer technically violated the FMLA by failing to determine whether FMLA leave was appropriate, plaintiff's claim failed because he was not denied FMLA leave. Plaintiff was permitted to work and agreed to work under a flex-time arrangement that allowed him to care for his mother.

**Glover v. DCP Midstream GP, LLC, 20 WH Cases2d 1421 (10th Cir. 2013)**

Plaintiff was formerly employed by defendant as a Field Operator. In February 2010, defendant granted plaintiff's request for leave due to depression and to attend to his mother after she attempted suicide. However, prior to that leave request, plaintiff had already utilized 34 days of FMLA leave within the same year. Plaintiff was scheduled to return to work in March 2010. Because he could not return, defendant granted him extended sick leave for an additional month that was scheduled to end in April 2010. There were different accounts from plaintiff and defendant regarding the communication and events that happened when it was time for plaintiff to return to work. Plaintiff claimed defendant was not responsive to his attempts to make contact except for one call he received from a human resources representative stating that if he did not

return the appropriate paperwork to return to work he would be terminated. Plaintiff did not complete the required paperwork or request a leave extension and stated that he thought his employment was terminated as a result. Defendant argued that it made several attempts to reach plaintiff before plaintiff's leave expired as well as after it had expired. In May 2010, defendant sent a letter to plaintiff to confirm his intent to return or request additional leave. When defendant received no response, defendant then terminated plaintiff's employment.

Plaintiff initially filed suit against defendant alleging FMLA interference and retaliation. The district court granted summary judgment for defendant and plaintiff appealed the interference claim. The Tenth Circuit affirmed. The court noted that defendant granted the leave due to plaintiff under the FMLA, but plaintiff was unable to return to work at the end of his leave. Thus, because the right to reinstatement expires at the end of the FMLA leave period – and plaintiff used all of his FMLA leave and was unable to return to work – the court dismissed plaintiff's interference claim.

**Crawford v. JP Morgan Chase, 2013 WL 4670639 (W.D. Wash. Aug. 30, 2013)**

Plaintiff was employed as a mortgage loan officer for JP Morgan Chase. In 2009, plaintiff had received feedback regarding his performance and the need to improve on enforcing security measures. In March 2010, plaintiff's mother became ill and he requested leave for a three-day period. Plaintiff was the primary caregiver for his mother and her recovery required six months of intensive care, which required plaintiff to attend to her daily. Plaintiff went to the HR department to request leave because he felt that his managers had an issue with his absences and had denied him leave. He claimed he expressed to HR his concern that his manager had interfered with his attempt to exercise his rights under the FMLA and Washington's Family Leave Act. After plaintiff expressed his concern, plaintiff met with his manager and they planned to use a flexible working arrangement to accommodate plaintiff's personal situation. In April 2010, plaintiff backdated a loan request after being told another department within the company would not honor the request. Defendant's policy required that all requests be submitted by 7 p.m. on the expiration date. The issue was investigated by defendant's global security investigation team, which found that plaintiff had backdated several loan requests. Defendant terminated plaintiff's employment in May 2010. Plaintiff then filed suit, alleging that defendant willfully failed to grant him family medical leave, and wrongfully terminated his employment in violation of the FMLA, in addition to state law claims.

The court granted defendant's motion for summary judgment on both claims. The court found that plaintiff produced no evidence of pretext, and defendant made a strong showing that plaintiff's employment was terminated for backdating financial documents. Thus, the court dismissed plaintiff's retaliation claim. The interference claim did not stand because plaintiff received all the leave he requested, was provided with a flexible working arrangement that he agreed to and was not denied FMLA leave. The court then held that plaintiff's interference claim failed because he received all the leave he requested and could not show that he was prejudiced.

**Nixon v. Silverado Hospice of Houston, 2013 WL 3973980 (S.D. Tex. July 31, 2013)**

Plaintiff worked as a Volunteer Manager/Coordinator for defendant. During her time with the organization, plaintiff worked at defendant's north and south locations. In May 2010, defendant hired a new manager for the south location. The new manager became plaintiff's immediate supervisor. Shortly after the new supervisor started she started receiving complaints about the volunteer programs. In June 2010, plaintiff took leave for spinal surgery. Plaintiff took leave again between October and November 2010 for a second spinal surgery. Defendant implemented a computer software program to assist with volunteer file maintenance during plaintiff's second leave period. During the systems update, plaintiff's supervisor claimed that she noticed that there were discrepancies regarding plaintiff's volunteer time logs and the volunteers' personal time logs. Plaintiff claimed the hours included those spent by volunteers at both the North and South locations. In January 2011, the manager met with plaintiff and expressed her concern with the hour logs as well as the need for more volunteers to be recruited. A week later plaintiff's employment was terminated.

Plaintiff then filed suit in state court and defendant removed the suit to federal court. Plaintiff amended the complaint and added claims under the ADA and the FMLA. The District Court granted in part and denied in part defendant's motion for summary judgment. The court denied defendant's motion for summary judgment as to plaintiff's FMLA interference claim. The court found that there was evidence that showed that defendant may have interfered with plaintiff's rights under the FMLA when the office manager telephoned plaintiff in November 2010 and discouraged her from remaining on leave after her second spinal surgery. On the other hand, the court granted defendant's motion for summary judgment as to plaintiff's post termination FMLA claim. The court rejected plaintiff's argument that defendant interfered with her FMLA rights when it refused to allow plaintiff to take additional leave she requested when she was discharged. The court held that plaintiff was no longer an employee of defendant when she requested the leave.

**Smith v. Verizon Washington, D.C. Inc., 2013 WL 1316391 (D. Md. Mar. 28, 2013)**

Plaintiff, a call center employee in defendant's customer service department, was absent from work from November 5 to November 7, 2009. In response, defendant automatically sent plaintiff an eligibility letter. Plaintiff completed and timely filed the appropriate forms, but they were misplaced and plaintiff's request was denied. Plaintiff requested administrative review of his denial and the company subsequently reversed its decision and retroactively granted plaintiff his FMLA leave. On or about December 18, 2009, defendant discharged plaintiff based on numerous disciplinary incidents spanning back to 2006. On January 11, 2009, although plaintiff had already been terminated, he filed an application for additional FMLA leave for the period of December 18, 2009 through January 1, 2010. The division of the company that handles all FMLA requests was not yet aware plaintiff had been discharged and approved plaintiff's leave request.

Plaintiff asserted that the employer had interfered with his right to take FMLA leave when it initially refused to grant his November 2009 FMLA leave and, moreover, that his termination violated the FMLA because it occurred during his approved leave. In granting the

employer's motion for summary judgment, the federal district court opined that plaintiff had failed to prove that the employer had interfered with his ability to file an FMLA claim or that he had been retaliated against for filing a claim. The employer did not interfere with plaintiff's right to take FMLA leave in November 2009, as the employer recognized the clerical error and retroactively provided plaintiff with his FMLA benefits. Additionally, the court found no causal link between plaintiff's FMLA request and his termination. The court noted that the exercise of FMLA rights must precede the termination for there to be a causal connection. Moreover, there was no indication from the employer's management team that the retroactively-approved FMLA leave referral was meant to rescind plaintiff's prior termination notice. The court then held that plaintiff's retaliation claim also failed because there was no causal link.

**Howard v. Pennsylvania Dep't of Pub. Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

After being diagnosed with fibromyalgia and tendonitis in her shoulder, the employee suffered pain when filing, an essential job function. The employee's doctor provided a note stating the employee could work with restrictions. The employer sent the employee home, stating she could not return until she presented a note clearing her to work without restrictions. The employee's absences were recorded as intermittent FMLA leave under her previously-approved fibromyalgia leave request. The employer requested documents to support her need for full-time FMLA leave, but the employee never provided them. After her intermittent leave expired and she was discharged for unauthorized absences, the employee filed suit for interference and retaliation under the FMLA.

On cross-motions for summary judgment, the court held that issues of material fact existed as to the employee's interference claim, but not her retaliation claim. The employee argued that she was not reinstated to her former position, and successfully pointed out that the employer had previously reinstated an employee who was able to perform filing without using both arms. However, the court also found that the employer did not violate the FMLA designation notice requirement, finding it never actually demanded a fitness-for-duty certificate. In addition, the employer did not violate the FMLA by making the employee take involuntary leave. Following Sixth Circuit precedent, the court held that the employee did not have a claim for involuntary leave since she did not request additional FMLA leave that was denied. *See Wysong v. Dow Chem. Co.*, 503 F.3d 441 (6th Cir. 2007). Finally, the court held that a genuine issue of material fact existed as to the employer's requirement that employees return with no restrictions following leave, because the employee may have been able to perform her essential job functions. For her retaliation claim, however, the employee could not establish that the employer's legitimate non-discriminatory reason for her discharge was pretext. The employee was placed on involuntary leave because the return-to-work note restricted her duties, not because she exercised her FMLA rights.

**Berg v. TXJ Companies, 20 WH Cases2d 1575 (D. Mont. 2013)**

While a store manager was on FMLA leave, her subordinates complained that she was a bully and treated people unfairly. When the manager returned from leave, she was placed on paid administrative leave and eventually was discharged. The manager brought a claim against



the employer under the FMLA, and the court granted summary judgment for the employer. The district court construed the store manager's FMLA claim as alleging interference, not retaliation, and stated that the *McDonnell-Douglas* burden shifting framework did not apply. The court noted that the store manager's reinstatement claim failed because when she returned to work, she was reinstated to the same position with the same pay. Similarly, the employee's discharge claim failed because even if there was temporal proximity between the FMLA leave and the discharge, there was no evidence that the FMLA was a negative factor in the decision to terminate her employment. The employer did not initiate the investigation because the store manager went on leave. Rather, the employees felt comfortable reporting the store manager's behavior at that time because she was absent.

***Kinds v. Ohio Bell Tel. Co.*, 724 F.3d 648, 20 WH Cases2d 1781 (6th Cir. 2013)**

Plaintiff sued defendant for interference with her right to FMLA leave. Defendant filed a motion for summary judgment, arguing plaintiff failed to timely provide medical justification for three of the nine weeks of leave. The district court granted summary judgment. The Sixth Circuit affirmed.

Plaintiff went on leave October 12, 2009, at which time she requested FMLA leave and then returned on December 29, 2009. After her eighth day of absence, defendant notified its short-term disability plan third-party administrator of plaintiff's absence. In a letter to plaintiff, defendant explained that if her disability claim was approved, no medical documentation would be needed. However, on November 24, 2009, the third-party administrator only approved the latter six weeks of her leave. When plaintiff returned to work on December 29, 2009, defendant requested medical documentation for the first three weeks of her leave to determine if it qualified as FMLA leave.

Plaintiff did not timely submit the documentation even after being granted an extension of time. She eventually was terminated for excessive absences. Plaintiff argued that defendant violated the law when it did not request the medical documentation within five days of her going on leave pursuant to 29 C.F.R. § 825.305(b). However, that regulation allows the request to be made at a later date if the appropriateness of the leave is questioned after-the-fact. The appellate court found that the third-party administrator's denial of her claim provided adequate reason for defendant to later question the appropriateness of the leave. The court held that her leave was not protected under the FMLA because plaintiff did not provide the requested medical documentation timely.

***Apo v. HBE Corporation*, 2013 WL 4787748 (E.D. Mo. Sept. 9, 2013)**

The employee had worked for the employer for seven years when she went on FMLA leave to care for her mother. On the second day of the employee's leave, the employer discharged her. The employee brought claims of FMLA interference and retaliation, and the employer moved for summary judgment. As to the retaliation claim, the court held that the employee did not allege that she was terminated for opposing any practice made unlawful under the FMLA pursuant to 29 U.S.C. § 2615(a)(2). Accordingly, the court analyzed the allegation as an FMLA discrimination claim under 29 U.S.C. § 2615(a)(1).

As to both claims, the court denied the employer's motion for summary judgment. The court found that the employer did not establish that it would have terminated the employee had she not exercised her FMLA rights or that it had a legitimate, non-discriminatory reason for the decision. Discharging the employee on her second day of FMLA leave suggested that her leave influenced the decision. Furthermore, at the time of her discharge, the employee had worked with the employer for seven years, and the employer had indicated to her that "everything was ok" at her job.

**Douglas v. Lofton, 2013 WL 2156053 (N.D. Ill. May 17, 2013)**

Plaintiff, a teacher with the Chicago public schools, claimed interference and retaliation under the FMLA after she took FMLA leave for post-traumatic stress disorder and severe depression. The district court granted the employer's motion to dismiss because plaintiff did not identify in her complaint any manner in which defendants denied her any FMLA benefits. The complaint indicated she took off on multiple occasions and there was no claim defendants denied her request for FMLA time off. Plaintiff argued her complaint raised the inference that defendants acted to discourage using FMLA rights, but the Court found there were no factual allegations of any actions by defendants to deny plaintiff her benefits.

**Brewer v. City of Dayton, 2013 WL 2378041 (S.D. Ohio May 30, 2013)**

The employee injured his knee while working and was unable to work from August 2010 until early April 2011. In April 2011, he was able to return to work with restrictions, but instead defendant sent him home because he could not work without restriction. His doctor cleared him to return without restrictions in mid-May, but defendant terminated his employment for being absent without leave at the end of April.

The employee argued that by not providing him leave to which he was eligible under a collective bargaining agreement ("CBA") and the FMLA in a specified order, defendant interfered with his FMLA rights and he was deprived of FMLA leave when he needed it. Specifically, he claimed that the order he should have taken leave was as follows: injury leave under the CBA with pay; FMLA leave without pay; and ninety day unpaid leave under the CBA. Plaintiff also claimed that he was forced to take FMLA leave when he had other leave options available under the CBA, and therefore had no FMLA leave available when he ran out of leave under the CBA. The court labeled this an 'involuntary leave' claim, which it described as a species of interference claim.

The court granted the employer's motion for summary judgment on the FMLA claim. The court held that the employer was entitled to run FMLA leave concurrently with other forms of leave and that the employee provided no evidence to support an involuntary leave claim. To the extent that the employee's claim challenged whether he had received all of his CBA leave, the court held that the employee was estopped by an adverse grievance determination which the employee did not appeal and noted that state, not federal, labor law applied to the city defendant.

**Colpoys v. County of Erie, 2013 WL 5437635 (W.D. N.Y. Sept. 27, 2013)**

The employee, a Sheriff's Deputy, suffered a knee injury, and as a result only worked eight-hour shifts for some time. When he received a doctor's approval to do so, he began working additional four-hour overtime shifts. When a new supervisor once again restricted the employee to eight hour shifts, the employee requested a medical accommodation for workdays not to exceed 12 hours. The employer granted his request, but according to employee, his supervisor frequently denied him overtime hours and stated that there were no four hour shifts. The employee claimed that other similarly situated employees without disability-related restrictions were allowed to work various portions of an eight hour shift without any problem. His request for a temporary extension of his accommodation until his next doctor's appointment was denied. With the accommodation period now closed, employee claims his supervisor forced him to work a 16-hour shift, which exacerbated his disability to the point where he suffered extreme swelling of his knee and pain so severe that his supervisor relented and sent a sergeant to take him to the hospital. Since that incident, and despite requesting to work four-hour overtime shifts, employee was not given overtime, and was restricted to regular eight-hour shifts. Employer offered no explanation for the restriction, other than stating that the eight-hour shift is an essential requirement of the job that could not be changed with accommodations.

Employee brought suit against Erie County, the Erie County Sheriff's Department and his supervisor alleging violations of his rights under the U.S. Constitution, the ADA, the FMLA and New York State's Human Rights Law. The employer filed a motion to dismiss, which the court granted with respect to the FMLA claim. The employee claimed that the employer interfered with his rights by forcing him to take FMLA leave when he did not have to. He did not allege that he was actually denied any benefits. Therefore, his FMLA claim was dismissed.

**Latowski v. Northwoods Nursing Center, 2013 WL 6727331 (6th Cir. Dec. 23, 2013)**

Plaintiff, a certified nursing assistant, filed suit against her former employer, a nursing home, alleging, in part, interference with her rights under the FMLA. During her employment, plaintiff's physician imposed a fifty pound maximum lifting restriction due to her pregnancy. Upon receipt of this restriction, the employer informed plaintiff she would not be allowed to work as a nursing assistant and it would not accommodate non-work related restrictions. The employer then presented the option of FMLA leave during the pendency of plaintiff's pregnancy. Plaintiff declined to take FMLA leave because she would still be pregnant when her FMLA eligibility expired. The employer ultimately accepted plaintiff declining to use FMLA leave as her voluntary "resignation."

On appeal, the Sixth Circuit affirmed the district court's grant of summary judgment on plaintiff's FMLA interference claim. The court explained that while it is unlawful to deny an employee FMLA benefits by forcing "the employee to take FMLA leave when the employee does not have a 'serious health condition' that precludes her from working," that claim only ripens if and when "the employee seeks FMLA leave at a later date" and the leave is no longer

available because said employee “was wrongfully forced to use FMLA leave in the past.” Because plaintiff was discharged in October of 2008, she would have no longer been employed (thus eligible for FMLA leave) when she gave birth to her son in early 2009. The court held that because plaintiff “never sought to take FMLA leave in 2009, her claim never ripened and she cannot prove a prima facie case of FMLA interference.”

**Chaney v. Eberspaecher N. Am., 2013 WL 3381437 (E.D. Mich. Jul. 8, 2013)**

The employee required shoulder surgery for a work-related injury and took several weeks of FMLA leave. Seven weeks later, employee complained of shoulder pain and left early to visit her doctor. She returned to work three days later with a note from her doctor. However, the employee was assessed two points for the absences under the employer’s no fault attendance policy. A company representative later testified that the documentation she provided should have been sufficient to certify the employee’s absences as medically-excused pursuant to the employer’s policy. Over the next several months, the employee accumulated three more points under the no-fault attendance policy, bringing her total to five points, and the employer then terminated her employment. The employee brought suit, alleging FMLA interference, retaliation, and discrimination for exercising her FMLA rights.

The district court denied the company’s motion for summary judgment on the employee’s FMLA interference claim. The court found that, applying the company’s “rolling twelve month period” for calculating FMLA availability, the employee had FMLA leave available to cover the days she missed for shoulder surgery complications. The court rejected the employer’s argument that the employee did not complete proper paperwork for FMLA leave to cover the days because testimony from the employer’s human resources manager confirmed that the employer understood the employee was attempting to exercise her FMLA rights. Therefore, the court ruled that the evidence created a genuine issue of material fact with regard to whether or not the employee gave the company sufficient notice for FMLA leave and whether she had any FMLA leave available during the relevant time frame. The district court granted the company’s motion for summary judgment on the employee’s FMLA discrimination claim. The court found that the employee could not establish a *prima facie* case. The employee argued that she had sufficient evidence of temporal proximity to establish causation because she was discharged 5½ months after she missed several days of work due to shoulder complications. However, the court found this time span was not sufficient to show temporal proximity. Finally, even if the employee had shown causation, the company acted on an honest belief that the employee had no FMLA available.

**Schultz v. Wells Fargo Bank, Nat’l. Assoc., 2013 WL 4782157 (D. Or. Sept. 5, 2013)**

The employee received approved FMLA medical leave for two surgeries on her legs. The second surgery resulted in amputation of one leg. Within her first year back, the employee received her first write-up in her 30 year career, based largely on sales performance for her branch. The employee refused to sign the write-up, as she had been on medical leave for more than 25% of the year in question. Within the next month, the employee suffered from acute renal failure and required a short medical leave. She initially returned to the same position with the same salary and benefits; however, she received her first negative performance review in 30

years, was transferred to a different location, demoted, and had her bonus potential reduced within one week of returning to work. Several months later, one of employee's direct reports claimed that the employee loaned money to a customer from her personal account. The company investigated and ultimately terminated the employee for this infraction. The employee filed suit under the FMLA, and the company moved for summary judgment.

The district court granted summary judgment in part and denied it in part. The court denied the company's motion for summary judgment as to the employee's interference claim. The company claimed there was no evidence that her FMLA leave played a role in her termination and that the employee could not rely on her transfer and demotion because her claims were time-barred. The court noted that a rational jury could conclude the company knew or acted with reckless disregard as to whether its conduct violated the FMLA. Accordingly, the transfer and demotion decisions fell within the three-year statute of limitations. The court also found that a genuine dispute of material fact existed as to whether her FMLA leave was a negative factor in the transfer, demotion, and termination decisions. The court granted the company's motion for summary judgment on the employee's Section 2615(b) retaliation claim because there was no evidence that she was discriminated against for participation in an enforcement proceeding. However, the court applied the *McDonnell Douglas* framework and denied the motion for summary judgment on the employee's Section 2615(a) retaliation claim. Finally, the court rejected the employer's claim that it should prevail on summary judgment because the employee applied for and received social security disability benefits.

**Johnson v. City of Blaine, 2013 WL 4516339 (D. Minn. Aug. 26, 2013)**

The employee, a police officer, suffered from PTSD and depression. After several years with no symptoms, the employee experienced several deaths within a short period of time, and her symptoms reappeared. She was hospitalized for several lengthy periods. Ultimately, the employer received several complaints of misconduct, insubordination, and harassment involving the employee. The employer placed the employee on paid administrative leave to investigate the allegations. While on administrative leave, the employee demonstrated symptoms of severe depression, and was hospitalized. She also informed the employer that she was "incapacitated" and hospitalized due to mental illness and that she was participating in a six month treatment program. She submitted a request for FMLA leave and asked that her leave begin after her administrative leave ended. However, information from the employee's physician gave an earlier date for commencement of the employee's condition. The employer used the earlier date as the start date for the employee's FMLA leave. Several months later, while the employee was in the process of completing a return to work assessment, she was charged with criminal disorderly conduct for her threats to the co-worker. The employee resigned and later sued her employer for, among other things, FMLA retaliation.

The district court granted the employer's motion for summary judgment. The employee based her FMLA retaliation claim on the employer's decision to place her on FMLA leave after she was already on paid administrative leave. However, the court found no case law requiring an employer to allow an employee to take paid administrative leave when the employee is unable to perform her job due to a serious health condition. Instead, the court noted that the FMLA does not require provision of paid leave. In this case, the court found that the employee was, by her

own assessment, incapacitated during the relevant time period and that she never completed a fitness for duty exam that would have allowed her to return to work. Further, there was no evidence of any employer policy requiring provision of paid administrative leave when an employee was unable to work. Finally, there was no evidence that the employer took any adverse employment actions after the employee's final FMLA leave, and therefore, the employee's FMLA claim could not survive summary judgment.

**Langenbach v. Wal-Mart Stores, Inc., 2013 WL 6827814 (E.D. Wisc. Dec. 23, 2013)**

An assistant store manager for defendant asserted FMLA interference and retaliation claims after she was discharged for poor performance. The employee requested and was granted four weeks of FMLA leave to have surgery. Several days before her return, she experienced complications with the incision from her surgery. She had a conversation with the employer's human resources manager about the possibility of working part-time while her incision healed. Instead, the employer granted continuous leave for several more weeks. Upon the employee's return to work, she presented a medical certification indicating that she could return with no restrictions. She was assigned to the overnight shift upon her return. Before her leave, her performance evaluations indicated the need for her to improve her performance in multiple areas and she was placed on a performance improvement plan (PIP). The employer did not follow through on the PIP, though, and ultimately terminated it. Less than one month after her return, she was placed on a second PIP. After three follow up sessions over the course of six months, she did not show adequate improvement. After these six months, she was discharged.

The court granted summary judgment to the employer on both her interference and retaliation claims. With regard to her interference claim, the employee alleged that the company interfered with her FMLA rights when it required her to take continuous, rather than intermittent leave when her incision was healing and when it discouraged her from taking intermittent leave after she returned from her continuous leave. However, the court found no record evidence to support either claim. The medical documentation the employee provided did not indicate that intermittent leave was necessary when she needed leave to heal her incision; rather, she was completely restricted from performing any heavy lifting. Additionally, when she returned from her continuous leave, her medical documentation fully released her, obviating any need for further leave. With regarding to the employee's retaliation claim, she alleged that the company retaliated against her for taking leave by: (1) assigning her the overnight shift; (2) giving her a negative performance review; (3) placing her on a PIP within one month of her return; and (4) terminating her employment. The court held that the first three allegations were not materially adverse actions and, therefore, could not serve as the basis of a retaliation claim. The court then analyzed the termination claim using both the direct and indirect methods of proof. Using the direct method, the court found no evidence of a causal connection between her leave and termination and noted that the timing of the events alone was not enough to establish a causal connection. Using the indirect burden shifting method, the court found the employee could not establish a prima facie case of retaliation because, given her documented performance, she could not show that she was meeting her employer's legitimate expectations.

**Bracy v. Melmark, Inc., 2013 WL 5330147 (E.D. Pa. Sept. 24, 2013)**

Plaintiff worked for defendant, a provider of residential, educational, therapeutic, and recreational services for children and adults with developmental disabilities, as a health services manager. Before plaintiff became eligible for FMLA leave, she submitted paperwork requesting intermittent time off in 2011 to care for her father who was suffering from dementia. After learning of her eligibility status, she instead used time off available through company policies to care for her father after he suffered from a stroke in December 2011. On February 2, 2012, plaintiff once again discussed FMLA leave with her supervisor. Thereafter, a human resources representative processed plaintiff's December 2011 FMLA request paperwork requesting *intermittent* leave. Plaintiff returned from her leave early in March 2012 and was separated from employment three days later. Plaintiff contended that her employment was terminated whereas defendant argued she voluntarily abandoned her job.

The court denied both parties' summary judgment motions with respect to plaintiff's claim that defendant interfered with her FMLA rights by placing her on block instead of intermittent leave as she originally requested. Because each party offered vastly different versions of the content of plaintiff's February 2012 discussion with her supervisor, the court concluded there were genuine issues of material fact precluding summary judgment on the FMLA interference count. The court further found that plaintiff could not satisfy the *prima facie* case for her FMLA retaliation claim because it was not convinced that she had been terminated.

**Colon v. Fashion Institute of Technology, 2013 WL 5677047 (S.D. N.Y. Oct. 18, 2013)**

At the time of her discharge, plaintiff was a tenured full-time employee in the fabric room in the employer's design department. In 2008 and 2009, plaintiff received written warnings regarding her tardiness, absences and misuse of sick days. In August 2011 the chair of plaintiff's department requested that HR bring charges against plaintiff for her ongoing attendance issues. In October 2011, plaintiff tore the ACL in her left knee and provided paperwork to her supervisors from her physician substantiating her condition.

On November 1, plaintiff picked up FMLA paper work and her surgeon provided the required leave forms on November 3. On November 7, 2011, the employer suspended plaintiff's employment. The employer's board of trustees ultimately adopted the arbitrator's recommendation to terminate plaintiff's employment due to her excessive lateness and absences.

The court denied defendant's motion for summary as to plaintiff's FMLA interference and retaliation claims. First, the court found that it could not determine whether plaintiff's request for FMLA leave was a negative factor in the decision to terminate her. Although the court recognized that the employer would not be liable for discharging plaintiff if it would have done so regardless of the leave, there were gaps in the timeline of plaintiff's disciplinary issues and requests for leave. Next, the court found that plaintiff satisfied her *prima facie* case of FMLA retaliation. Although the employer offered evidence to prove that plaintiff's attendance issues were the motivating factor in her suspension, the court noted her request for leave may have been an additional factor.

**Bullard v. Texas Department of Aging & Disability Servs., 2013 WL 6513752 (E.D. Tex. Dec. 12, 2013)**

Plaintiff, an employee of a state agency in Texas, spent time in a hospital due to a health condition that left fluid on her heart and lungs. Plaintiff alleged that, while she was in the hospital, she was questioned by her employers as to whether she had a diagnosis, was required to call in to work every day, and was required to provide proof of being in the hospital. Furthermore, she claimed that her employers had driven to the hospital to speak with plaintiff's doctor about her health. After she was discharged, plaintiff filed suit, alleging FMLA interference, among other claims. Specifically, plaintiff alleged her FMLA rights were interfered with when her employer required her to call in to work from the hospital and present documentation supporting her assertion that she needed leave. The employer, in response, asserted Eleventh Amendment immunity to plaintiff's FMLA claim.

The court stated that the self-care provision of the FMLA, standing alone, is not enough to abrogate a State's immunity from a suit of money damages. The court went further and stated that even if the employer was not entitled to Eleventh Amendment immunity, plaintiff had not alleged a viable claim under the FMLA. It stated that plaintiff was allowed to take off time from work, and although plaintiff was required to call in and present documentation from her doctor, plaintiff failed to provide any factual allegations that would support a claim of interference with her FMLA rights. The complaint was subsequently dismissed.

**Demarce v. Robinson Property Group Corp., 2013 WL 6528843 (N.D. Miss. Dec. 12, 2013)**

Plaintiff, while employed at defendant's casino, began suffering from osteoarthritis that made it difficult for her to work while standing. Defendant initially granted plaintiff intermittent leave under the FMLA and provided her a casino table where she could work sitting down. However, as part of defendant's employment policy, certain parts of the casino would shut down when business was slow and employees were required to sign an "early-out" form if they wished to leave early on those days. Not signing the sheet and leaving early would negatively affect an employee. Because plaintiff's sit down table would usually close on these days and she could not work at a standing casino tables, plaintiff usually left early without signing the early-out form. When plaintiff requested intermittent leave again, she was denied because she no longer met the 1,250 hour requirement under the FMLA as a result of her early departures from work. Plaintiff was later discharged due to her attendance.

Plaintiff brought suit against defendant, alleging FMLA interference and retaliation. Under plaintiff's FMLA interference claim, she claimed that defendant interfered with her ability to take FMLA leave by repeatedly sending her home so she would no longer qualify for FMLA. The court held that plaintiff could not make out a prima facie case of FMLA interference because she did not meet the 1,250 hour requirement to be considered an eligible employee under the FMLA, and therefore was not entitled to FMLA leave. The court stated that, although it seemed that defendant's "interference" prevented her from becoming an eligible employee, plaintiff did not cite to any authority asserting such theory of liability. For the FMLA retaliation claim, where plaintiff claimed defendant retaliated against her for taking necessary leave, the court held



that plaintiff had abandoned this claim when she offered no rebuttal to defendant's summary judgment motion in which defendant had attacked her FMLA retaliation claim. The court, subsequently, granted defendant's Motion for Summary Judgment.

**Rains v. Newmont USA Ltd., 2013 WL 6632671 (D. Nev. Dec. 16, 2013)**

Plaintiff took FMLA leave for an unspecified period of time and, upon returning to his job as a miner, was demoted. That same day, plaintiff left work early because of his "serious mental and emotional health condition caused by the demotion." Plaintiff brought a claim for interference under the FMLA. Defendant moved to dismiss and the court granted the motion on the grounds that plaintiff failed to allege any facts showing that the "serious mental and emotional health condition caused by the demotion" were related to any needed treatment or care. Plaintiff also failed to allege that the demotion and eventual termination were motivated by or even related to the exercise of his FMLA rights.

***Summarized Elsewhere:***

**Lopez v. Pactiv Corp., 2013 WL 4008626 (N.D. Ill. Aug. 5, 2013)**

**Miles v. University of the District of Columbia and Howard University, 2013 WL 5817657 (D. D.C. October 30, 2013)**

**Lichty v. Allina Health System, 21 WH Cases2d 432 (D. Minn. 2013)**

**Tomlinson v. Wiggins, 20 WH Cases2d 1156 (W.D. Ark. 2013)**

**Yamamoto v. Panasonic Corp. N. Am., 2013 WL 3356214 (D. N.J. July 2, 2013)**

**Richards v. City of Atlanta et al., 2013 WL 1129197 (N.D. Ga. Mar. 19, 2013)**

**Avila v. El Paso County, 2013 WL 2458619 (W.D. Tex. June 6, 2013)**

**Howard v. Pennsylvania Dep't of Pub. Welfare, 2013 WL 102662 (E.D. Pa. Jan. 9, 2013)**

**Nicely v. E. Kentucky Power Co-op., Inc., 2013 WL 142430 (E.D. Ky. Jan. 11, 2013)**

**Nichik v. New York City Transit Auth., 2013 WL 142372 (E.D. N.Y. Jan. 11, 2013)**

**Hamm v. Nestle USA, Inc., 2013 WL 4401328 (N.D. Ill. Aug. 15, 2013)**

**Archie v. Dart, 2013 WL 1283466 (N.D. Ill. March 27, 2013)**

**Schluckebier v. Assisted Living Concepts, Inc., 2013 WL 550744 (D. Neb. Feb. 12, 2013)**

**Lassalle v. Port Authority of New York & New Jersey, 2013 WL 6094339 (D. N.J. Nov. 19, 2013)**

**Maack v. School Board of Brevard County, 2013 WL 6050749 (M.D. Fla. Nov. 15, 2013)**

**Stoler v. Institute for Integrative Nutrition, 2013 WL 6068598 (S.D. N.Y. Nov. 18, 2013)**

**Lister v. National Oilwell Varco, L.P., 2013 WL 5515196 (S.D. Tex. Sept. 30, 2013)**

**Taylor-Novotny v. Health Alliance Medical Plans, 2013 WL 5832670 (C.D. Ill. Oct. 30, 2013)**

**Rossi v. Fulton County, Ga., 2013 WL 1213243 (N.D. Ga. Feb. 13, 2013), adopting report and recommendation, 2013 WL 1213139 (N.D. Ga. Mar. 22, 2013) (unpublished decision)**

**Ward v. City of Birmingham, 2013 WL 541429 (N.D. Ala. Feb. 8, 2013)**

**Joyce v. Office of the Architect of the Capitol, 2013 WL 4758186 (D. D.C. Sept. 5, 2013)**

**Campbell v. Costco Wholesale Corp., 21 WH Cases2d 358 (M.D. Tenn. 2013)**

**Metroka-Cantelli v. Postmaster General, 2013 WL 5939776 (N.D. Ohio Nov. 5, 2013)**

**Douglas v. Lofton, 2013 WL 5940749 (N.D. Ill. Nov. 6, 2013)**

**Dean v. One Life America, Inc., 2013 WL 870352 (S.D. Miss. Mar. 7, 2013)**

**Young v. Wackenhut Corp., 2013 WL 435971 (D. N.J., Feb. 1, 2013)**

## B. Other Claims

### **Carnes v. Capital Improvement Bd. of Managers of Marion County, Indiana, 2013 WL 3834653 (S.D. Ind. Jul. 24, 2013)**

The employee, a pipefitter, was employed by the employer for twenty-three years and began taking intermittent FMLA leave in 2007. When he returned from his last period of intermittent leave in mid-2012, the employee claimed that he was told by the company's human resources director that his use of FMLA leave was a source of contention and concern for the company's CEO. In August 2012, the employee was discharged after backing into a uniform locker during the course of his employment. The employee then brought an FMLA retaliation claim and the employer moved to dismiss based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court denied the employer's motion to dismiss, finding that the employee had stated sufficient facts to support a claim for retaliation. Although noting that the employee's factual allegations were sparse, the alleged comment by the human resources director and the temporal connection between his discharge and his last use of intermittent leave was sufficient to survive the motion to dismiss.

### **Shenk v. Pennsylvania, 118 FEP Cases 1054 (M.D. Pa. 2013)**

Plaintiff, a senior manager with a state agency, brought multiple claims against defendants, including FMLA retaliation. She alleged that she was issued a negative performance evaluation while on FMLA leave, though she had been shown the negative performance evaluation prior to applying for and being granted FMLA leave. Defendants moved for summary judgment. A magistrate judge recommended that summary judgment be denied with regard to plaintiff's FMLA retaliation claim because plaintiff had presented sufficient evidence in support of her claims to create a genuine issue of material fact.

However, the district court did not adopt the magistrate's recommendation and granted defendant's motion for summary judgment. The court held that there was no evidence that the adverse action was causally linked to her exercise of protected FMLA rights because plaintiff had seen the negative evaluation prior to applying for and being granted FMLA leave.

### **Nelson v. Clermont County Veterans Service Commission, 21 WH Cases2d 965 (S.D. Ohio 2013)**

Plaintiff's daughter had been the victim of a sexual assault. Plaintiff alerted her employer of the assault and her need for FMLA leave to provide the care her daughter would require in the time ahead. Plaintiff also needed FMLA leave herself due to crying spells, a lack of energy, and an inability to focus or concentrate. After plaintiff returned to work from FMLA leave she began bringing her daughter to work with her every day. The employer told plaintiff it was inappropriate to bring her daughter with her and that she had to "choose between caring for her daughter or keeping her job." A few days later, the employer began proceedings to terminate plaintiff's employment due to poor performance.

The employer held a formal disciplinary hearing and allowed plaintiff the opportunity to present evidence and testimony, but she opted not to do so. Instead, she submitted a rebuttal letter the next day, which the employer refused to consider. The district court found that plaintiff's FMLA retaliation claim could proceed to trial based on her termination nine days after returning from FMLA leave, her claim that her employer overloaded her with work, the employer's comments about choosing between caring for her daughter and her job, and the employer's refusal to consider her post-hearing rebuttal letter.

*Summarized Elsewhere:*

**Lanier v. University of Texas Southwestern Medical Center, 20 WH Cases2d 1423 (5th Cir. 2013)**

1. Discrimination Based on Opposition

**Augustus v. AHRC Nassau, 2013 WL 5532634 (E.D. N.Y. Oct. 4, 2013)**

On January 7, 2008, plaintiff began work for defendant, which provides a variety of services to individuals with intellectual disabilities. While plaintiff's initial performance reviews were positive, she received several requests to improve her communication with supervisors about her attendance. On September 22, 2008, she received a formal Counseling Memorandum to that effect. Plaintiff's January 2009 performance review was similarly positive, but again noted the need for her to improve her communication. On January 23, 2009, plaintiff arrived to work late and received a "written supervision" requiring that she talk directly to a supervisor if she would be late or miss work. Two days later, plaintiff missed work and merely left voicemails for her supervisor, resulting in a second written supervision. Plaintiff received a third written supervision related to communication in August 2009. On November 3, 2009, plaintiff missed an appointment with a client. Her supervisor left her a voicemail, but she did not return the call and was late to work without calling in the following morning. Plaintiff was discharged on November 5, 2009. Plaintiff filed suit, alleging that she was subjected to stricter work standards than her coworkers because of her advocacy of a pregnant client's FMLA rights.

After a bench trial, the court rejected plaintiff's claim. The court found that defendant did not know about the client's pregnancy until after the first two written supervisions were issued. The court also found no evidence linking the disciplinary action to any hostility toward the client and instead found that the employer tried to help the client obtain FMLA benefits.

2. Discrimination Based on Participation

**Davis v. Postmaster General, 2013 WL 6671233 (11th Cir. Dec. 19, 2013)**

Plaintiff, an employee of the United States Postal Service, sought FMLA leave from defendant to care for his "sick children." On appeal, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the Postal Service on plaintiff's FMLA retaliation claim. The Eleventh Circuit held that plaintiff failed to establish evidence that he engaged in statutorily protected conduct "because even if he was eligible for FMLA leave and his call-ins to the Postal Service's automated leave line were sufficient notice," his absences during a three and a half month period exceeded the twelve weeks protected by the FMLA. The court went on to

hold that plaintiff failed to demonstrate a causal link where defendant made multiple attempts to substantiate plaintiff's FMLA requests and did not terminate plaintiff's employment until one month after any FMLA leave had expired. Finally, the court noted that even if plaintiff could establish a prima facie case of retaliation under the FMLA, he failed to set forth any evidence of pretext.

**Cook v. Dolgencorp, LLC, 2013 WL 5408670 (D. S.C. Sept. 25, 2013)**

A former sales associate alleged that she took FMLA leave to care for her prematurely born son beginning on April 30, 2010, and informed her employer of her approximate return date. The employee alleged that on her estimated date of return, which was also day the employee was usually off in order to take her son to therapy appointments, her manager called and asked if she would work. The employee further alleged that she attempted to call into work sick that same day, but that the employer hung up on her when she tried to say that she was going to the doctor. She alleged that, while at the doctor for her own illness that same day, the employer left a message stating that she had been discharged. The employee subsequently filed suit for FMLA retaliation.

The court denied the employer's motion to dismiss the retaliation claim under Fed. R. Civ. P. 12(b)(6). The court held that the employee's allegations that she was asked to work on a day she was usually off to take her son to therapy, and on which she was sick, and then discharged that same day, set forth a plausible claim that she was discharged because of her prior FMLA leave.

**Joyce v. Office of the Architect of the Capitol, 2013 WL 4758186 (D. D.C. Sept. 5, 2013)**

The employee injured his back and gave proper notice of the need for leave. When the employee returned after one week, his supervisor assigned him to a new schedule, which created complications in the employee's personal life. The employee protested the decision, and when his supervisor would not reconsider, the employee resigned. He then filed suit against his employer on numerous grounds, including FMLA retaliation and interference with his FMLA rights. The employer moved to dismiss.

The district court held that the employee stated plausible claims for FMLA retaliation and interference at the motion to dismiss stage. The court concluded that while denial of sick leave and the potential shift change could not constitute adverse actions, the employee could, at the motion to dismiss stage, build his case on the constructive discharge claims pled in his amended complaint. The employer argued that the employee never properly requested family medical leave, that his injury was ineligible for FMLA leave, and that the employee never opposed any unlawful practices. However, the court rejected each of these arguments in turn, stating that the allegations in the employee's amended complaint were sufficient to survive the employer's motion to dismiss. The employee's FMLA interference claim also survived the motion to dismiss because, due to the shift change, the employee was never given a chance to return to an equivalent position.

*Summarized Elsewhere:*

*Baier v. Rohr-Mont Motors, Inc.*, 2013 WL 2384269 (N.D. Ill. May 29, 2013)

*Segura v. TLC Learning Center*, 2013 WL 1283827 (N.D. Ill. March 26, 2013)

*Allen v. Verizon Wireless*, 2013 WL 2467923 (D. Conn. June 6, 2013)

*Johnson v. City of Blaine*, 2013 WL 4516339 (D. Minn. Aug. 26, 2013)

### III. ANALYTICAL FRAMEWORKS

#### A. Substantive Rights Cases

*Travis v. Deming, Malone, Livesay, & Ostroff, P.S.C.*, 20 WH Cases2d 1792 (W.D. Ky. 2013)

Plaintiff had been working for the employer for several years as an accountant. Plaintiff had a history of subpar performance evaluations dating back to 2007. In January 2010, plaintiff requested FMLA leave for rotator cuff surgery from February 17 until March 15, 2010. In early February 2010, however, plaintiff began experiencing back pain and scheduled back surgery for February 14. Both leaves of absence were approved and plaintiff was off work from February 2 to March 29, 2010 and again from April 12 to May 10, 2010.

According to plaintiff, her supervisor made a hostile comment regarding her need for leave: "it's tax season. We have lots of work to do." Additionally, plaintiff claimed that when she returned to work, her supervisor was rude and hostile. Because plaintiff's work performance did not improve, she received a verbal counseling in June 2010; a poor performance appraisal and performance improvement plan in September 2010; and her employment was terminated in April 2011.

Plaintiff subsequently filed a lawsuit and brought multiple claims against the employer, including FMLA violations. Specifically, plaintiff argued that her employer retaliated against her for taking FMLA leave by terminating her employment. The employer moved for summary judgment as to plaintiff's FMLA retaliation claims and argued that plaintiff could not show a causal connection between her FMLA leave and her termination. The court agreed and ruled that the evidence was insufficient to allow for an inference that plaintiff's employment was terminated because she took FMLA leave. Here, the court focused on the fact that plaintiff was terminated nearly one year after she returned from leave and noted that a lack of temporal proximity may serve to undermine a finding of causation. The court also found that the employer gave plaintiff repeated chances to improve her job performance throughout the year. The court also rejected plaintiff's argument that the employer was merely attempting to "paper the file" and found the argument implausible given the expansive intervening time period. Finally, the court ruled that a single comment by plaintiff's supervisor "it's tax season. We have lots of work to do," was insufficient to prove causation because it occurred prior to plaintiff's FMLA leave request.

#### 1. General

*Summarized Elsewhere:*

*Myrks v. City of Oklahoma City*, 2013 WL 2147417 (W.D. Okla. May 15, 2013)

## 2. No Greater Rights Cases

### **Perez v. Cellco Partnership, 2013 WL 4848070 (M.D. Fla. Sept. 10, 2013)**

A call center employee periodically used intermittent FMLA leave to care for herself and later requested FMLA leave to care for her mother. Eventually, the employee was discharged for performance reasons. The employee filed a lawsuit alleging FMLA interference and retaliation. The court granted summary judgment to the employer, however, because the evidence showed that the employee would have been discharged for her performance regardless of whether she went on leave. It was undisputed that the employee had performance problems during the relevant time period, and the employer utilized and complied with its performance plan. The court also rejected the employee's attempt to rely on the temporal proximity between the exercise of FMLA rights and the discharge because there was no evidence to support the employee's speculation that the adverse actions were related to her FMLA leave. Additionally, there was nothing in the record to suggest that the employer prevented the employee from meeting her performance goals.

#### ***Summarized Elsewhere:***

### **Klein v. L-3 Communications Corp. et al, 2013 WL 5913776 (M.D. Ala. Nov. 1, 2013)**

## B. Proscriptive Rights Cases

### **Avila v. El Paso County, 2013 WL 2458619 (W.D. Tex. June 6, 2013)**

Plaintiff, an office supervisor, told defendant's human resources department that she had to take time off due to medical procedures related to her back. The department gave plaintiff a certification form to determine whether she was eligible for FMLA benefits. The following day, defendant terminated plaintiff's employment, citing her unprofessional conduct towards co-workers and customers and insubordination. Plaintiff sued, arguing her termination interfered with her right to take leave under the FMLA. Plaintiff ultimately filed a motion for partial summary judgment on her interference claim, arguing that the claim was governed by a strict liability standard.

The district court denied plaintiff's motion, holding that strict liability does not apply to an FMLA interference claim. Specifically, the court noted that an employer can avoid liability by proving it would have made the same termination decision had the employee not tried to exercise her FMLA rights, precluding a strict liability approach. The court explained that this approach has been taken by a majority of district courts in the Fifth Circuit as well as seven federal courts of appeals outside the Fifth Circuit, and that it was not aware of any federal courts of appeals applying strict liability to 29 U.S.C. § 2615(a)(1) claims in a termination context.

Second, the court held that it could not decide as a matter of law whether defendant interfered with plaintiff's FMLA entitlement because there was an issue of material fact as to whether plaintiff's entitlement was "extinguished" by her termination. While plaintiff argued that the timing of the termination decision coupled with a letter from defendant stating that "leave without pay is generally discouraged" may be enough for a jury to conclude there was a causal relationship between her leave request and the termination decision, defendant's articulated

reasons for the termination could lead a jury to conclude these were the real reasons for plaintiff's termination, thereby extinguishing her FMLA leave entitlement. Thus, the court denied plaintiff's motion for partial summary judgment.

**Hoff-Pierre v. Univ. Hosp., Inc., 523 Fed. App'x 313 (6th Cir. 2013)**

Plaintiff, a medical-records coder for defendant hospital, brought multiple claims against defendant, including an FMLA retaliation claim. Following discovery, defendant moved for summary judgment. In response to the motion, plaintiff attempted to assert an FMLA interference claim. The district court rejected her claim, finding that she elected to plead an FMLA retaliation claim and that it would be unfair to permit her to raise an interference claim at that time. The court, however, denied defendant's motion for summary judgment as to her FMLA retaliation claim, holding that while the law permitted defendant to count plaintiff's light duty work toward the 12 weeks that defendant was required to keep her job open for her, there was a genuine issue of material fact regarding defendant's decision to assign plaintiff to light duty. A jury returned a verdict in favor of defendant on plaintiff's FMLA retaliation claim. Plaintiff appealed the district court's summary judgment order, arguing that the court erred in holding that she failed to plead a claim for FMLA interference and erred in finding that her light duty work counted toward her job protection allowance.

The Sixth Circuit affirmed, holding that the district court properly held that plaintiff failed to plead an FMLA interference claim. Specifically, the court found that while a plaintiff does not waive an interference claim under the FMLA if she alleges general violations of the law that can apply to both interference and retaliation, plaintiff in this case did not make such general allegations. Instead, she made an express retaliation claim, the allegations contained were the "essence of a retaliation claim," and she did not allege interference with her FMLA rights anywhere in her complaint.

The Sixth Circuit also affirmed the district court's holding that the law in effect at the time allowed defendant to count plaintiff's time on light duty toward her FMLA 12-week protection allowance. The version of 29 C.F.R. § 825.220(d) in place at the time plaintiff took her leave provided that an employer could count an employee's voluntary time on light duty against her 12 weeks of job protection allowance under the FMLA.

***Summarized Elsewhere:***

**Ranade v. BT Americas, Inc., 2013 WL 5818019 (E.D. Va. Oct. 28, 2013)**

**Watson v. Ciena Healthcare Mgmt., Inc., 2013 WL 5435279 (E.D. Mich. Aug. 16, 2013), report and recommendation adopted as modified by Watson v. Ciena Healthcare Mgmt., Inc., 2013 WL 5432177 (E.D. Mich. Sept. 27, 2013)**

**Miles v. University of the District of Columbia and Howard University, 2013 WL 5817657 (D. D.C. October 30, 2013)**

**Gordon v. U.S. Capitol Police, 923 F. Supp. 2d 112, 20 WH Cases2d 453 (D. D.C. 2013)**

**Alford v. Providence Hosp., 20 WH Cases2d 1349 (D. D.C. 2013)**

#### IV. APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK

**Benavides v. City of Oklahoma City, 508 Fed. Appx. 720, 20 WH Cases2d 331 (10th Cir. 2013)**

The employee police officer sued the employer alleging retaliation under the FMLA, among other federal claims. The employee began working as a police officer in 1992 and in 2006 took FMLA leave as a result of a serious health condition which had residual effects on the employee's health. In May 2010, another employee filed a confidential report alleging that the employee was engaged in illegal gambling. About one week after being informed that he had been accused of illegal gambling, the employee filed a complaint that he had been harassed by other employees as a result of his medical condition and use of leave. In July, the employer issued a detailed report finding that the officer had violated several police department policies. In September 2010, the employee was subpoenaed to testify before a grand jury and placed on administrative leave pursuant to department policy.

The Tenth Circuit affirmed the lower court's ruling that the employer had articulated a legitimate nondiscriminatory reason for discharging the employee, and the employee had failed to produce facts sufficient to show that the reason was pretextual. In analyzing the elements of retaliation under the FMLA, the Tenth Circuit relied on the burden-shifting test applicable in traditional discrimination claims. The employee argued that the employer retaliated by placing the employee on administrative leave. However, the employer produced evidence that the employer places all police officers on administrative leave when they are charged with a crime. The court held that the employee had not satisfied his burden of showing that he had suffered a materially adverse action by being placed on administrative leave, and even if he had, the employee failed to show that the employer's reason for the leave was pretextual. The Tenth Circuit affirmed the lower court's decision, affirming summary judgment in favor of the employer.

**Algie v. Northern Kentucky University, 2013 WL 624396 (E.D. Ky. Feb. 20, 2013)**

From 1999 to 2007, the employee worked in the employer's printing department. In 2006, the employee filed one FMLA certification seeking intermittent leave for his rheumatoid arthritis and another FMLA certification to provide him with intermittent leave to care for his wife. In the employee's final performance review, conducted in March 2007, the employer characterized the employee's overall performance as needing improvement, particularly noting that his absenteeism interfered with production schedules. Approximately six months after the employee's 2007 performance review, defense counsel notified the employer that the employee misrepresented his criminal record on his employment application and presented a safety risk to the employer's community. In response to defense counsel's recommendation, and without knowledge of the employee's FMLA leave or his issues with absenteeism, the employer discharged the employee. In June 2008, the employee filed a *pro se* complaint, contending that the employer discharged him in retaliation for exercising his FMLA rights. The court dismissed some of the employee's claims, including a claim that the court perceived as a Title VII medical disability claim and ultimately granted summary judgment in favor of the employer. Following review, the Sixth Circuit affirmed the summary judgment ruling but vacated dismissal of the perceived Title VII medical disability claim. The Sixth Circuit explained that the perceived Title



VII claim actually was an FMLA retaliation claim and remanded the case to the court to address that claim accordingly.

Before proceeding to the merits of the employee's FMLA retaliation claim, the court addressed the employer's potential immunity. As to the employee's request for leave to care for his wife, the court found that the employer was not entitled to immunity because the Sixth Circuit has recognized that the Eleventh Amendment does not bar suits for violation of the subsection (c) family-care provision. As to the employee's request for leave due to his rheumatoid arthritis, because the employee was seeking equitable relief in the form of reinstatement, the court considered the merits of the employee's retaliation claim. On remand, the employer moved for summary judgment as to the employee's claim that the employer retaliated against him for exercising his FMLA rights. Because the employee based his claim upon indirect evidence, the court applied the traditional burden-shifting framework of *McDonnell Douglas Corporation v. Green*. Ultimately, the court found that the employee's claim failed for two reasons. First, the employee did not make a prima facie case of retaliation because he offered no evidence to show that the person responsible for his termination knew he was exercising his FMLA rights and his supervisor did not exert influence over the employment decision. Second, the employer set forth legitimate, non-discriminatory reasons for the termination and the employee did not establish that any of those reasons were pretextual.

***Summarized Elsewhere:***

***Malin v. Hospira, Inc.*, 2013 WL 2436483 (N.D. Ill. May 31, 2013)**

**A. Direct Evidence**

***Tomlin v. Washington University*, 2013 WL 5406484 (E.D. Mo. Sept. 25, 2013)**

Plaintiff, a grant specialist for a university, sued her former employer for retaliation under the FMLA. Plaintiff had performance problems, which did not improve even after substantial assistance and guidance from her direct supervisor. Eventually, plaintiff was issued a written warning that explained her performance deficiencies and noted that her behavior in a recent meeting was insubordinate and unacceptable. Immediately after receiving the written warning, plaintiff requested twenty days of full-time FMLA leave followed by additional intermittent leave, citing stress and depression caused by her workload. The employer approved plaintiff's request. After returning from leave, despite continued efforts to assist plaintiff, her performance continued to decline. Plaintiff's supervisors made the decision to terminate her employment because of her failure to improve her performance and behavior, as well as demands by faculty members that plaintiff no longer work on their grants.

Plaintiff claimed the employer discharged her for taking FMLA leave. The court granted summary judgment for the employer, holding plaintiff could not make out a *prima facie* case of FMLA retaliation under either the direct or indirect method of proof. Plaintiff presented no evidence of intentional attempts to terminate her employment based on her FMLA leave. Absent any direct evidence, the court applied the *McDonnell Douglas* burden-shifting framework and concluded that plaintiff was not meeting the employer's legitimate expectations at the time she was discharged. Plaintiff received a written warning before she engaged in any protected activity, and she could not protect herself from further disciplinary action simply by engaging in

protected activity. Furthermore, the length of time (two months) between plaintiff's leave and her discharge diluted any inference of causation. Given plaintiff's ongoing poor performance and the lack of evidence of some other motivation behind the employer's decision, the court held plaintiff could not prove her FMLA retaliation claim.

**Herrera v. Illinois Bell Telephone Co., 2013 WL 654920 (N.D. Ill. Feb. 21, 2013)**

Plaintiff, a customer service representative at a call center, sued her former employer for retaliation under the FMLA. In November 2009, plaintiff experienced several personal health and family issues that significantly increased her stress and anxiety levels. These issues caused plaintiff to take FMLA leave from December 3, 2009 through March 7, 2010. When plaintiff returned from leave on March 8, 2010, her supervisors informed her that she was being suspended pending termination due to her lack of consistent satisfactory job performance. It was undisputed that plaintiff failed to achieve the employer's minimum performance scores for nine out of the twelve months preceding her discharge, which resulted in progressive discipline. Prior to taking leave, plaintiff had already received a first written warning, was put on a performance improvement plan, received a final written warning and three repeat final written warnings resulting in one-day suspensions. Plaintiff was on FMLA leave by the time her October 2009 performance score became available. The employer made the decision to discharge plaintiff upon receiving her unsatisfactory October 2009 performance score.

Plaintiff claimed the employer violated the FMLA by suspending her pending termination for taking FMLA leave. She relied almost entirely on the timing of the suspension, alleging the fact she was suspended the same day she returned from FMLA leave, which in and of itself gave rise to an inference of retaliation. The employer moved for summary judgment on plaintiff's retaliation claim. The district court granted the motion, holding plaintiff could not make out a *prima facie* case of FMLA retaliation under either the direct or indirect method of proof. The district court found that suspicious timing alone could not support a reasonable inference of retaliation. And plaintiff failed to point to any evidence that could be construed as intentional attempts to terminate her employment based on her FMLA leave, let alone offer any evidence that her supervisor even knew of plaintiff's FMLA leave when he made the decision to place plaintiff on a suspension pending termination. Absent such direct evidence, the district court applied the *McDonnell Douglas* burden-shifting framework. The district court found plaintiff's FMLA retaliation claim failed because plaintiff was not meeting the employer's legitimate expectations at the time she was discharged and plaintiff could not identify any employee who did not take FMLA leave and who consistently failed to achieve the minimum required performance scores. Given plaintiff's consistently low performance scores, demonstrated inability to improve over a twelve month period, and the lack of evidence suggesting there was some other motivation behind the decision to terminate plaintiff's employment, the district court held plaintiff could not prove her FMLA retaliation claim.

**Lopez v. Pactiv Corp., 2013 WL 4008626 (N.D. Ill. Aug. 5, 2013)**

The employee, a labor relations manager, requested a couple days off because his wife was diagnosed with skin cancer. The request was approved, but the employee failed to submit any paperwork requesting an FMLA leave of absence. The employee was then discharged by the employer shortly after he took FMLA leave. An email between the Manager of Human Resources and the employee stated that the Vice President of Field Human Resources did not consider the employee fit. The employee claimed that the employer violated the FMLA by terminating his employment in retaliation for exercising his FMLA rights and that the employer interfered with his FMLA leave.

The District Court granted in part and denied in part the employer's motion for summary judgment. The court denied the employer's motion for summary judgment as to the employee's retaliation claim. The court rejected the employer's argument that the Chief Human Resources Officer made the decision to terminate the employee weeks before the employee requested FMLA leave. According to the court, the email would allow a reasonable jury to find that the Vice President of Field Human Resources terminated the employee rather than the Chief Human Resources Officer. And with other record evidence, the court concluded that a reasonable jury could conclude that the employee would not have been fired had he not taken FMLA leave.

Finally, the court granted in part the employer's motion for summary judgment as to the interference claim. The court ruled that the employer was entitled to summary judgment as to the FMLA interference claim to the extent it pertained to leave requested and taken by the employee at all previous times because the employer granted him the leave he requested. On the other hand, the court found that a reasonable jury could conclude that the employer unlawfully interfered with the employee's FMLA leave for the leave requested relating to his wife's skin cancer. The court then ruled that summary judgment was inappropriate for the same reasons stated regarding the employee's retaliation claim.

**Carter v. Chicago State Univ., 2013 WL 3975009 (N.D. Ill. Aug. 1, 2013)**

Plaintiff was employed by defendant as an Associate Professor. Plaintiff requested FMLA leave for more than seven weeks, and defendant hired a part-time professor to cover plaintiff's courses. When plaintiff returned, defendant required plaintiff to prepare course outlines instead of teaching the courses that were reassigned to the part-time professor. After plaintiff's FMLA leave ended, plaintiff also received a record that incorrectly stated that plaintiff's sick day balance was zero. In addition, a month after plaintiff returned from leave, defendant conducted an appointment process to appoint the Chair of the Department. Plaintiff and another employee were tied with votes – but the Dean of the college did not support plaintiff – and even though the other employee withdrew from consideration, leaving only plaintiff as a candidate, defendant did not promote plaintiff. Instead, defendant stated that it had a policy of not appointing candidates that did not have a Ph.D. The Department then held another election because the individual appointed during the previous election resigned. Finally, plaintiff also received summer course assignments that varied depending upon the year. Plaintiff claimed that Defendant interfered with his FMLA rights and that he was retaliated against for exercising his FMLA rights.

The court granted in part and denied in part the Defendant's motion for summary judgment. The court held that plaintiff's interference claim failed. The court first ruled that Defendant restored plaintiff to the same position when he returned from leave. The court found that the outline assignment was reasonable, and indeed, plaintiff admitted that it was reasonable. The court then ruled that the payroll record that mistakenly listed plaintiff's sick day balance as zero did not prejudice plaintiff because plaintiff still had the requisite number of sick days as he had before he took FMLA leave.

The court then ruled that plaintiff presented sufficient evidence under the direct method of proof to create a genuine dispute of material fact as to whether defendant retaliated against him in the Chair appointment process. The court held that a jury could reasonably infer that defendant's actions were motivated by retaliatory animus. The court also found that plaintiff provided sufficient evidence under the indirect method to create a genuine dispute of material fact as to whether faculty without a Ph.D. were similarly situated and treated more favorably. The court noted that other faculty members without a Ph.D. were appointed to Chair positions. However, the court granted the employer's motion for summary judgment as to the second appointment process because the court found that plaintiff did not apply for the position.

**Pope v. Blue Ridge Electric Membership Corp., 2013 WL 1728011 (W.D. N.C., Apr. 22, 2013)**

Plaintiff was the director of defendant's finance department. Plaintiff took multiple periods of leave pursuant to the FMLA. After her third period of leave, her employer informed her that the department was being reorganized and her position would be eliminated. Plaintiff's position was the only one eliminated at the time. Defendant explained that during plaintiff's periods of leave, defendant discovered that the department ran as smoothly in the employee's absence as it did when she was present. Plaintiff rejected the severance package offered by defendant, but the parties subsequently entered a written Mediated Settlement Agreement that purported to resolve their respective rights, claims and defenses. Seven days later, plaintiff informed defendant of her intention to revoke the agreement and pursue her remedies in court. Plaintiff filed suit and alleged that the termination was either in interference with her rights under the FMLA or in retaliation for her taking FMLA-protected leave.

The court granted defendant's motion for summary judgment based upon the settlement agreement. The court reasoned that under North Carolina law, it is well established that mediated settlement agreements are governed by principles of contract law. The agreement had been executed and was in effect, and there was nothing in the record to suggest the agreement was anything less than final and complete. Most importantly, plaintiff was represented by counsel and did not contend that she failed to make a knowing or voluntary release of her claims.

**Bravo v. Union Cnty., 20 WH Cases2d 1339 (D. N.J. 2013)**

A former computer terminal operator and elections clerk brought suit against the Union County Board of Elections and her former supervisor, asserting multiple claims, including FMLA interference and retaliation. Plaintiff took over forty sick days in 2010 to care for her mother. Plaintiff's attendance records indicated that many of those days were taken as "FMLA with pay." In December 2010, plaintiff's supervisor recommended that plaintiff be placed on

probation due to inadequate attendance. The Board was unaware that plaintiff's leave largely had been FMLA leave, and placed her on probation. In 2011, plaintiff asked if she could purchase vacation time because she had used her vacation days to take FMLA leave in 2010. Defendant denied her request, stating that no one was allowed to purchase time for 2011. Two other employees, however, had been allowed to purchase time. In July 2011, plaintiff requested days off for sinus surgery. She was allowed to take time off, but her supervisor indicated that "it doesn't look good." After she returned to work, it was recommended that plaintiff be suspended without pay. Plaintiff retained counsel for this incident and agreed to accept a penalty of six suspension days without pay. She also agreed to release defendants from liability. In the middle of 2011, plaintiff was diagnosed with PTSD, anxiety, and depression. She then informed defendants of her need for FMLA leave. Her supervisor told her that it was not a good time to use FMLA leave and that she was putting her job in jeopardy by taking leave. Defendant also failed to provide her with FMLA paperwork, which delayed the approval process. She then took leave from October 31, 2011 to December 5, 2011. Thereafter, it was recommended that plaintiff not be reappointed the following year. Defendant then terminated her employment.

The district court denied defendants' motion for summary judgment on plaintiff's FMLA retaliation claim. The court found that a reasonable jury could find that her probation was related to her 2010 FMLA leave because she was placed on probation for excessive use of sick leave during the 2010 year. Further, the court found that a reasonable jury could find that defendants' proposed reason for the probation was pretext. Plaintiff submitted evidence establishing that she was entitled to 26 days of sick leave in 2010. Thus, she would not have exceeded her 26 sick days without using FMLA leave. Accordingly, the court found that defendants had likely considered her FMLA leave in placing her on probation.

The court also denied defendants' motion for summary judgment on plaintiff's interference claim. Statements made to plaintiff relating to her FMLA leave, the delay in providing her with FMLA paperwork, and her non-reappointment provided direct evidence that defendants had taken actions that would discourage plaintiff from seeking FMLA leave. The court also found that defendants failed to show that they would have made the decision not to reappoint her absent her FMLA leave.

**Spurling v. C & M Fine Pack, Inc., 2013 WL 655136 (N.D. Ind. Feb. 21, 2013)**

The employer discharged the employee for repeatedly falling asleep on the job, and she was later diagnosed with narcolepsy. The employee brought an interference claim under the FMLA and three claims under the Americans with Disabilities Act Amendments Act ("ADAAA"). The court granted the employer's motion for summary judgment on all claims. Subsequently, the employee asked the court to reconsider the initial ruling whereupon the court denied the employee's motion to amend the summary judgment ruling.

The employee's FMLA interference claim failed because she did not present evidence that the employer discharged her because of her need for FMLA leave. The employee needed to prove: (1) that the employer knew of the qualifying condition and (2) discharged her because of it. The employee relied on one case to argue that an employee's unusual behavior is all that is required to put an employer on notice that FMLA leave is necessary. However, in this case, the employee's behavior was not unusual. In fact it was a continuing course of conduct that persisted

for a year. The court also stated that if an employer has already decided to discharge an employee before the employee requests FMLA leave, no FMLA violation occurs.

***Summarized Elsewhere:***

***Smith v. Aptar Group, Inc.*, 2013 WL 655523 (N.D. Ill. Feb. 21, 2013)**

***Dudzinski v. Spirit Airlines, Inc., et al.*, 2013 WL 1189701 (E.D. Mich., March 4, 2013)**

***deBarros v. Wal-Mart Stores, Inc.*, 20 WH Cases2d 1597 (D. Or. 2013)**

***Campbell v. Costco Wholesale Corp.*, 21 WH Cases2d 358 (M.D. Tenn. 2013)**

***Wallner v. J.J.B. Hilliard, W.L. Lyons, LLC*, 2013 WL 5934145 (W.D. Ky. Nov. 5, 2013)**

**B. Application of *McDonnell Douglas* to FMLA Claims**

***Badger v. MCG Health, Inc.*, 2013 WL 5716896 (11th Cir. Oct. 22, 2013)**

Plaintiff, a nurse manager, requested and was granted one month of FMLA leave. While plaintiff was out on leave, her supervisor discovered that she had failed to fulfill several job duties, such as creating files for important documents, maintaining a competency manual required for accreditation, appropriately disciplining employees, minimizing use of employee overtime, and maintaining FMLA paperwork. For these reasons, upon her return to work, defendant terminated her employment.

Plaintiff filed a lawsuit alleging that her employment was terminated by defendant in retaliation for requesting FMLA leave. Defendant moved for summary judgment, arguing that it provided legitimate, non-retaliatory reasons for terminating plaintiff's employment. The district court granted summary judgment for defendant and held that plaintiff failed to show that defendant's proffered reasons for her termination were pretext for FMLA retaliation. The Eleventh Circuit affirmed the district court's decision, concluding that defendant provided multiple non-retaliatory reasons for plaintiff's termination. Further, instead of providing evidence that the reasons were pretext, plaintiff admitted to most of the performance issues. Although plaintiff provided evidence that her failures were based on workplace issues beyond her control and her discharge may not have been deserved, the Court found that plaintiff still failed to present any reasons why defendant's reasons for terminating her employment were pretextual.

***Hopkins v. Chartrand*, 2013 WL 3787596 (N.D. Ohio Jul. 18, 2013)**

Plaintiffs worked as investigators for the employer, the county coroner. One of the employees expressed interest in taking FMLA leave in 2009 and the other plaintiff conveyed the information to the employer. The employer allegedly told the employee he would be terminated if he took leave, although the employer denied that either plaintiff ever provided information regarding a FMLA-qualifying medical condition. Neither employee requested FMLA leave. In 2011, plaintiffs were laid off after their positions were eliminated. Plaintiffs filed suit, bringing multiple claims, including FMLA interference and retaliation claims. The parties filed cross motions for summary judgment. Plaintiffs abandoned their interference claim and focused solely on their retaliation theory of recovery, alleging that the employer terminated them in retaliation for expressing interest in taking leave. The court denied plaintiffs' motion and granted summary

judgment for the employer, finding that plaintiffs had failed to show an issue of fact regarding the employer's non-discriminatory explanation for their termination.

**Dudzinski v. Spirit Airlines, Inc., et al., 2013 WL 1189701 (E.D. Mich., March 4, 2013)**

Plaintiff sued defendants, including her employer, several individuals and the union of which she was a member after she was discharged in connection with her attendance and rule violations. Defendants filed a motion for summary judgment. The court analyzed the motion with respect to the FMLA claim under the direct and indirect evidence theories. The court analyzed the claim under the direct evidence standard because plaintiff alleged that one of the individual defendants told her that she was being discharged in connection with her use of FMLA leave. The court found in favor of defendant on this point because defendant approved all requested FMLA leave and despite having multiple opportunities to discharge plaintiff pursuant to its published rules and policies, it gave plaintiff numerous chances to meet expectations. The court then analyzed the claim under the indirect theory as set forth in *McDonnell Douglas Corp. v. Green*. The court found that plaintiff met all of the elements of the *prima facie* case. The court noted that with respect to the causal connection element, the temporal proximity of the use of FMLA leave and the discharge permitted an inference of discriminatory intent. The court noted that defendant provided plaintiff with numerous chances to meet expectations, but shifted the burden to defendant based on the temporal proximity factor. Defendant established the legitimate reason for the discharge as being the numerous attendance violations.

Thus, the burden shifted back to plaintiff to establish pre-text. The court determined defendant's stated reason for the discharge was not pretext, noting that plaintiff's attendance violations were a basis for the discharge, that defendant was truly motivated by the violations because it provided plaintiff multiple opportunities to meet expectations, and that defendant's policies and procedures established that the violations were a sufficient reason for the discharge.

**Brown v. Children's Hosp. of Philadelphia, 20 WH Cases2d 1249 (E.D. Pa. 2013)**

The employee worked as an office coordinator for just under two years. The employee received one performance evaluation after nine months in the office coordinator position, which indicated that she fully met fourteen of the fifteen categories of evaluation. In her second year of employment, the employee requested and was approved for intermittent FMLA leave to care for her father for six months and then her son for six months. Five weeks after applying for the second leave, the employee received a formal memo regarding deficiencies in her performance. The employee was given 30 days to improve her performance. After 30 days, the employee was presented with a Performance Improvement Plan, providing her with 30 days to meet the deficiencies outlined in the Plan. Three days after receiving the Plan, the employee filed a complaint with the Philadelphia Commission on Human Rights. The employer received notice eighteen days later, and discharged the employee ten days after that.

The court denied the employer's motion for summary judgment on the employee's FMLA retaliation claim. The court ruled that plaintiff established her *prima facie* case. The court noted that plaintiff produced sufficient evidence to infer that a causal link existed between her seeking FMLA leave and her termination because of the heightened performance criticism

which occurred after she requested leave. The court then held that the employer produced sufficient evidence of a legitimate reason for termination – that the employee’s performance was inadequate and caused complaints from customers. However, the court found that the employee presented sufficient evidence to create enough doubt and credibility issues to overcome the burden of showing pretext and avoid summary judgment.

***Serby v. New York City Dept. of Education, 2013 WL 2150807 (2nd Cir. May 20, 2013)***

Plaintiff, a former probationary teacher employed by defendant, was given two unfavorable ratings by evaluators more than eight weeks after she returned from FMLA leave. Defendant discharged plaintiff due to her poor performance and plaintiff filed suit, alleging her discharge was in retaliation for her taking FMLA leave.

The district court granted summary judgment in favor of defendant and the Court of Appeals affirmed. First, plaintiff did not challenge the accuracy of the two unfavorable ratings and, in fact, had admitted to a colleague that she had difficulty with class management. In addition, the Court found the evaluators had objective bases for the ratings. Lastly, the temporal proximity between her leave and the evaluations was not sufficient to establish a causal connection. While plaintiff pointed to a comment regarding her absences as evidence of pretext, the court found the comment was merely a response to her contention that she was not given an opportunity for further observation.

***deBarros v. Wal-Mart Stores, Inc., 20 WH Cases2d 1597 (D. Or. 2013)***

The employee initially brought a lawsuit against her employer under the FMLA after she was demoted. The parties settled the dispute, however, and the employee was reinstated to her prior position. Following her return, the employee had ongoing performance issues, and eventually she was discharged. Subsequently, she filed another lawsuit under the FMLA, this time claiming that she experienced discrimination and retaliation as a result of her prior lawsuit.

The court denied the employer’s motion for summary judgment as to both claims. The employee argued that she had presented direct evidence of discrimination based on a comment made by one of her supervisors. However, the court held that this was not direct evidence because it was merely a stray remark, and the supervisor who made it was not involved in the decision to terminate her employment. Applying the *McDonnell-Douglas* framework for indirect evidence, the court held that the employee established a prima facie case because she engaged in protected activity by filing the earlier lawsuit, she suffered an adverse employment activity, and there was a causal connection because of the employer’s knowledge of the protected activity and based on temporal proximity. Although the employer presented a legitimate, non-discriminatory reason for her discharge—the employee’s poor performance—the court found evidence of pretext based on the stray comment. Accordingly, the court denied the employer’s motion for summary judgment.



**Rhodes v. The Arc of Madison County, Inc., 920 F.Supp.2d 1202 (N.D. Ala. 2013)**

The employee filed suit, alleging wrongful termination under the FMLA, among other state law claims. The employee was employed as an instructor in a day program for adults with intellectual disabilities and development delays from July 12, 2006 to August 12, 2010. In 2008 and 2009, the employee took FMLA leave. The employee again requested FMLA leave which was to begin on August 12, 2010. However, on August 5, 2010, a supervisor allegedly received a complaint that the employee had neglected a client. The employer engaged the Medicaid program coordinator to conduct an investigation into the neglect and found that the employee had been negligent in the care of the client by violating a personalized care plan applicable to the client. As a result of the findings of the investigation, the Medicaid program coordinator delivered a termination notice to the employee on August 12, 2010, just days before her leave was to begin and about six days before the completion of the investigation report. The Medicaid program coordinator alleged that she was not aware that the employee had filed a request for FMLA leave, although other supervisors involved in the investigation were aware of the request.

The court denied the employer's motion for summary judgment on the employee's claim of wrongful termination under the FMLA. The court rejected defendant's argument that the allegations in the complaint only constituted a retaliation claim. Instead, the court held that the complaint sufficiently set forth facts for claims of both interference and retaliation under the FMLA. The court analyzed both claims under the *McDonnell Douglas* framework used when no direct evidence of discrimination is alleged. The court held that the employee had produced sufficient evidence to support a *prima facie* case based on allegations that the employee had requested FMLA leave, was discharged, and the close proximity in time between the employee's discharge and request for FMLA leave, as well as the employer's knowledge of the request. The court acknowledged that the employer had presented a legitimate business reason for the employee's discharge based on the finding of negligent care of the client. But the court found that the employee had adequately shown the reason was pretextual by producing facts that other employees outside of plaintiff's class had engaged in similar activity and were not disciplined. The court denied the employer's motion for summary judgment.

**Walters v. Carson, 2013 WL 6734257 (D. N.J. Dec. 19, 2013)**

The employee, a maintenance and grounds worker at a high school, suffered from a heart attack in the Spring 2007 semester, which resulted in him taking a three-month leave of absence under the FMLA. During the 2007-2008 school year, the employee called in 31 times and during the 2008-2009 school year, he called in sick 20 times. None of these absences were covered by the FMLA, but he exhausted his paid sick leave in both years, which caused him to have to take unpaid leave. In the final year of the employee's employment, the employer notified him that he had again exhausted his sick leave and that he would need to improve his attendance going forward. The employer ultimately discharged the employee for excessive absenteeism. The employee filed suit, alleging FMLA retaliation.

The court found that there was no causal connection between the FMLA leave taken by the employee two years before his termination, and his discharge, which was based upon a

pattern of absenteeism over the course of four years. Because the employee's termination was several years after his FMLA leave, the court found that there was no "unusually suggestive" timing that would indicate that the employer's termination of employee was retaliatory. The court granted summary judgment to the employer.

**Fantroy v. Publix Super Markets, Inc., 2013 WL 6768369 (M.D. Fla., Dec. 19, 2013)**

The employee had previously sued the employer for FMLA interference and that case was settled. Part of that settlement was the reinstatement to the employee's former position. The employee was absent from work on her first day back on the job and she was absent two additional times in her first month back – each of these times she failed to abide by the employer's no-call/no-show policy. The employer discharged the employee for violating the policy and the employee sued again, alleging interference with her FMLA rights and retaliation as a result of her prior lawsuit.

With respect to the employee's interference claim, the court found that the employee's absenteeism after reinstatement was not related to a serious health condition, and that the employee had released any claims relating to FMLA interference that occurred prior the execution of the settlement agreement in the prior lawsuit. Likewise, the court found that while the employee had stated a *prima facie* case for retaliation under the FMLA, when the court applied the burden-shifting *McDonnell Douglas* analysis, the employer had stated a legitimate, nondiscriminatory reason for the employee's discharge. The court further held that the employee was unable to demonstrate that the employer's stated reason was pretextual. The court granted summary judgment to the employer on both of the employee's FMLA claims.

**Branstetter v. General Parts Distribution, LLC, 2013 WL 6780672 (D. Or., Dec. 19, 2013)**

The employee was ill and missed nine days of work in one month. The employee discussed his illness, and his need to see a doctor, with his supervisor approximately ten times. While the employee never explicitly requested FMLA leave from his employer, he was informed that if he needed any additional leave, he would need to fill out FMLA paperwork. The employee missed an additional day of work and, after an altercation with his supervisor, was discharged. The employee filed suit, alleging FMLA interference.

The employer contended that the employee never requested FMLA leave before his discharge, and that he was discharged because of the altercation with his supervisor; and not because of his illness that led to his absenteeism. The employee alleged that the employer interfered with his rights by frustrating his efforts to attend a doctor's appointment and that he provided his employer with verbal notice of his intent to assert rights under the FMLA. The court noted that an employee does not need to expressly assert rights under the FMLA or even mention the FMLA in order to assert rights under the Act. The court denied the employer's

motion for summary judgment, finding that there were issues of fact surrounding the employee's discharge.

**Szostek v. Drexel University, 2013 WL 6667746 (E. D. Pa., Dec. 18, 2013)**

The employee sought reconsideration of the district court's grant of summary judgment in favor of the employer. The employee alleged that the district court erred in finding that employee's FMLA leave had been exhausted because the court permitted the employee's FMLA leave to run concurrently with other leave granted the employee. On reconsideration, the court held that the employer was not required to notify the employee of each date designated as FMLA leave. Furthermore, the court noted that the employee's sick leave, vacation time, and worker's compensation leave all could be counted against plaintiff's intermittent FMLA leave.

The employee also alleged that the court erred in finding that the employer's policy was to grant intermittent leave on a rolling six-month basis. The court found that the employee had failed to introduce evidence supporting his argument in response to the employer's motion for summary judgment and that an employer requiring recertification every six months is consistent with the FMLA's regulations. The court also upheld its decision that the employer's stated reason for discharging the employee – excessive absences – was not pretextual, as the employee exceeded his permitted leave by eight days.

**Turner v. EASTCONN Regional Education Service Center, 2013 WL 6230092 (D. Conn. Dec. 2, 2013)**

The employee was a special education teacher, and her duties included managing aggressive behavior exhibited by students. After becoming pregnant with twins, she submitted a doctor's note requesting she be excused from restraining aggressive students. The employer complied with her request. Several months later, the employee submitted a second doctor's note. This one stated that she could not work in any area with potentially aggressive students present. The employer was unable to accommodate this restriction because it directly impacted an essential function of the employee's job. As a result, the employee was required to take FMLA leave earlier than she desired. The employee failed to return from leave following the birth of her twins and did not provide the employer with a date of her anticipated return. Accordingly, her employment was terminated. The employee filed a lawsuit against the employer, which included claims of interference and retaliation under the FMLA.

The court granted summary judgment for the employer as to both FMLA claims. With respect to the interference claim, although the employee may have been required to take FMLA leave earlier than she had anticipated, it was undisputed that she received all the leave to which she was entitled. The court also rejected the employee's argument that she could state an interference claim due to the "involuntary nature" of her leave, noting that the FMLA does not require that the exercise of its benefits be voluntary. The court also granted summary judgment on the employee's retaliation claim. First, the court determined that the employee could not state a *prima facie* claim because she could not show that she was "qualified" for her position. The court noted that the appropriate date for determining qualification is the date of the alleged

adverse employment action—in this case, the employee’s discharge. Because the employee had not returned to work at the time of her discharge (and refused to provide a return to work date), she was not “qualified” for her position. The court further held that, even if the employee could establish a *prima facie* claim, there was no evidence suggesting that the actual reason for her discharge was her exercise of FMLA rights, or to rebut the neutral, non-discriminatory reason articulated by the employer—namely, the employee’s refusal to return to work.

**Buel v. The Toledo Hospital, 2013 WL 6230957 (N.D. Ohio Dec. 2, 2013)**

The employee, a former medical transportation dispatcher, suffered from chronic depression. The employee was granted intermittent FMLA leave, which was not to exceed two days per month based on the certification provided by his healthcare provider. When the certification expired approximately one year later, the employee presented a new certification that purportedly called for “12” days of absences per month. The employer questioned the certification based on the large increase in days off and because the “1” in the number “12” appeared to have been written in at an odd angle. The employer contacted the healthcare provider, who confirmed that the certification should have provided for only two days off per month. The employee was called in for a meeting and questioned. The employee denied altering the document, but was unable to provide any satisfactory explanation. He admitted that the certification had been in his sole possession before he turned it in to the employer. The employee was discharged for falsifying the document.

The employee sued for interference and retaliation under the FMLA. The court granted summary judgment for the employer on both claims. The court found that the employee could not state a claim for interference because he had not been denied FMLA leave. To the extent that his discharge could be construed as a “denial of leave,” the court applied the *McDonnell Douglas* burden-shifting framework and held that the employer had met its burden of providing a legitimate reason for the termination—specifically, the employer’s honest belief that the employee had falsified documents. For similar reasons, the court affirmed summary judgment on the employee’s retaliation claim, finding no evidence to raise a triable issue of pretext as to the actual reason for the employee’s discharge. The court noted that the Sixth Circuit has applied the “honest belief rule” in the context of FMLA retaliation claims, and that the record evidence was sufficient to support the employer’s claim that it honestly believed the employee had falsified the medical certification. The employee argued that he didn’t actually falsify the document, but this was insufficient to raise a triable issue and summary judgment was granted for the employer.

**Latta v. U.S. Steel – Edgar Thompson Plant, 2013 WL 6252844 (W.D. Penn. Dec. 4, 2013)**

The employee, a steel worker, suffered from depression, high blood pressure, a torn leg tendon, and other ailments. Some of his illnesses were periodically aggravated by his exposure to high temperatures on the job. The employee had taken intermittent FMLA leave over a number of years, and all his requests were granted by the company. The employee, who was a union member, applied for a new position and received the bid, but did not accept the bid before the acceptance deadline expired. The employee was subsequently assigned to the position of “burner,” and shortly thereafter he collapsed at work from a heat-related illness. The employer

did not allow the employee to return to work until he received clearance from his physician. When the employee did not provide certification within the requested time, the employer concluded that he had abandoned his position. After discussions with the union, however, the employee was returned to work in the “burner” position. The employee thereafter filed suit on various grounds, including claims of interference and retaliation under the FMLA.

The court granted the employer’s motion for summary judgment on both FMLA claims. As to the interference claim, although the employee alleged that the employer’s attorney had made a disparaging comment to him about his request for FMLA leave, he had in fact received all the leave to which he was entitled. For the retaliation claim, the court applied the *McDonnell Douglas* framework, and held that the employee could not satisfy the “causal link” element of a *prima facie* case. The employee was required to establish a causal link by showing temporal proximity that was “unduly suggestive” of causation, or by pointing to timing and “other evidence,” such as a pattern of antagonism by the employer in the intervening period. The court concluded that a time period of two months was not unduly suggestive, and no other evidence indicated a retaliatory motive. Instead, the court found that the record reflected a number of intervening events (including the employee’s failure to accept the job bid and his collapse at work) that negated any possible inference of causation. Therefore, the employer was entitled to summary judgment on all claims under the FMLA.

**Wallner v. J.J.B. Hilliard, W.L. Lyons, LLC, 2013 WL 5934145 (W.D. Ky. Nov. 5, 2013)**

Plaintiff, a former options trader at a brokerage firm, frequently arrived late to work. Plaintiff’s tardiness became an issue and she received repeated informal verbal warnings and a formal written warning, which indicated that future unscheduled absences would be subject to further discipline up to and including termination. Thereafter, plaintiff went on FMLA leave for knee surgery. There was confusion regarding plaintiff’s date of return. When she did return to work, she was given a final written warning for not communicating about her return date and her unprofessional conduct during a telephone call with defendant’s human resources manager. The final warning again indicated that any future violations will be subject to further disciplinary action, up to and including termination. During the following week, plaintiff was tardy five out of seven days. On the seventh day, defendant terminated her employment.

Plaintiff brought claims for FMLA interference and retaliation, and the court granted defendant’s motion for summary judgment. Regarding the interference claim, the court found that defendant did not deny plaintiff any FMLA benefits because it allowed her to take the full amount of FMLA leave to which she was entitled. Regarding the FMLA retaliation claim, the court granted summary judgment in favor of defendant on both single-motive and mixed-motive theories. Under the single-motive claim for retaliation, plaintiff failed to produce direct evidence of discrimination. The court found that a memorandum authored by plaintiff’s supervisor detailing the reasons of her discharge did not constitute direct evidence, because the totality of the memorandum referred to problems association with plaintiff’s work *in general*, and not simply her absence during FMLA leave. Under the *McDonnell Douglas* burden-shifting framework, plaintiff established a *prima facie* case of retaliation by arguing that her termination occurred only nine days after returning from FMLA leave. However, defendant had legitimate, non-discriminatory and non-pretextual reasons for terminating plaintiff: excessive tardiness,

unexcused absences, unprofessional decorum, and failure to communicate her return date. Plaintiff's mixed-motive FMLA retaliation claim likewise failed, as she was unable to prove by direct or circumstantial evidence that her FMLA leave was a motivating factor in her termination. Although temporal proximity was sufficient to establish a *prima facie* case of single-motivation retaliation, further evidence was required to survive a summary judgment motion on a mixed-motivation retaliation claim.

**Dean v. Christiana Care Health Servs., Inc., 21 WH Cases2d 560 (D. Del. 2013)**

The former employee alleged her employer retaliated against her for seeking FMLA leave during her pregnancy. Plaintiff's FMLA retaliation claim was closely intertwined with her Title VII sex/pregnancy discrimination claim. Specifically, plaintiff alleged that because her employer failed to inform her of an accommodation option for bending to prevent contractions, she was forced to choose between taking leave and risking injury to her unborn child. For purposes of evaluating the employer's summary judgment motion, the court assumed that this failure to accommodate was an adverse employment action. After finding a genuine factual dispute in relation to plaintiff's *prima facie* pregnancy discrimination claim, the court went on to conclude the same for plaintiff's FMLA retaliation claim. In its analysis the court noted that the employer failed to brief the first two elements of the three-factor *prima facie* FMLA retaliation claim and as to the third element, found that a factual dispute existed as to whether the adverse employment action and the invocation of plaintiff's FMLA right were casually connected. The court therefore denied the employer's motion for summary judgment.

**Wehrelly v. American Family Mutual Ins. Co., 2013 WL 1092856 (10th Cir. Jan 3, 2013)**

The employee was an insurance claims adjuster whose job required him to do roof inspections. The employee was injured on the job by falling from a ladder and eventually returned to work under medical restrictions that did not permit him to do roof inspections. For a time, the employer refrained from assigning the employee to roof inspections, assigning him instead to other field claims that did not involve roofs and ladders. When the employee mentioned a scheduled knee surgery, his supervisor advised him several times to contact the company's FMLA coordinator about potential FMLA leave. The employee never did so. Eventually, the employee was discharged because he could not perform roof inspections. The employee filed a lawsuit alleging ADA and state law claims, as well as a retaliation claim under the FMLA.

The district court granted summary judgment in the employer's favor on all claims, and the Tenth Circuit affirmed. Plaintiff then sought – and the Tenth Circuit granted – panel rehearing on the basis that its earlier decision was incomplete. Nevertheless, upon rehearing, the Tenth Circuit again affirmed the district court's grant of summary judgment for the employer on all claims. With respect to plaintiff's FMLA claim, the court found that the employee had engaged in protected activity by notifying the employer of his intention to take FMLA leave. The court also found that the close timing (five weeks) between the employee's notification of intent to take leave and his discharge supported an inference of retaliation. However, the court found that the employer had a legitimate, nondiscriminatory reason for the discharge – namely, that the

employee could not fulfill an essential function of his job (roof inspections). Since the employee had produced no evidence of pretext, the court affirmed summary judgment.

*Summarized Elsewhere:*

**Tomlin v. Washington University, 2013 WL 5406484 (E.D. Mo. Sept. 25, 2013)**

**Herrera v. Illinois Bell Telephone Co., 2013 WL 654920 (N.D. Ill. Feb. 21, 2013)**

**Benimovich v. Fieldston Operating, LLC, 20 WH Cases2d 878 (S.D. N.Y. 2013)**

**Berg v. TXJ Companies, 20 WH Cases2d 1575 (D. Mont. 2013)**

**Rivera v. FedEx Corporation, et al., 2013 WL 6672401 (N.D. Cal., Dec. 18, 2013)**

**McCall v. City of Philadelphia, 2013 WL 5823873 (E.D. Pa. Oct. 29, 2013)**

**Barnes v. Spirit Aerosystems, Inc., 2013 WL 5495883 (10th Cir., Oct. 4, 2013)**

**Miller v. Northwest Airlines, Inc., et. al., 2013 WL 5425420 (D. Minn., Sept. 27, 2013)**

1. *Prima Facie* Case

**Attakora v. District of Columbia, et al., 20 WH Cases2d 1624 (D. D.C. 2013)**

The employee became ill in January 2011 and underwent surgery for several medical conditions in May 2011. Shortly before the surgery, the employee informed his supervisor that he intended to travel to Ghana for additional medical treatment and recuperation after the surgery. After he returned to work on May 10, the employee again informed his supervisor that he intended to take FMLA leave to travel to Ghana, but the supervisor did not respond. On June 2, the supervisor met with the employee to share concerns about the employee's job performance. The employee disputed the claims and indicated he would begin his FMLA leave in a few weeks. The supervisor then discharged the employee on June 6.

The employee filed suit, claiming that the company interfered with his FMLA rights and retaliated against him for exercising his FMLA rights. The employer moved to dismiss for failure to state a claim, contending the employee was unable to perform the functions of his position in June 2011, when he sought FMLA leave. The court held that that the employee failed to plead facts specific enough to state a claim under the FMLA, finding that the employee's absence must be necessary for the employee's treatment. Because the employee made no attempt to show that the treatment he planned to receive in Ghana was necessary and admitted that prior surgeries and time off was not necessary, his FMLA claims were dismissed.

**Turner v. McKesson Corp., 2013 WL 4727651 (N.D. Ala. Sept. 3, 2013)**

Plaintiff, who was employed as a customer service manager at one of defendant's distribution centers, took two weeks of FMLA leave plus an additional week of paid leave in November 2009. The following Spring, plaintiff received a pro-rated bonus in connection with her annual performance review. Plaintiff was informed that her bonus had been prorated because of her FMLA leave of absence. Plaintiff then made a complaint to both human resources and the manager of the distribution center where she worked. After Plaintiff complained, she was reassigned to other supervisors six times, was not selected for two promotions, and her position was eliminated in Spring 2012.

Plaintiff subsequently filed suit against the employer for FMLA interference and retaliation as well as for race discrimination and retaliation under 42 U.S.C. 1981. The employer moved to dismiss plaintiff's original complaint – which was granted. Plaintiff then served an amended complaint and the employer also moved to dismiss that pleading in its entirety on the grounds that plaintiff failed to articulate which adverse actions constituted FMLA interference and which actions constituted FMLA retaliation. The court dismissed a majority of plaintiff's FMLA claims and held that plaintiff could only use the fact that her base salary was reduced to support her FMLA claims. None of the other factual allegations plaintiff made in the amended complaint (which related to her reassignment and failure to promote) were actionable.

The court also dismissed plaintiff's claim for reinstatement as part of the relief sought under the FMLA. The court ruled that reinstatement is an available remedy only where an employee's termination results directly from the FMLA violation in question. The court ruled that reinstatement was not an appropriate remedy "because the facts surrounding her eventual termination do not support an FMLA claim."

**Nichik v. New York City Transit Auth., 2013 WL 142372 (E.D. N.Y. Jan. 11, 2013)**

The employee worked as a superintendent for the New York City Transit Authority. Upon returning to work from FMLA leave, the employee did not provide the employer with medical certification that he was able to return to work. The employer requested the employee submit to an FMLA-permitted "ability to perform" exam, which was "job-related and consistent with business necessity." The examining doctor did not clear the employee to immediately return to work, citing his continued use of Valium. The employee returned one week later with a letter from his physician stating he could return to his normal duties. The employee sued the employer, claiming it interfered with his use of FMLA leave and retaliated against him for taking FMLA leave.

The court granted summary judgment for the employer on both claims. On the interference claim, the court noted that the employer granted the employee's entire FMLA leave request. Furthermore, the employer was entitled to request medical certification and to delay the employee's reinstatement until certification was received. As to the retaliation claim, the court held that no reasonable juror could find the employer's actions were retaliatory. The employer's requirement that the employee submit medical certification was a uniform policy and was permitted under the FMLA. Since no other evidence was offered to support the employee's retaliation claim, he failed to establish an adverse employment action in violation of the FMLA.

**Echevarria v. Marcvan Restaurants, Inc., 2013 WL 1881313 (M.D. Fla., May 3, 2013)**

Plaintiff filed a complaint against defendant for retaliation in violation of the FMLA. Defendant failed to plead or defend, so plaintiff moved for a default judgment. The court analyzed the complaint to determine if there was sufficient basis to support a default judgment. Plaintiff alleged that she notified defendant of a health condition requiring her to take FMLA leave and that defendant terminated her instead of approving her FMLA leave. The courts found that these allegations stated a prima facie claim for retaliation under the FMLA and accordingly



granted plaintiff's motion for default judgment as to liability against defendant and scheduled an evidentiary hearing to determine the amount of plaintiff's damages and any other relief requested.

**Incorvati v. Best Buy Co., Inc., 118 FEP Cases 1837 (D.N.J. 2013)**

Plaintiff was a “team lead” who used a company vehicle to provide in-home television repair service for defendant. After suffering a heart attack, plaintiff was granted FMLA leave. During his absence, another employee filled plaintiff’s team lead position. Upon completion of his leave, plaintiff returned to his job as television team lead, but due to high customer demand, the other employee also remained a television team lead. In addition, plaintiff no longer was required to perform in-home service, and admitted that he would have refused to do so. Instead, plaintiff performed all of his duties at the customer service center. About two months later, defendant discovered several e-mails in which plaintiff used vulgar language, and discharged him as a result. Plaintiff filed suit alleging FMLA retaliation, and the court granted summary judgment for defendant.

The court noted that the Third Circuit has identified two general methods of raising an inference of causation on an FMLA retaliation claim: (1) “unusually suggestive” timing between the leave request and the adverse employment action, and (2) a period of “intervening antagonism” following the leave request. Plaintiff could establish the “timing” method of causation, but could not demonstrate pretext in defendant’s reason for removing his access to a company vehicle. Specifically, plaintiff was the only team lead who had used a company-owned vehicle to make in-home service calls. No inference of pretext existed because those service visits ended, with plaintiff’s tacit approval, after he returned from leave. As to his discharge, plaintiff could not rely on temporal causation because several months had passed since his leave request. The court further rejected plaintiff’s “intervening antagonism” argument, because he could only show that his co-lead, a non-decision maker, joked about him needing to use a “Hoveround” electronic mobility chair. Accordingly, plaintiff could neither establish a *prima facie* case nor demonstrate pretext in his discharge, and the court dismissed his FMLA claims.

**Anusie-Howard v. Todd, 2013 WL 6091815 (D. Md. Nov. 18, 2013)**

Plaintiff, a service worker for an elementary school, began taking intermittent FMLA leave. Two years later, plaintiff requested FMLA leave on three occasions to care for her husband. The request was denied, and as a result plaintiff used vacation days and sick time when she needed time off work. In addition, plaintiff switched to a part-time position. In her subsequent FMLA retaliation lawsuit, plaintiff claimed that the employer continued to assign her a full-time work schedule, and otherwise expected her to complete a full amount of work in half the time. The employer moved to dismiss plaintiff’s retaliation claim, arguing that plaintiff had failed to state a claim.

The court granted the motion in part and denied it in part. The court agreed with the employer that plaintiff failed to plead a *prima facie* claim of retaliation by simply alleging that she suffered “unequal and disparate treatment.” Nevertheless, the court inferred a causal connection between the employee’s leave and an adverse action because of the heavier workload given to the employee shortly after she filed for FMLA benefits. Accordingly, the court denied

the employer's motion to dismiss this claim, but granted it in part to dismiss the employee's more conclusory allegations.

**Johnson v. Sparrow Health System, 2013 WL 6222977 (W.D. Mich. Nov. 27, 2013)**

The employee suffered from a chronic health condition. When the condition worsened, it was necessary for the employee to cease working. She subsequently filed a complaint alleging a violation of the FMLA, but was not clear whether she was pursuing her claim under a theory of discrimination or retaliation because she failed to allege the required elements for either type of claim. The district court granted the employer's motion to dismiss because the employee failed to allege she suffered an adverse employment action or that she was denied FMLA leave. Furthermore, based on the facts in the complaint, her health condition would have prevented her from returning to work after any FMLA leave ended.

**Shaw v. Economic Opportunity Planning Ass'n of Greater Toledo, Inc., 2013 WL 633825 (N.D. Ohio Feb. 20 2013)**

In January 2009, the employee began work as a disabilities assistant with the employer. Her employment contract was pursuant to a collective bargaining agreement ("CBA") between the employer and the employee union. The employer discharged the employee in May 2009 and reinstated her in mid-September 2009 because she challenged the termination. When the employee returned in mid-September, she was pregnant and her doctor ordered her to bed rest. Because she did not qualify for FMLA leave, the employee needed to take serious medical leave under the employer's policy, which only entitled her to 60 days of leave. Despite an alleged notice to the contrary, the employee believed she was covered by the "leave without pay" policy from the time her 60 days expired until she was set to return to work on February 4, 2010. In early January, the employer notified the employee that she was subject to termination for exhausting her leave beyond 60 days. The employee filed a grievance with the union that did not yield her desired outcome. The employee then sought arbitration through the union's appeals process, but the union elected not to pursue arbitration. The employee then alleged nine actions, including FMLA interference and retaliation, and the employer filed a motion for summary judgment on all counts. The court granted the employer's motion for summary judgment. The FMLA claims failed because the employee had not worked for twelve months, thus she was not an eligible employee under the FMLA.

***Summarized Elsewhere:***

**Werner v. Nott Co., 2013 WL 2443867 (D. Minn. Jun. 5, 2013)**

**Carr v. Mike Reichenbach Ford Lincoln, Inc., 2013 WL 1282105 (D. S.C. Mar. 26, 2013)**

**Smith v. CVS Caremark Corp., 2013 WL 2291886 (N.D. Tex. May 23, 2013)**

**Szostek v. Drexel University, 2013 WL 4857989 (E. D. Pa. Sept. 11, 2013)**

**Schultz v. Wells Fargo Bank, Nat'l. Assoc., 2013 WL 4782157 (D. Or. Sept. 5, 2013)**

**Wallner v. J.J.B. Hilliard, W.L. Lyons, LLC, 2013 WL 5934145 (W.D. Ken. Nov. 5, 2013)**

**Bracy v. Melmark, Inc., 2013 WL 5330147 (E.D. Pa. Sept. 24, 2013)**

- a. Exercise of Protected Right

**Richards v. City of Atlanta et al., 2013 WL 1129197 (N.D. Ga. Mar. 19, 2013)**

Plaintiff was employed in various roles for the City of Atlanta for over twenty years prior to his termination. From 2006 through plaintiff's discharge in 2008, plaintiff took FMLA leaves due to arthritis in his hip. Between 2007 and 2008, defendants determined that a reduction in force ("RIF") in the fall of 2008 was required due to budgetary issues. In September 2008, plaintiff applied for leave under the FMLA from October 2008 through April 2009. According to defendants, plaintiff was selected for the RIF by plaintiff's immediate supervisor in conjunction with defendants' approved policies. Plaintiff was informed in December 2008 that his position was being eliminated due to budgetary cuts.

Plaintiff then brought multiple claims against defendant, including FMLA interference and retaliation claims. The District Court granted in part and denied in part defendants' motion for summary judgment. The court ruled that the leave plaintiff requested in December 2008 was not protected under the FMLA because plaintiff had already used his twelve weeks of FMLA leave. Therefore, the court dismissed plaintiff's FMLA retaliation claim because he was not engaged in statutorily protected activity. On the other hand, the court denied defendants' motion for summary judgment as to plaintiff's FMLA interference claim because they did not feel sufficient evidence was provided regarding the claim and decided to make a determination on that claim separately.

***Summarized Elsewhere:***

**Picard v. Louisiana ex rel. Department of Justice, 931 F. Supp. 2d 731 (M.D. La. 2013)**

**Gonzales v. Pasco County Board of County Commissioners, 2013 WL 179948 (M.D. Fla. Jan. 17, 2013)**

**Holmes v. Bd. of Cnty Com'rs, 2013 WL 2368394 (W.D. Ok. May 28, 2013)**

**McBride v. Tyson Foods, Inc., 2013 WL 2285929 (W.D. Ark. May 23, 2013)**

b. Adverse Employment Action

**Kimble v. Donahoe, 511 Fed. Appx. 573, 20 WH Cases2d 1292 (7th Cir. 2013)**

Plaintiff, a postal worker, injured her shoulder while on-duty. She argued that the employer took three actions against her after she requested medical leave: a seven-day suspension that was reduced to a letter of warning, a seven-to-fourteen day suspension that was rescinded, and a letter of warning. The employee claimed that she was retaliated against for exercising her FMLA rights. The Seventh Circuit affirmed dismissal of the employee's FMLA retaliation claims. The court ruled that the three actions were not "adverse employment actions" that could support recovery under the FMLA.

**Kasper v. County of Bucks, 514 F. App'x 210, 20 WH Cases2d 1025 (3d Cir. 2013)**

The employee purported to use FMLA leave to take her son to medical appointments but did not provide the documentation required by her employer's policies. The employer issued the employee a "Step 1" notice for misuse of sick leave, under the employer's multi-step disciplinary policy. The Step 1 notice reminded the employee that she would be required to submit certain

documentation when she used leave in the future and warned her that she could receive further discipline if she failed to do so. The employee sued the employer, claiming that her Step 1 disciplinary notice violated the FMLA. The court dismissed the employee's FMLA claim because the employer's Step 1 disciplinary notice did not amount to an adverse employment action, an essential element of the employee's FMLA claim. The U.S. Court of Appeals for the Third Circuit affirmed.

In determining whether the employee had suffered an adverse employment action, the court assumed that the standard established by the Supreme Court for Title VII lawsuits in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) applied in the FMLA context. Under *Burlington*, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, such that the action might have dissuaded a reasonable worker from engaging in protected activity. The Third Circuit found that the Step 1 notice issued by the employer did not constitute an adverse employment action because it merely required the employee to provide a doctor's note to document future absences caused by her son's medical appointments. Thus, the court ruled the Step 1 notice was not of such severity that it might dissuade a reasonable worker from taking FMLA leave.

**Moore v. County of Camden, 20 WH Cases2d 1369 (D. N.J. 2013)**

Plaintiff, an employee of the Camden County Communications Center, was diagnosed as suffering from chronic leukemia in September 2009. On December 7, 2009, plaintiff turned in an FMLA leave request form. Two days later, plaintiff was called into his supervisor's office and demoted from an "Acting Chief" position to "Captain," resulting in a significant decrease in salary as well as a reduction in status.

Plaintiff claimed that he was demoted from his position as Acting Chief in retaliation for his request for FMLA leave. Defendant moved for summary judgment, arguing that plaintiff failed to present a *prima facie* case and that there was a legitimate, nondiscriminatory reason for plaintiff's demotion. The court denied defendant's motion, finding plaintiff stated a *prima facie* case of FMLA retaliation because (1) plaintiff's demotion was an adverse employment action, and (2) two days between plaintiff's request for leave and his demotion was sufficiently close to support a *prima facie* finding of a causal connection. The court also found that plaintiff had presented sufficient evidence to create an issue of pretext for a jury regarding the nondiscriminatory reason advanced by defendant. Defendant contended plaintiff told his supervisor in late November 2009 (before he requested FMLA leave) that he was unable to meet the needs of the Acting Chief position. In addition to the close temporal proximity, the court pointed to evidence that plaintiff denied that he had ever expressed inability to perform essential job functions and that plaintiff's supervisor had expressed an opinion that plaintiff was in fact able to perform his duties as Acting Chief.

**Hopkins v. ADT Security Services Inc et al., 2013 WL 1909416 (N.D. Ala., May 8, 2013)**

Plaintiff, a former commercial sales representative, brought FMLA retaliation claims against his former employer. Plaintiff contended that after his first FMLA leave, defendant did not turn over all the accounts within his territory that had been serviced by other sales

representatives during his leave. Plaintiff also contended that he was discharged in retaliation for taking a second FMLA leave.

The court granted defendant's motion for summary judgment as to both retaliation claims. While the court found that defendant had not, in fact, turned over the accounts that other representatives sold in his territory during his first leave, plaintiff failed to establish a causal connection. Plaintiff claimed he was entitled to commissions from these sales, but the court noted that the FMLA does not require paid leave. Moreover, allowing other employees to sell within plaintiff's territory without sharing commissions with plaintiff was consistent with defendant's established procedure. The court also found no close temporal proximity between plaintiff's leave and his discharge. Additionally, the court found there was no dispute that plaintiff's employment ended due to job abandonment, and plaintiff failed to offer any evidence of pretext.

**Scott v. Illinois Department of Revenue, 2013 WL 5098059 (C.D. Ill. Sept. 12, 2013)**

The employee was an attorney who, throughout her employment, repeatedly asked for authorization to work from home. Her supervisor eventually allowed her to work from home for two days each week. After this supervisor no longer worked for the employer, other superiors who generally opposed work-from-home schedules for attorneys were surprised to learn that the arrangement had been authorized. The employee was granted FMLA maternity leave, and after she returned, the employer rescinded the work-from-home arrangement. The employee filed a lawsuit against the employer, alleging interference and retaliation with her rights under the FMLA.

The court granted summary judgment for the employer. The employee claimed that but for taking FMLA leave, she would have been able to continue working from home two days a week indefinitely. The court, however, found that even if she had not taken FMLA leave, it was clear that her supervisors opposed permanent work-from-home schedules, and would have ended the arrangement. The employee made the same allegation to support her retaliation claim. The court first concluded that the employee suffered no adverse employment action: she still worked for the employer and suffered no negative consequences as a result of her FMLA leave or the filing of her lawsuit. The court specifically found that denying her a remote work schedule was not a materially adverse action and further noted that many of the employer's allegedly retaliatory acts were countermeasures in response to the employee's attempts to photocopy and obtain information at work for her lawsuit without using the regular discovery process.

**Giles v. Daytona State College, Inc., 2013 WL 5764659 (11th Cir. Oct. 25, 2013)**

Plaintiff began working for the employer in 2003 as a Senior Learning Specialist and was promoted in 2008 to Assistant Director. In 2009, plaintiff took FMLA leave to care for her parents. Shortly after she returned, the employer informed her that her contract would not be renewed for budgetary reasons. She internally appealed the decision and was reinstated later that year. After her reinstatement, plaintiff claimed that she was retaliated against in the following ways: Her office was relocated, many of her job duties were taken away, she was monitored

more closely, she was denied career advancement opportunities, and she received a poor performance evaluation, which led to her being placed on probation. A year after being placed on probation, her contract was not renewed because of her ongoing performance issues. Plaintiff filed suit, alleging FMLA interference and retaliation. The district court granted summary judgment in favor of the employer and plaintiff appealed.

The Eleventh Circuit determined the district court properly granted summary judgment to the employer on the interference claim because plaintiff used all of her available leave in 2009 and there was no evidence that she was denied an FMLA benefit to which she was entitled. The Court also found summary judgment on the retaliation claim was properly granted. The only adverse actions plaintiff alleged were the 2009 non-renewal of her contract and the hostile work environment she faced upon her reinstatement. The Court found the 2009 non-renewal was not a compensable FMLA injury because she was reinstated to the Assistant Director position. In addition, plaintiff provided no evidence to support her contention that she faced a hostile work environment when she returned.

*Summarized Elsewhere:*

*Reddy v. JPMorgan Chase Bank, N.A.*, 2013 WL 3147949 (S.D. Ohio June 19, 2013)

*Ross v. Continental Tire of Americas, LLC*, 2013 WL 1628193 (E.D. Pa. April 16, 2013)

*Nicely v. E. Kentucky Power Co-op., Inc.*, 2013 WL 142430 (E.D. Ky. Jan. 11, 2013)

*Wilson v. Cleveland Clinic Found.*, 2013 WL 486310 (N.D. Ohio Feb. 6, 2013)

*Forbes v. Unit Texas Drilling, L.L.C.*, 20 WH Cases2d 1548 (5th Cir. 2013)

*Ehling v. Monmouth-Ocean Hospital Service Corp.*, 2013 WL 4436539 (D. N.J. Aug. 20, 2013)

*Poorbaugh v. Bd. of County Commissioners*, 2013 WL 5799910 (D. Colo. Oct. 28, 2013)

*McNamara v. Trinity Coll.*, 2013 WL 164221 (D. Conn. Jan. 15, 2013)

*Lister v. National Oilwell Varco, L.P.*, 2013 WL 5515196 (S.D. Tex. Sept. 30, 2013)

*Langenbach v. Wal-Mart Stores, Inc.*, 2013 WL 6827814 (E.D. Wisc. Dec. 23, 2013)

*Freeman v. Philadelphia Housing Authority, et al.*, 2013 WL 3761274 (E.D. Pa. July 18, 2013)

*Jehling v. A. H. Belo Corp.*, 2013 WL 5803813 (N.D. Tex. Oct. 28, 2013)

*Murphy v. Ohio State University*, 21 WH Cases2d 914 (6th Cir. 2013)

c. Causal Connection

*Cardenas-Meade v. Pfizer, Inc.*, 510 F. App'x 367 (6th Cir. 2013)

Plaintiff, a new employee at a pharmaceutical company, was required to complete an 18-20 month training program that culminated in a three-day evaluation period known as Phase VI. The employee initially failed Phase VI and, per company policy, was placed on probation. Thereafter, the employee told her employer that she was having marital and family care issues and would need to go on medical leave. While on leave, the employee asked to be assigned to a different supervisor, which her psychologist said would allow her to return to work. Based on the employee's failure to pass Phase VI, the employer declined her request. Also during her leave, the employee began working for a competitor of the employer. As a result, the employer discharged the employee.

The employee's subsequent lawsuit alleged retaliation in violation of the FMLA. The district court had dismissed this claim, and the Sixth Circuit affirmed. Although a number of different adverse employment actions were alleged by the employee, there was no evidence of a causal connection between any of those adverse employment actions and the employee's FMLA leave. The employer had a legitimate, non-discriminatory reason for discharging her when she started working for a competitor, and the employee offered no evidence of pretext.

**Cheatham v. Farmers Insurance Group, 2013 WL 961494 (N.D. Tex. Mar. 13, 2013)**

Plaintiff, an employee at an insurance company, developed narcolepsy and began to exhibit decreased productivity. In the ensuing years, the employee exercised her rights under the FMLA and took significant amounts of leave from her job. Eventually, the employee received a "formal warning" memo, and an overall rating of "below expectations" in a performance review. Another performance memo followed a few months later, which indicated that the employee would be expected to meet her performance goals for that year. Soon after, the employee was placed on probation, and during her probation period she went on medical leave. Upon her return to work, the employee was given an additional thirty days to improve her performance. When she failed to do so, she was discharged.

The employee brought a claim against the employer for retaliation under the FMLA, and the court granted summary judgment for the employer. The employee presented no evidence in support of the third element of a *prima facie* claim. She could not show that she was treated less favorably than an employee who had not requested leave under the FMLA, or that the adverse decision was made because she sought protection under the FMLA. The district court further indicated that, even if the employee had been able to present a *prima facie* case of FMLA retaliation, the employer had offered legitimate and nondiscriminatory reasons for the discharge decision, and the employee did not present evidence of pretext or mixed motives.

**Gonzalez v. Wells Fargo Bank, N.A., 21 WH Cases2d 535 (S.D. Fla. 2013)**

Plaintiff, a mortgage consultant, requested FMLA to care for his daughter after she was diagnosed with cancer. Defendant initially responded that it did not grant FMLA leave to employees, but eventually, plaintiff was granted intermittent FMLA leave. Later on, a new manager suggested to plaintiff that he quit his position and take an unpaid leave of absence instead of FMLA leave. Plaintiff refused. At about the same time, defendant reassigned plaintiff to another office location. After reviewing plaintiff's time records, defendant accused plaintiff of receiving over \$9,000 in compensation overpayments. A few months later, plaintiff learned that his daughter needed surgery for removal of a tumor and began making arrangements to go to New York to attend her treatment. However, just days prior to his scheduled departure, defendant fired him for falsification of time records. Thereafter, plaintiff filed a complaint alleging that defendant violated the FMLA by firing him in retaliation for exercising his right to take intermittent leave to attend to the medical needs of his daughter. Defendant filed a motion to dismiss for failure to state a claim, arguing that plaintiff failed to allege sufficient facts showing the causal link between the discharge and his exercise of intermittent FMLA leave.

The district court denied defendant's motion to dismiss. Defendant argued that plaintiff's retaliation claim failed to state a claim because he alleged that he was terminated *after* he took FMLA intermittent leave and not *because* he exercised the leave. However, the court found that the complaint properly alleged a variety of direct and indirect evidence suggestive of retaliatory motive. According to the complaint, defendant initially threatened to fire him if he took FMLA leave, requested he quit and take administrative leave in lieu of intermittent leave, transferred him to an inactive office location after exercising intermittent leave, and ultimately discharged him following eighteen months of intermittent FMLA leave. The Court found that these allegations sufficiently satisfied the plausibility requirement of *Iqbal* and *Twombly* as related to the causation element of plaintiff's FMLA retaliation claim.

**Bonzani v. Shinseki, 2013 WL 5486808 (E.D. Cal. Sept. 30, 2013)**

Plaintiff, an anesthesiologist at a Veterans Affairs Medical Center with documented performance issues, alleged that his employer decided not to renew his contract because he took FMLA leave. After he took FMLA leave to have knee surgery, another doctor who was named as a defendant allegedly yelled at him, required him to work extra shifts, and excluded him from the hiring process. After he was informed that his appointment with the medical center would not be renewed, he filed FMLA claims against the Secretary of Veterans Affairs and the other doctor at the medical center. Defendants filed a motion for summary judgment, arguing that the leave was not a factor in the decision not to renew plaintiff's employment. Defendants also argued that the other doctor was entitled to summary judgment because he was not a supervisor under the FMLA and he was entitled to qualified immunity.

The court denied defendants' motion for summary judgment. The court determined that the individual defendant's comments that plaintiff's contract was not renewed because he took too much medical leave created a genuine dispute as to the reason plaintiff's employment ended. The court also found a genuine dispute with regard to the individual defendant's supervisor status. Applying the "economic reality" test, the court found a genuine dispute as to the amount of control the doctor had over plaintiff's employment. Although the doctor stated that he only made recommendations, which were subject to approval by a superior, the court noted that in emails, the doctor stated he would not renew plaintiff's contract and the doctor's superior was apparently unaware that plaintiff's contract was not renewed. Lastly, the court determined the individual defendant was not entitled to qualified immunity. While the doctor contended he had qualified immunity because it was not clearly established that him yelling, assigning extra shifts, and excluding from the hiring process constituted interference under the FMLA, the court reasoned that the conduct at issue in the claim was the non-renewal of plaintiff's employment. Because there is no ambiguity as to whether an employer can lawfully use FMLA leave as a factor in a decision about renewing employment, he was not entitled to qualified immunity on this basis. The doctor also argued he was entitled to qualified immunity because it was not clearly established that public employees could be individually liable for FMLA violations. The court disagreed, finding the qualified immunity analysis should focus on whether the right that was allegedly violated was clearly established, not whether the individual liability of the public official was clearly established.



**Byington v. NBR Financial Bank, 2013 WL 3895033 (D. Md. July 26, 2013)**

Plaintiff, a bank customer service representative, was terminated when she wrote a check for \$425 from an account containing a balance of thirteen cents. Plaintiff filed suit, alleging FMLA retaliation, among other claims. In the calendar year prior to her termination, plaintiff used 296 hours of paid leave, 16 of those hours under the FMLA. Defendant filed a motion for summary judgment. The court determined that plaintiff's retaliation claim did not present a causal connection between her use of FMLA leave and her termination. The court noted that when temporal proximity is the sole basis for establishing the requisite causal connection in a FMLA retaliation claim, a substantial lapse in time between the protected activity and the termination fails to support any inference of a causal connection between the two. In plaintiff's case, six months had elapsed between the FMLA leave and her termination. The court granted defendant's motion for summary judgment.

**Duggins v. Appoquinimink Sch. Dist., 921 F. Supp.2d 283 (D. Del. 2013)**

Plaintiff was employed by defendant school district as principal of a high school. In March 2009, the school district conducted teacher surveys which revealed failures in plaintiff's leadership and that plaintiff's performance required improvement. In April 2009, the superintendent of the school district met with plaintiff and notified her that her performance had not improved. The superintendent scheduled another meeting to discuss performance concerns on May 15, 2009, but plaintiff failed to attend the meeting. Plaintiff was absent for several days beginning on May 13, 2009, and she subsequently applied for FMLA leave due to depression. Plaintiff remained on FMLA leave from May 13 until June 22, 2009. In July 2009, the school district conducted a summative performance evaluation of plaintiff and concluded that she acted unprofessionally, lacked leadership skills and created low morale among teachers. Shortly thereafter, the school district notified plaintiff that she was reassigned to the assistant principal position at a different high school.

Plaintiff brought a claim for FMLA retaliation. The federal district court granted defendant's motion for summary judgment. The court held that plaintiff had not demonstrated a causal connection between her FMLA-protected activity and her demotion to assistant principal. The court explained that the record established that defendant was contemplating reassigning plaintiff as early as April 2009 due to poor performance. Plaintiff argued that the temporal proximity between her return from leave, the summative evaluation and demotion were indicative of causation. The court rejected this argument, holding that temporal proximity alone was insufficient to establish causation. Further, the court held that even if plaintiff could establish a *prima facie* case of retaliation, she could not refute defendant's legitimate, nondiscriminatory reason for demoting her.

**Mercer v. Arc of Prince George's Cnty., Inc., 2013 WL 451814 (D. Md. Feb. 5, 2013)**

Defendant is an organization that provides benefits, such as food stamps to people with disabilities. Plaintiff was defendant's Finance and Benefits Coordinator from 2004 until her discharge in March 2011. Plaintiff's position required her to ensure, among other things, that

“all those eligible for Food Stamps receive them on an ongoing basis,” and that “all Food Stamp application and re-certification requirements are completed in a timely fashion.” Plaintiff had well-documented performance deficiencies. In 2007 she was placed on probation because many eligible individuals were not receiving food stamps, and she was failing to complete food stamp applications. In January 2011, plaintiff was in a car accident and took approved FMLA leave. While she was on leave, defendant discovered that her deficiencies were far worse than they had previously thought. For example, only 61 of 160 eligible individuals were receiving their food stamps. When plaintiff returned from leave, defendant conducted an investigation into her performance. Plaintiff took FMLA leave a second time, and when she returned, her employment was terminated for her performance issues.

Plaintiff brought an FMLA interference and retaliation claim, contending that she was not reinstated to her former position and that her employment was terminated in retaliation for her taking FMLA leave. Defendant moved to dismiss and the court granted the motion. The court concluded that plaintiff was not entitled to reinstatement because the undisputed evidence showed she would have been terminated regardless of her taking FMLA leave, and therefore, she could not make an interference claim. The court reasoned that her retaliation claim failed because she could not show that defendant’s proffered legitimate non-retaliatory reason for its action—plaintiff’s well-documented performance deficiencies—was pretext.

**Coleman v. FFE Transp. Services, Inc., 2013 WL 1914932 (N.D. Tex. May 9, 2013)**

The employee requested and was granted FMLA leave to take his wife to her cancer treatments and related medical appointments, beginning on October 26, 2009. The employee claimed that he was frequently reprimanded for taking leave, which the company disputed. After an allegation and subsequent investigation regarding the theft of light bulbs, the employee was discharged. The employee contended that the termination was in retaliation for taking FMLA leave and that the allegations of theft were pretext for the underlying retaliatory animus. The company moved for summary judgment, contending that (1) the company was not the employer, (2) no causal link existed between the employee’s FMLA leave and discharge, and (3) the company had a legitimate, nondiscriminatory reason for discharging the employee.

The court held that there was sufficient evidence to establish an issue of fact as to whether the employee was employed by the company and whether the company’s allegations of theft were a pretext for retaliation. On the issue of the causal link, the company noted that the decision to discharge was made by two people who were unaware of the FMLA leave. In opposing summary judgment, plaintiff contended that the investigator of the alleged theft, who recommended discharge to the decision makers, knew of the FMLA leave. The court held that the employee failed to assert a valid cat’s paw theory because he failed to assert and, in fact, expressly disclaimed that the investigator exhibited retaliatory animus. Because plaintiff could not establish the requisite causal link, the company’s summary judgment motion was granted.

**Gebhardt v. Exide Techs., 2013 WL 1137011 (10th Cir. Mar. 20, 2013)**

The employee was injured on the job and took periods of FMLA leave ending no later than August 2007. The employee was terminated in September, 2008 for throwing an object at a

co-worker and subsequently lying about the incident. The employee filed suit against the employer, claiming that he had been discharged in retaliation for taking FMLA leave.

On the employer's motion for summary judgment, the court held that the retaliation claim failed for lack of sufficient evidence on causation. To establish causation, plaintiff relied on a supervisor's remark to the employee that "if [he] took all 90 days of FMLA leave, [his] day shift would be taken away from [him] and [he] would be forced to work at night." The court determined this remark was insufficient because the supervisor was not a decision maker in the employee's discharge. Furthermore, the court noted that the employee had not indicated whether he had taken all 90 days of FMLA leave.

**Tomlinson v. Wiggins, 20 WH Cases2d 1156 (W.D. Ark. 2013)**

Plaintiff began working at AmerCable in October 2008. In August 2010, plaintiff requested and was granted leave to deal with mental health issues. While on leave, plaintiff requested an extension of leave, which was also granted. Upon his return, plaintiff worked for the company for another nine months. During that time, plaintiff deliberately disregarded instructions from his supervisor on more than one occasion. He later requested vacation time in the middle of a work emergency. Because of plaintiff's subpar performance, his supervisor recommended termination, and the Human Resources Director adopted that recommendation on May 23, 2011. On May 25, 2011, before the HR Director notified plaintiff of his termination, plaintiff took medical leave again. Upon returning to work on May 31, 2011, plaintiff was discharged. Plaintiff subsequently sued AmerCable, the HR Director, and the supervisor for, *inter alia*, FMLA interference and retaliation. Defendants moved for summary judgment on all claims.

The district court found that plaintiff's FMLA claims were without merit. While discharging an employee while he is on FMLA leave constitutes FMLA interference, the record showed that defendants decided to terminate plaintiff before he took leave on May 25, 2011. Moreover, his leave had ended when he was notified of his termination, so there was no right to interfere with. Plaintiff's FMLA retaliation claim also fell short. While plaintiff offered evidence of the first two elements of a *prima facie* retaliation case, the court found that plaintiff could not show a causal connection between the exercise of his FMLA rights and his termination. Although there was temporal proximity between his leave and his termination, temporal connection alone is insufficient to show causality. Moreover, there was no evidence that defendants considered plaintiff's leave when they made the decision to discharge him. Finally, there was no evidence that defendants considered plaintiff's requests for leave to be an "undesirable condition" that eventually led them to terminate him. All of plaintiff's leave requests were granted without complaint or modification. Thus, the court granted defendants' motion for summary judgment on plaintiff's FMLA claims.

**Anusie-Howard v. Todd, 2013 WL 363205 (D. Md. Jan. 29, 2013)**

The employee, a building service worker, filed a *pro se* complaint on December 3, 2011, alleging FMLA interference and retaliation. The employee claimed that defendants interfered with her rights under the FMLA when they denied her request for FMLA leave in October of 2009 to care for her husband who suffered a hernia. The employee also claimed that defendants

retaliated against her when they gave her a full-time work load after switching to part-time, work that exceeded her doctor's restrictions, and more work than her coworkers. These incidents, as well as a threat of discharge or discipline after calling in sick in March of 2010, all occurred five months to a year after the October 2009 denials of FMLA leave.

The District Court, on a motion for summary judgment, found that the employee sufficiently alleged a willful request violation in October of 2009 in order to allow a three-year statute of limitations regarding her interference claim on the 2009 denial of FMLA leave. However, the court dismissed a 2008 claim because it did not fall within the three-year limitations period. On the retaliation claims, the court found that the employee sufficiently alleged adverse employment actions in 2010, but did not sufficiently plead eligibility for FMLA leave during that same time period. However, the court granted the employee leave to amend her complaint to plead a prima facie case of retaliation.

**Ross v. Continental Tire of Americas, LLC, 2013 WL 1628193 (E.D. Pa. April 16, 2013)**

The employee was promoted, but soon after, he received a rating of "not meeting expectations" during his annual performance review. To make him aware of the need to improve, the employer created a performance improvement plan, which called for evaluations every thirty days. Less than one month later, plaintiff was diagnosed with prostate cancer and was granted FMLA leave. Although the employee requested that the plan evaluations be finished before he left, his employer delayed the timetable pending his return. When plaintiff returned to work, his employer implemented an addendum to the improvement plan. Plaintiff sued under the FMLA, alleging interference and retaliation. Two months later, he was discharged.

The court granted summary judgment for defendant on all claims. Plaintiff argued that failure to conclude plan before his leave constituted interference, but the Court disagreed. Plaintiff could not show that he was denied any benefits to which he was entitled under the FMLA because his leave request was granted, he received salary and benefits while on leave, and he kept his position upon his return. Furthermore, the court rejected plaintiff's argument that defendant retaliated against him by implementing an amended plan upon his return because there was no evidence of a causal link between the leave and adverse action. Even if there was temporal proximity, it was not unusually suggestive of retaliatory motive. The employee's performance issues were recognized prior to his leave, the employee acknowledged his deficiencies, the plan was in place before plaintiff's departure, and the addendum was a continuation of the plan upon his return. There was no evidence of the intent required for a retaliation claim. Lastly, the record established that he was terminated based on poor performance, not in retaliation for using of FMLA leave.

**Cosby v. Vicksburg Healthcare, LLC, 2013 WL 2149705 (S.D. Miss. May 16, 2013)**

For 25 years, plaintiff worked as a lab assistant/phlebotomist for a medical clinic. The employer discharged plaintiff because she violated HIPAA by accessing a coworker's health record. The employee claimed that this reason was pretextual. According to the employee, she was discharged for "voicing concern and opposition to the sending of a letter of termination to her friend and co-worker that was on medical leave and was very sick."

The court granted summary judgment for the employer, concluding the employee could not establish a prima facie claim of FMLA retaliation. At the outset, the court stated that it was unclear whether the Plaintiff's alleged actions actually constituted opposition to an employment practice made unlawful by the FMLA. The court based its decision, however, on the absence of evidence of a causal link between plaintiff's conduct and her discharge. There was no evidence that the decisionmaker for plaintiff's discharge had any knowledge of her alleged protected activity, which precluded a finding of causation. In addition, even if the employee had stated a prima facie case, the employer proffered a legitimate, non-retaliatory reason for its decision, which plaintiff could not rebut.

**Murray v. JELD-WEN, Inc., 922 F. Supp. 2d 497, 21 WH Cases2d 1145 (M.D. Pa. 2013)**

Plaintiff, a former maintenance technician, brought an action against his former employer, alleging violations of the FMLA. Specifically, plaintiff asserted that defendant failed to provide him with a comparable position upon return from leave, retaliated against him for taking leave, and terminated his employment while he was on leave.

Defendant brought a partial motion for summary judgment on damages, arguing that plaintiff failed to establish that he suffered any actual damages because there was not one day during which plaintiff could have worked but did not due to an alleged wrongful act by defendant. Plaintiff claimed that the stress caused by the elimination of his position upon his return from FMLA leave resulted in an exacerbation of his symptoms to the point that he needed to take additional FMLA leave. Plaintiff argued that compensation for the days of work he missed because of the exacerbation of his condition is compensable under the FMLA. The court found that the exacerbation theory is not viable under FMLA, as neither the FMLA nor related regulations concern themselves with the cause of injury, and found that plaintiff failed to establish that he suffered any actual damages as a result of the actions taken by defendant in eliminating his position. Similarly, the court granted defendant's motion for summary judgment as to plaintiff's interference claim under the FMLA. The court ruled that the decision to eliminate plaintiff's position was based upon an objective evaluation process, and the evidence supported defendant's position that it was going to eliminate plaintiff's position irrespective of whether or not he took FMLA leave.

The court also granted defendant's motion for summary judgment as to plaintiff's retaliation claim. The court found that plaintiff failed to establish a causal connection between his taking of FMLA leave and the adverse employment action. The court rejected plaintiff's argument that certain factors, including the manner in which defendant conducted the evaluation process of his job performance and the fact that less than one month after defendant eliminated plaintiff's position it created another maintenance position, were sufficient to establish a question of material fact on the issue of causation.

**Shaw v. Tennessee Department of Transportation, 2013 WL 1910313 (M.D. Tenn., May 7, 2013)**

Plaintiff, who was employed by the State of Tennessee in an executive service position, began to experience health problems and was absent from work on FMLA leave between January 26 and March 8, 2011. Before going on FMLA leave, plaintiff had been demoted due to

preliminary findings of reckless management. In February 2011, while plaintiff was on FMLA leave, plaintiff's supervisor received the final internal audit report that confirmed earlier findings of mismanagement and noncompliance with federal law within plaintiff's area of responsibility. Plaintiff's supervisor recommended plaintiff's dismissal effective March 8, 2011. The notice of separation stated the reason for plaintiff's separation as "Expiration of Executive Service Appointment."

Plaintiff claimed that she was discharged in retaliation for requesting FMLA leave. The court found that plaintiff had not established a prima facie face of retaliation because she provided no evidence of a causal connection between her FMLA leave and her dismissal. Further, even if plaintiff had made out a prima facie case, the court noted that defendant had submitted proof of mismanagement under plaintiff's leadership, which would shift the burden to plaintiff to demonstrate that defendant's stated reasons were pretextual. Plaintiff's only offered evidence of pretext was the fact that defendant did not specifically tell plaintiff that her dismissal was caused by her mismanagement. The court held that the mere lack of explanation for plaintiff's dismissal in the separation notice did not provide a causal link between plaintiff's FMLA leave and her termination. The court therefore granted defendant's motion for summary judgment.

**Nolen v. Fedex Techconnect, Inc., 2013 WL 4774771 (W.D. Tenn. Sept 4, 2013)**

Plaintiff, an African-American female, was employed as a customer service representative. She was issued a reprimand and suspended for rudeness to a customer on May 12, 2009. Several months later, in December of 2009, she was again reprimanded for poor performance and warned future violations would not be tolerated. Nonetheless, she again violated policy in May of 2010 in her dealings with a customer. Plaintiff's employment was then terminated consistent with defendant's policy that three disciplines in a year require termination.

In August of 2009, plaintiff requested FMLA leave for therapy which was granted. After her termination, she sued under FMLA for retaliation and under Title VII. In analyzing her FMLA claim, the court applied the *McDonnell Douglas* burden-shifting analysis. First, the court found that plaintiff did not show a causal connection in the time between her leave and her termination. In addition, the court found that defendant had a legitimate, nondiscriminatory reason for her termination and dismissed her claim.

**Rossi v. Fulton County, Ga., 2013 WL 1213243 (N.D. Ga. Feb. 13, 2013)**

Plaintiff was an employee who had Bipolar II, chronic depression, and migraines. For three years, and up until her discharge, plaintiff filed paperwork to be approved for intermittent FMLA every year. In her final year of employment, her FMLA leave expired, but she did not immediately return to work. Plaintiff accrued about a week of unexcused absences and, as a result, the employer terminated her employment.

Plaintiff brought claims for FMLA interference and retaliation, and the employer moved for summary judgment. A magistrate recommended the court deny the motion as to both FMLA claims. As to FMLA interference, the employer argued that plaintiff was allowed to take all of

the FMLA leave to which she was entitled. The court recognized that this would normally be a basis for granting summary judgment, but it refused to do so because the employer did not include a representation in its statement of material facts that plaintiff was granted leave each time she requested it. Additionally, a deposition indicated that a supervisor once denied plaintiff permission to take leave to go to a doctor's appointment, and therefore the magistrate recommended denying defendant's motion on the interference claim. As to the retaliation claim, defendant argued that the decision to discharge plaintiff was not causally related to protected activity. The employer pointed out that it had been considering discharging her before she took FMLA leave, but the court rejected this assertion because plaintiff had been taking leave for years. Accordingly, it was impossible that the employer would have seriously considered discharging plaintiff before she began exercising FMLA rights, and the magistrate recommended that summary judgment was inappropriate.

**Boronda v. Move, 2013 WL 868300 (D. Or. Feb. 7, 2013)**

Plaintiff, a construction worker, alleged that the county retaliated against him in violation of the FMLA. Plaintiff previously filed a lawsuit against the county alleging that he was discharged because he took FMLA leave. The parties reached a settlement, but plaintiff argued that there was an improper deduction from the settlement amount for the state's Public Employees' Retirement System. During this dispute, plaintiff was employed by a temporary employment agency that assigned him to perform construction work on the basement of the county courthouse, where county offices were located. An employee for the county recognized plaintiff's name and requested that he not be approved to work in the courthouse basement, where he might have access to confidential information about the county. As a result, the agency removed plaintiff from the project. Plaintiff received other assignments from the temporary employment agency, but they did not pay as well.

Plaintiff filed suit, alleging that the county deprived him of the opportunity to work for a third party because of his FMLA claim. The county filed a motion for summary judgment. The magistrate judge applied the *McDonnell Douglas* framework and found that plaintiff did not establish a prima facie case of retaliation because he did not show that he was removed from the courthouse project because he filed an FMLA claim. Rather, he was not approved to work in the courthouse because of the dispute over the deduction from the settlement amount. Therefore, plaintiff failed to show causation. The magistrate judge also noted that the county had a legitimate, nondiscriminatory reason for denying plaintiff access to the courthouse basement. The magistrate judge recommended that summary judgment be granted as to the FMLA claim.

**Henson v. U.S. Foodservice, 2013 WL 6080359 (D. N.J. Nov. 19, 2013)**

The employee, a worker in the food packing industry, was asked multiple times by his supervisor to rebuild a "leaning pallet" because it was a significant safety hazard. The employee disregarded his supervisor's instructions and instead swapped the leaning pallet with a new one. He was discharged a few days following the incident for insubordination and lack of remorse for his refusal to rebuild the leaning pallet as instructed. At the time of his discharge, the employee was eligible to take intermittent FMLA leave. The employee filed a claim for interference and retaliation under the FMLA.

The court granted summary judgment for the employer, finding the employee failed to establish a causal connection between his termination and his FMLA leave. The employer had approved the employee's requests for intermittent FMLA leave for four years, at no time taking any adverse employment action. The employee also attempted to show pretext by citing anti-FMLA remarks made by his supervisor, but the court rejected this argument. The comments were stray remarks by a non-decisionmaker, and were temporally remote from the date of decision. Additionally, there was no indication that the supervisor intended to act upon them. The court reasoned that the FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA claim. Therefore, summary judgment was warranted because there was no factual dispute that the employee was insubordinate, and that his insubordination, not his FMLA leave status, led to his discharge.

**Allen v. Nutrisystem, Inc., 118 FEP Cases 310 (E.D. Pa. 2013)**

The employee worked for defendant as a customer service representative from May 2008 until her discharge in September 2010. Over the course of her employment, the employee took three FMLA leaves of absence. The first was from December 14 to 20, 2009 to care for a sick child and the second was from March 1 to May 12, 2010 after she was involved in a car accident. Before the third leave, on June 8, 2010, the employee submitted a written complaint requesting a new headset because customers could not hear her over the phone. The employer replaced the headset and the batteries. Then from June 20 to 27, 2010 she was out on leave for stress and anxiety. Two months after the employee returned from leave, defendant advised the employee that she was being discharged for poor performance, which included completing school work during her shift, repeatedly hanging up on customers, and complaints that the employee would answer a customer's call and then say nothing else, leaving the customer on the line.

The employee filed suit alleging FMLA retaliation and interference stemming from her three FMLA leaves of absence. The court granted summary judgment in favor of the employer. The court held that the employee could not establish a prima facie case for FMLA retaliation because she could not establish a causal connection between her leaves and her termination. The court noted that because the employee's final leave occurred over two months before her termination, her "temporal proximity" evidence was weak. In addition, the employee could not establish pretext as she did not dispute that she completed school work during her shift or dropped calls, instead contending the employer was wrong or mistaken. While the employee contended calls were dropped because of a mechanical failure and that was not her fault, the disconnections continued after the employer serviced the phone.

**Lister v. National Oilwell Varco, L.P., 2013 WL 5515196 (S.D. Tex. Sept. 30, 2013)**

Plaintiff was diagnosed with anxiety and took over 16 weeks of leave in 2011. During his leave, a process server attempted to serve papers concerning plaintiff's child support obligations. The employer did not accept service of the papers on plaintiff's behalf and did not inform him that the process server was attempting to serve him. After returning from leave, an employee under plaintiff's supervision was injured on the job. The employer's accident reporting policy required plaintiff to complete a form within 24 hours of the accident. The employer specifically told plaintiff that it was his responsibility to fill out the form and warned



him that refusing to do so was grounds for discharging him. Plaintiff refused to fill out the necessary accident form and attend an accident meeting with the injured employee, as required under the policy. The employer subsequently discharged plaintiff.

Plaintiff then filed suit claiming FMLA interference and retaliation, and the employer filed for summary judgment. The court granted summary judgment in favor of the employer. On his interference claim, plaintiff alleged that his return to work and immediate termination was tantamount to a failure to return him to work. The court disagreed that this was a basis for an FMLA interference claim. Because plaintiff failed to allege that he had been denied leave, that he refrained from taking leave because of the employer's conduct, that he returned early from leave due to pressure from the employer, or that he was not reinstated to his previous position, summary judgment was entered in favor of the employer. As to his FMLA retaliation claim, plaintiff alleged that his employer retaliated against him for taking FMLA leave by terminating his employment two weeks after returning to work and by failing to inform him of the attempts to serve him with legal papers while he was off on leave. The court found that the temporal proximity between the leave and the adverse employment action was not enough for a retaliation claim to survive summary judgment. The court also found that the employer had no obligation to notify plaintiff of the attempts to serve court papers and the employer's failure to do so could not be the basis of a retaliation claim.

**Jerome v. Barcelo Crestline, Inc., 507 F. App'x 861 (11th Cir. 2013)**

The employee, proceeding *pro se*, sued his former employer. The employee claimed that his employment was terminated in retaliation for exercising his rights under the FMLA. The employer moved for summary judgment on this claim, which the district court granted and the Eleventh Circuit affirmed on appeal. The Eleventh Circuit summarily concluded that the district court did not err in granting summary judgment because the employee "failed to present any evidence showing a causal relationship between his termination and the exercise of his FMLA rights."

**Rossi v. Fulton County, Ga., 2013 WL 1213243 (N.D. Ga. Feb. 13, 2013), adopting report and recommendation, 2013 WL 1213139 (N.D. Ga. Mar. 22, 2013)**

The employee filed a lawsuit alleging interference and retaliation under the FMLA. Three years before her discharge, the employee requested intermittent FMLA leave, and she was granted intermittent leave every year thereafter. The employee experienced numerous performance issues over several years, including unexcused absences after her FMLA leave expired each year. The employee was informed that she was going to be discharged. Prior to her termination, however, the employee was offered a voluntary demotion, a pay cut, or a ten-day suspension. The employee did not attend the meeting regarding her dismissal. As a result, her employment was terminated.

The magistrate judge recommended the court deny the employer's motion for summary judgment. The employer argued that the employee was allowed to take all FMLA leave she sought, but there was no record evidence to support this statement. The employee stated that there was one instance when she was denied leave to attend a doctor's appointment. Thus, the

magistrate judge concluded that there was a genuine dispute of material fact as to whether the employer interfered with the employee's rights under the FMLA. As to the retaliation claim, the employer argued that it contemplated the employee's discharge before she exercised rights under the FMLA. However, the evidence showed that the decision maker was not employed at the time the employee first exercised her rights under the FMLA, and thus he could not have contemplated her termination prior to the protected activity. As a result, the magistrate judge concluded that the employer failed to proffer sufficient evidence to support the legal grounds for its motion for summary judgment on this claim.

**Ward v. City of Birmingham, 2013 WL 541429 (N.D. Ala. Feb. 8, 2013)**

The employee worked for the employer for fifteen years before being discharged for performance issues. The employee filed a lawsuit alleging interference with her rights under the FMLA and retaliation for the exercise of rights under the FMLA. The court granted the employer's motion for summary judgment. As to the interference claim, the employee offered no evidence that she was denied a benefit to which she was entitled under the FMLA. The employee testified that she received all of the leave she requested. While she asserted that she was harassed about her leave, and ultimately discharged, the court opined that these allegations are more appropriately addressed under a claim for retaliation, not interference.

With respect to the retaliation claim, the employee could not establish a prima facie case because there was no evidence of causation. The two and a half months between the protected activity and the employee's termination was too long to establish a causal connection based on temporal proximity. The employee also pointed to comments made by the director, but the court found that these comments were not about the employee's performance, not medical leave. In addition, it was undisputed that the employee was not performing her job functions at an acceptable level, or following instructions. The employee created a hostile work environment for co-workers, and even the employee acknowledged various reasons why the employer's actions were unrelated to her FMLA leave. Therefore, summary judgment for the employer was appropriate.

**Abernathy v. Science Applications International Corp., 2013 WL 6904089 (N.D. Ala. Dec. 31, 2013)**

The employee was placed on a performance improvement plan (PIP) just one day after she submitted paperwork requesting FMLA leave for the birth of her child. She filed an FMLA retaliation claim, asserting that the employer placed her on the PIP because she requested leave, and therefore interfered with her FMLA rights. The district court granted the employer summary judgment on this claim, based on record evidence showing that the decision-making process for the PIP began two months before the employee submitted her FMLA request. The court concluded that based on this timing, the employee could not establish the requisite causation between her FMLA request and the PIP.

**Campbell v. Costco Wholesale Corp., 21 WH Cases2d 358 (M.D. Tenn. 2013)**

Plaintiff, a licensed optician, was denied a promotion for which she applied shortly after returning from FMLA leave. She filed suit claiming interference and retaliation under the

FMLA. The employer moved for summary judgment on both claims. The district court denied summary judgment on the retaliation claim and granted the employer's motion on the interference claim.

The court found that the employer's general statements against plaintiff's absences were not sufficiently targeted to her FMLA leave to provide direct evidence of discrimination. The statements could have referred to both FMLA and non-FMLA leave. It found, however, that these statements, made close in time to her return from leave, could constitute circumstantial evidence of causation and pretext to show retaliation under the *McDonnell Douglas* burden-shifting framework. The statements could show that the employer's articulated reason for not promoting plaintiff, that the promoted candidate was more qualified, did not actually motivate the employer's decision. Although the individuals who made the statements did not make the ultimate promotion decision, their recommendations were considered in making the decision. The court therefore allowed plaintiff's retaliation claim to proceed to trial. On the other hand, the court granted summary judgment on the interference claim. As plaintiff had received the full amount of FMLA leave requested, she was restored to her position upon return from leave, and the denial of promotion occurred only after return from leave, there was no interference with her substantive FMLA rights.

**LaFleur v. Hugine, 2013 WL 5355035 (N.D. Ala. Sept. 24, 2013)**

The employee was employed by a university to conduct training on how to incorporate technology into school curricula. The employee's position was created by a contract between the university and a state agency. As part of her duties, the employee was required to provide training by traveling to schools in her local area. Plaintiff requested and was granted FMLA leave between August 22, 2011 and September 2, 2011 for job stress. When she returned from leave, she was discharged; however, the decision to terminate her had been made several months before in April 2011. The university discharged her because she was not "out in the field" enough to perform her duties and was "inflexible" with respect to new procedures implemented by the university.

The court granted summary judgment for the university on the employee's claim that the university interfered with her FMLA rights when it did not reinstate her after returning from FMLA leave. It noted that 29 C.F.R. § 825.216(a) provides that an employee has no greater right to reinstatement than if employee had been continuously employed during FMLA leave. Because the employee herself admitted that discussions to terminate her employment had occurred well before her leave, her FMLA leave has no bearing on her discharge. While the court granted the university's motion for summary judgment, it also rejected several arguments that the university made in support of its motion. First, the court disagreed with the university's contention that the employee's suit, which was brought against state officials in their official capacities, was barred by the 11<sup>th</sup> Amendment. While the Amendment bars suits seeking *monetary* damages against state officials in their official capacities in federal court, the employee's suit was proper since it sought the *non-monetary* remedy of reinstatement. The university also argued that the 11<sup>th</sup> Amendment warranted dismissal of the employee's suit because that Amendment forbade suits against states under FMLA's self-care provisions. The court distinguished that point on grounds that, because employee's suit sought reinstatement, it

was not a self-care matter. The court also rejected the university's argument that, since her position was created through funding by a state agency, it was not her employer. Because the university provided her with an office and supervised and directed her, she was employed by the university.

**Nilles v. Givaudan Flavors Corp., 521 F. App'x 364, 20 WH Cases2d 841 (6th Cir. 2013)**

Plaintiff brought suit against defendant alleging, among other claims, that his employment was terminated in violation of the FMLA. The district court granted defendant's motion for summary judgment, and plaintiff appealed. The United States Court of Appeals for the Sixth Circuit affirmed.

Plaintiff was a purchasing supervisor for defendant. Plaintiff started having performance problems and several subordinate employees resigned, claiming problems with plaintiff's management style. Defendant then started a process to terminate plaintiff because of these issues. It took defendant about two years to complete the process. During that time plaintiff took several FMLA leaves. Plaintiff took FMLA leave for a respiratory infection and another for dizziness and headaches. Defendant approved both requests. During his second leave, plaintiff was diagnosed with multiple sclerosis and only told another same level supervisor in "confidence" and requested him to keep it to himself. During his absences, plaintiff only informed defendant that he was sick, and being treated by several doctors. Only his respiratory infection and dizziness and headaches were the listed reasons for his FMLA leaves. Plaintiff never informed defendant that he was diagnosed with multiple sclerosis. After two years, plaintiff's employment was terminated.

Plaintiff then filed suit alleging, among other things, retaliation in violation of the FMLA. The district court granted defendant's motion for summary judgment. The Sixth Circuit affirmed, noting that the Defendant planned to terminate plaintiff well before his second FMLA-leave request, and therefore, discrediting plaintiff's claim that his termination was motivated by his FMLA request. Additionally, the court noted that plaintiff's first FMLA leave request was more than a year and half prior to his discharge. Therefore, no causal connection existed between plaintiff's discharge and his request for FMLA leave.

***Summarized Elsewhere:***

**Ridgeway v. Royal Bank of Scotland Grp., 2013 WL 1985016 (D. Conn. May 13, 2013)**

**Hopkins v. ADT Security Services Inc et al., 2013 WL 1909416 (N.D. Ala., May 8, 2013)**

**Scott v. Sebelius, 2013 WL 709765 (D. Md. Feb. 25, 2013)**

**Gaskins, et al. v. Rock-Tenn Corp., 2013 WL 5964394 (S.D. Ohio, Nov. 8, 2013)**

**Wright v. Shore Memorial Hospital, 21 WH Cases2d 920 (D. N.J. 2013)**

**Maack v. School Board of Brevard County, 2013 WL 6050749 (M.D. Fla. Nov. 15, 2013)**

**Wagner v. Baystate Health, Inc., 2013 WL 5873295 (D. Mass. Oct. 29, 2013)**

**Cobb v. Florence City Board of Education, 2013 WL 5295777 (N.D. Ala. Sept. 18, 2013)**

i. Temporal Proximity

**Picard v. Louisiana ex rel. Department of Justice, 931 F. Supp. 2d 731 (M.D. La. 2013)**

The employee, a female assistant state attorney general, worked in a small branch of the state attorney general's office. The employee became pregnant, but five months later was involved in a second car accident and was placed on bedrest. The employer gave her permission to work from home while on bed rest, and whenever the office's elevator was out of service. In addition, one of the employee's major cases was reassigned because, according to her supervisor, the employer was worried about her pregnancy. After her child was born, the employee submitted a request for FMLA leave. A few days later, her employment was terminated. The employer claimed that it discharged the employee for two reasons: because the office lost the employee's position, and because of misrepresentations she had made to a judge in a major case.

In her subsequent lawsuit, the employee alleged interference and retaliation under the FMLA. The court granted summary judgment for the employer on the interference claim, but not the retaliation claim. The employee failed to present a prima facie case of interference because she was unable to show that she was denied benefits to which she was entitled. Despite the fact that the employee completed the FMLA paperwork and submitted it to the employer, there no evidence that the employer processed the request, or that she was ultimately denied leave. As to the retaliation claim, the employer argued that the employee could not show either that she was treated less favorably than an employee who had not taken FMLA leave, or that the adverse employment decision suffered by the employee was caused by her having taken FMLA leave. However, the employee successfully pointed out the temporal proximity: four days passed between the completion of her FMLA paperwork and her discharge. Further, under the mixed motive burden-shifting test, the employee could survive summary judgment because there was a genuine issue of material fact as to whether the employer proffered a pretextual reason for her discharge, since the office had the same number of attorneys now as it did before her discharge.

**Hanson v. Mental Health Resources, Inc., 118 FEP Cases 1364 (D. Minn. 2013)**

After the employee requested and was approved for FMLA leave on December 1 for maternity leave anticipated to begin in March, the employer discovered she had listed her domestic partner as a "spouse" on benefits forms and terminated her employment on January 23 due to what it deemed fraudulent conduct. The employee sued, alleging FMLA interference and retaliation, along with various state law claims. The district court granted the employer's motion for summary judgment, dismissing the interference claim because the timing alone was insufficient to support the claim, and the employee presented no other evidence to refute the stated reason for termination. The court noted the employer routinely grants FMLA leaves each year and the employee provided no evidence of any other employee whose leave was subject to interference. The retaliation claim was similarly dismissed because there was insufficient temporal proximity between her protected activity and the termination. The court found the employer proffered a legitimate, nondiscriminatory reason for her termination, and even if the employee did not intend to commit fraud, the employer did not have to be correct if it honestly believed the asserted grounds at the time of the termination. The court noted there was no evidence of similarly situated employees being treated differently.

**Blosser v. AK Steel Corp., 20 WH Cases2d 835 (6th Cir. 2013)**

Plaintiff worked for the employer as a senior engineer. Thirteen months after he was hired, the employee took a medical leave of absence to undergo surgery for a brain tumor. He closed his apartment while on leave to be near his family. The employee's supervisor asked the employee if he needed any help moving his things out of the apartment, but the employee declined the offer. He returned to work approximately 12 weeks later, with a full medical release. Five weeks later, he was discharged as part of a company-wide reduction in force. Plaintiff was selected based on lack of seniority, poor job performance, and a lack of unique work skills. Shortly after notification he was being laid off, the employee sent an e-mail to the human resources manager complaining that his medical condition was not taken into consideration in his last job evaluation. He later admitted that he sent the email in an attempt to avoid being laid off.

The employee filed suit alleging retaliation under the FMLA, among other claims. The employer moved for summary judgment on the FMLA claim arguing that there was no causal connection between the employee's leave and his selection for layoff. The district court granted the employer's motion. In affirming the district court's decision, the Sixth Circuit reviewed and rejected each category of evidence offered by the employee. The court began by rejecting the employee's reliance on temporal proximity, noting that there was an almost four month gap between the date the employee went on leave and when he was discharged and plaintiff offered no other evidence of retaliatory conduct. Next, the employee argued that the supervisor's offer to help him move should be interpreted as a desire that he not to return to the area. The court characterized this interpretation as "unreasonable." The court similarly rejected proof of causation based on a comment by the same supervisor that it was "the same old Al" that returned to work, not the "ball of energy" he expected. The employee argued this was a criticism of the employee's decision to take medical leave and seek treatment. The court found such an interpretation "strain[ed] credulity." Fourth, the court rejected statements by the employer's CEO critical of the Ohio Healthy Families Act, reasoning that they were isolated and not reflective of a cumulative management attitude. Finally, the court rejected the employee's claim that his medical condition was used against him. The court pointed out that there were documented complaints about the employee's work performance before and after his medical leave.

**Allen v. Nutrisystem, Inc., 118 FEP Cases 310 (E.D. Pa. 2013)**

Plaintiff was employed as a customer service representative from May 5, 2008, until her termination on September 2, 2010. Beginning in January 2010, plaintiff submitted several complaints to human resources about her supervisors and co-workers. At the time of the complaints, plaintiff started to report technical difficulties with her telephone (e.g., customers could not hear her over the phone and calls were cutting out). In some instances, the company assisted to resolve the issues, but in one instance, the company determined that plaintiff was to blame. Also around the time of the complaints, plaintiff took two separate FMLA leaves. After returning from the last of the FMLA leaves on June 27, 2010, plaintiff received a series of written warnings for job performance and attendance issues. On September 2, 2010, plaintiff's

employment was terminated for poor performance because she had violated the company's policies pertaining to the treatment of customers.

Plaintiff filed suit alleging, among other claims, interference and retaliation in violation of the FMLA. The employer moved for summary judgment, which the court granted. The court found that plaintiff could not establish causation, but even if she could establish causation, she could not establish pretext. In regard to causation, although timing alone is insufficient to establish causation, the court stated that a showing of timing paired with a "pattern of antagonism" will typically provide sufficient support for a retaliation claim. The court found no causation because the FMLA leave occurred over two months before plaintiff's discharge and there was no pattern of antagonism. Plaintiff could not establish pretext because she failed to provide proper comparator evidence. Some of the purported comparators had different supervisors or worked in different positions. As such, the comparators were not "similarly situated in all relevant respects." Further, to establish pretext, plaintiff was required to present evidence that discredits the proffered reason for employment termination. Plaintiff did not present that evidence, but rather improperly argued that the decision was wrong or mistaken, which the court would not consider.

**Brown v. Humana Insurance Co., 2013 WL 1831308 (W.D. Ky. Apr. 30, 2013)**

Plaintiff, who suffered from irritable bowel syndrome and Crohn's disease, filed suit against her former employer alleging the employer discharged her in retaliation for taking FMLA leave. The employer moved for summary judgment on plaintiff's FMLA retaliation claim, arguing that there was no causal connection between plaintiff's FMLA leave and her discharge and that it discharged plaintiff because of her well-documented performance issues.

Plaintiff argued that the close temporal proximity between her request for FMLA leave and her discharge was sufficient to establish evidence of causation. The court noted that in the Sixth Circuit, the prevailing standard is likely that temporal proximity alone is sufficient to establish a causal connection where the temporal proximity is close. Here, plaintiff was placed on a performance improvement plan one week after she received approval for intermittent FMLA leave and was discharged three months later. The court found that this close temporal proximity was sufficient to satisfy plaintiff's initial burden on summary judgment. The court also found that despite plaintiff's well-documented performance issues, which predated her request for FMLA leave, plaintiff was able to present genuine issues of material fact that the employer's stated reason for her discharge was pretext. In particular, plaintiff presented evidence of inappropriate comments regarding her FMLA leave from an individual who was instrumental in placing her on the performance improvement plan, and was also involved in her subsequent discharge. Plaintiff also demonstrated that her former employer's reaction to her performance issues became more serious after she began taking FMLA leave. Therefore, although the court noted that its determination was a "close call," it denied the employer's motion for summary judgment.

**Shenk v. Pennsylvania, 118 FEP Cases 1054 (M.D. Pa. 2013)**

Plaintiff was hired by the Pennsylvania Board of Probation and Parole (the "Board") in June 2007. During her tenure, plaintiff contended that she spoke out against unlawful

discrimination, retaliation, and harassment, including harassment of veterans. On April 1, 2008, after her involvement in a sexual harassment investigation, plaintiff was informed by her supervisor to seek employment elsewhere. Plaintiff took FMLA leave from May 1 to July 31, 2008. During that time, plaintiff received a copy of a negative performance evaluation that had been shown to her in April. Also while on leave, plaintiff was again reminded by her supervisor to seek alternate employment, or administrative measures would be taken against her. Plaintiff found another job. After exhausting her administrative remedies as to non-FMLA claims, she then filed suit in district court, claiming, *inter alia*, FMLA retaliation. The magistrate judge issued a report and recommendation (R&R), which recommended denying defendant's motion for summary judgment on plaintiff's FMLA claim.

The district court rejected the magistrate judge's R&R as to plaintiff's retaliation claim. The R&R concluded that mailing a negative performance evaluation to plaintiff during her leave was an adverse employment action, and its proximity to the beginning of plaintiff's leave suggested retaliation. The district court disagreed because plaintiff's supervisor showed her the negative evaluation and told her to get a new job several weeks before plaintiff requested FMLA leave. The subsequent communication during plaintiff's leave was simply the supervisor following up on a previous course of action. Thus, there was no evidence of causality between the adverse action and the FMLA leave, so summary judgment for defendant was proper.

**Brown v. City of Jacksonville, 711 F.3d 883 (8th Cir. 2013)**

The employee began FMLA leave to undergo hip replacement surgery. The employer had for some time warned the employee that her job performance was unsatisfactory. In the months after the employee returned to work, the employer issued a formal warning for the employee's failure to perform her duties and for creating a hostile work environment by harassing other employees. Eight months after the employee returned from leave, she was discharged.

The employee's subsequent lawsuit alleged that the employer retaliated against her because she exercised her right to FMLA leave. The Eighth Circuit affirmed the district court's decision granting summary judgment for the employer. Under the *McDonnell Douglas* standard, the employee failed for two reasons to demonstrate a causal connection between the employee's leave and her discharge. First, there was no temporal connection because her discharge occurred eight months after her FMLA leave. Second, the undisputed evidence showed that the employee was not performing her duties to the employer's satisfaction, and as a result the employee was unable to establish a prima facie case or show that the stated reason for her termination was pretext for FMLA discrimination.

**Bates v. Roche Diagnostics Corp., 2013 WL 5013916 (S.D. Ind. Sept. 12, 2013)**

Plaintiff was hired by defendant as an information security consultant in 2003. For three years, her old supervisor consistently gave plaintiff excellent performance evaluations. However, plaintiff's unit was reorganized in 2007, and a new supervisor was assigned to plaintiff's unit. Over the next several years, plaintiff received sub-standard performance evaluations, and was placed on a performance improvement plan. In June 2008, plaintiff had a hysterectomy which caused severe nerve pain in her right leg, and was granted FMLA leave for a month. Over the next 18 months, she took FMLA leave three more times. In 2011, defendant concluded that



plaintiff did not improve her performance as required by the performance improvement plan, and then terminated plaintiff's employment. Plaintiff then filed suit against defendant alleging multiple claims, including that defendant retaliated against her in violation of the FMLA.

The district court granted defendant's motion for summary judgment. The court noted that plaintiff was granted leave on multiple occasions and that plaintiff conceded that defendant freely encouraged her to take leave as needed. The court further explained that her supervisor coached and mentored plaintiff both before and after she took FMLA leave. Therefore, the court concluded that plaintiff failed to show a causal relationship between her taking leave and any adverse employment action. The court also noted that defendant terminated plaintiff's employment well over a year after she took FMLA leave. The court found the one year period too far attenuated in time to support a retaliation claim. Thus, the court ruled that plaintiff's retaliation claim failed as a matter of law.

**Bright v. Evonik Cyro, LLC, 2013 WL 2395264 (E.D. Ark. May 30, 2013)**

The employee exhausted his FMLA leave as a result of his foot condition, which made it painful for him to stand or wear steel-toed boots. His FMLA leave ran concurrently with paid time off under the employer's short term disability policy, and he was paid in full during his leave. After he had exhausted his leave, he requested FMLA leave for his wife's surgery and, although the request was denied because he had exhausted his leave for the year, he was allowed to take a vacation day to accompany his wife. Two months later, he filed a workers' compensation claim for his foot condition. The employer, believing he was attempting to get workers' compensation benefits in addition to full pay under the short term disability policy, terminated his employment. The employee sued the employer for retaliation under the FMLA, alleging that the employer retaliated against him for requesting time off to accompany his wife to her surgery.

The court granted the employer's motion for summary judgment. The court held that, even if a retaliation claim could be based upon a good faith request for FMLA leave when an employee was not eligible, the employee had no such good faith or reasonable belief that he had FMLA leave available. The court also ruled that, assuming the employee could state such a belief, he demonstrated no causal connection between the denial of the request and the termination two months later.

**Doucette v. Morrison County, Minn., 2013 WL 2359660 (D. Minn. May 29, 2013)**

The employee, an assistant jail administrator, brought multiple claims against defendant, including that defendant retaliated against her in violation of the FMLA when she was terminated about three weeks after returning from FMLA leave. The district court granted the employer's motion for summary judgment because the employee was unable to prove a causal connection under *McDonnell Douglas*.

As the starting point for its analysis, the court noted that plaintiff mistakenly focused on the date she returned from FMLA leave. Instead, the court explained that the starting point for her causation analysis is her initial exercise of FMLA rights. The court then held that a period of three months between the exercise of a protected right and termination is insufficient to establish

causation. Further, the employer suggested the employee consider FMLA leave, and that contradicted a retaliatory animus.

**Everett v. New Jersey (Dep't of Corrections), 2013 WL 2319359 (D. N.J. May 28, 2013)**

A former employee brought an FMLA retaliation claim against the New Jersey Department of Corrections and individual defendants. Plaintiff was placed in the position of acting Chief Investigator in February 2009, following the retirement of his supervisor. While he was in that role, plaintiff requested intermittent family leave and was granted the request. Between February 28, 2009 and March 10, 2009, plaintiff took intermittent leave. He was appointed as the Chief Investigator on a provisional basis in July 2009. In December 2009, nearly nine months after his intermittent leave, he was removed as Chief Investigator and returned to his role as Assistant Chief Investigator.

The district court granted defendants' motion for summary judgment, finding that plaintiff failed to establish a prima facie case of retaliation. The court found that plaintiff had failed to show that any genuine issue of disputed fact exists by reference to the record. The only evidence plaintiff submitted related to causation was temporal proximity. The court ruled that this was insufficient by itself to establish causation, particularly in light of the 9-month gap in between his FMLA leave and demotion. The court explained that temporal proximity alone is only sufficient to establish causation when it is "very close" or "unusually suggestive." Temporal proximity exceeding three months does not meet this standard.

**Jones v. Economic Opportunity Planning Ass'n, 2013 WL 444401 (N.D. Ohio Feb. 5, 2013).**

While plaintiff was on bereavement leave, defendant prepared a letter terminating plaintiff's employment; however, defendant delayed delivery of the letter until plaintiff completed her leave. Plaintiff's supervisor recommended plaintiff's termination because she knew that subordinate employees were selling scrap metal and, initially, denied that she knew they were scrap metal, and plaintiff also attended a luncheon paid for from proceeds of the scrap sales. On the day following her return to work from bereavement leave, defendant confronted plaintiff regarding she was confronted with her attendance at the luncheon. Three days after defendant confronted plaintiff, plaintiff went to her physician concerning depression. Plaintiff's doctor then diagnosed her with anxiety and depression. Plaintiff called the human resources department to request FMLA leave, which was approved by an employee who was unaware that plaintiff had been terminated by management. Approximately ten days later her request for FMLA leave, defendant officially terminated plaintiff's employment.

The district court granted defendant's motion for summary judgment and held that plaintiff could not make out a prima facie case for interference or retaliation. The district court noted that even if plaintiff had met all of the requirements for leave, there was no evidence that defendant had denied her any benefit to which she was entitled and had not imposed any obstacles to taking leave. Likewise, the court also found that her retaliation claim failed because the letter terminating her employment was prepared before she requested leave. Therefore, the court held that plaintiff failed to make any showing that her request for leave was a motivating factor in her discharge.

**Allen v. Nutrisystem, Inc., 118 FEP Cases 310 (E.D. Pa. 2013)**

Plaintiff, a customer service representative for defendant, used FMLA leave on two separate occasions. After returning from her second leave, plaintiff received a series of write-ups. Ultimately, her employment was terminated for poor performance. She violated the company's policies pertaining to the customer service by hanging up on customers, and by otherwise not properly ending phone calls with customers.

Plaintiff filed a lawsuit alleging interference and retaliation in violation of the FMLA. The court granted the employer's motion for summary judgment, finding plaintiff could not establish causation or pretext. The court stated that the evidence of causation was "weak" because plaintiff's last FMLA leave occurred over two months before her discharge. Ultimately, the court found no causation because there was no pattern of antagonism. The court concluded that two warnings and one coaching notice did not equate to a "constant barrage of written and verbal warnings" that would establish a pattern of antagonism. As to pretext, plaintiff failed to provide proper comparator evidence. Some of the comparators had different supervisors or worked in different positions, and therefore were not "similarly situated in all relevant respects." Furthermore, even though plaintiff argued that the decision to terminate her employment was wrong or mistaken, she presented no evidence to discredit the proffered reason for her discharge.

**Terpo v. RBC Bank, 2013 WL 5519704 (N.D. Ala. Oct. 2, 2013)**

The employee worked for defendant, a bank. Prior to submitting her request for FMLA leave, the employee committed two security infractions: first, when she brought her daughter to the bank when no other employees were present, and second, when she allowed her daughter into an area reserved for bank tellers. The employer did not take any immediate response to the infractions, and before it did, the employee submitted a request for FMLA leave so she could care for her daughter. Less than a week after learning about the employee's request, her supervisor confronted her about the security incidents. Based on the tone of the conversation, the employee believed that the supervisor's behavior was in retaliation for her FMLA request, and she reported it to human resources. The supervisor recommended that the employee be discharged for the infractions. The regional manager, who was not aware that the employee applied for FMLA leave, acted on the supervisor's recommendation and discharged the employee. Her leave was scheduled to begin two days later.

The employee filed a lawsuit alleging retaliation and interference under the FMLA, and the employer moved for summary judgment. The court denied the motion. The employer argued that temporal proximity (in this case, a matter of days) was not sufficient evidence of causation because the regional manager was unaware of her FMLA leave. The court rejected this argument, applying a "cat's paw" theory because the manager acted on the recommendations of a supervisor and human resources representative, who were both aware of the employee's FMLA leave. The court also found evidence of pretext because the employer was aware of the employee's policy violations, but failed to act on them until after he became aware of her FMLA request. The employer also admitted that it was not proper policy to wait days or weeks to reprimand an employee for wrongdoing, and there was disputed evidence regarding when the supervisor became aware of the incidents. Finally, a comparator-employee who had also allowed

her child to walk behind the teller line was not discharged. Ultimately, the circumstantial evidence was enough to give rise to an inference of pretext and defeat defendant's motion for summary judgment on both the retaliation and interference claim.

***Schummer v. Black Bear Distribution, LLC, 2013 WL 443136 (D. N.J. Aug. 15, 2013)***

The employee, a shift supervisor, began exhibiting signs of depression and anxiety following his bereavement leave. After he called his direct supervisor and indicated that he was depressed and overmedicating, the employer provided him with FMLA forms and referred him to a doctor. When the doctor was reluctant to sign the FLMA form, the employer called the doctor to explain the employee's situation, and subsequently the employee went on leave. After the employee returned to work, several co-workers reported that the employee was unfit for work, had been sleeping on the job, sounded incoherent, and had been slurring his words. The employee was discharged for failure to satisfactorily perform his job duties and for reporting to work in an unfit condition. The employee subsequently filed claims, including retaliation under the FMLA, against the employer.

The district court granted summary judgment for the employer because the employee failed to raise a genuine issue of material fact as to whether his discharge was causally related to his FMLA leave. The employee argued that the temporal proximity of one month between his FMLA leave and his discharge created an inference of retaliation, but the court found that one month was not an unusually suggestive amount of time did not suffice to establish causation. The court also found that the explanation given by the employer in the termination letter was consistent with the evidence from the employee reports and the deposition testimony from the employer's representatives. Finally, the court rejected employee's argument that the employer's reasons for his discharge were pretext for FMLA retaliation. The employer encouraged the employee to take FMLA leave in order to get treatment and took steps to get him approved. Ultimately, the employer proffered sufficient evidence that its decision to terminate the employee was based on the legitimate business reason that plaintiff was unfit for work. Therefore, granting summary judgment for the employer was appropriate.

***Colicchio v. Merck & Co. Inc. et al., 2013 WL 310390 (D. N.J. Jan. 25, 2013)***

The employee filed suit alleging retaliation under the FMLA, and other federal and state law claims in the district court of New Jersey. The court granted partial summary judgment to the employer on the basis that the employee failed to oppose the employer's motion. The employee filed a motion to reconsider alleging that the employee had opposed the employer's arguments. The court granted the motion to reconsider based on the employee's arguments.

The district court of New Jersey rejected the employer's argument that a ten (10) month gap between the employee's discharge and the employee's FMLA leave did not give rise to an inference of retaliation. The court held that the employee had alleged sufficient facts to establish a causal relationship between the adverse employment action and the FMLA leave because the employee had identified specific facts and an intervening process of dismantling her position. The court denied the employer's motion for summary judgment, holding that the

employee had created a genuine issue of material fact as to whether there was a causal relationship between the employee's FMLA leave and the employer's failure to promote the employee.

**Jackson v. Motorcity, 2013 WL 5566684 (E.D. Mich. Oct. 9, 2013)**

Plaintiff was a security guard for defendant, a casino. Plaintiff had taken FMLA leave during the course of his employment. One day, plaintiff used FMLA leave to report late for work. The next day, plaintiff's supervisors determined plaintiff would be suspended for carrying a personal cell phone while working. Later the same day, plaintiff requested FMLA leave to go home early due to an asthma attack. Prior to leaving work, plaintiff left his post without permission. He was later given a five-day suspension for the infraction. Plaintiff became angry and made profane statements to his supervisors when they told him about the suspension. While he was on suspension, the supervisors decided to terminate his employment because of his abusive language. Upon his return to work, plaintiff went on long-term FMLA leave for approximately three months, and his discharge was postponed. When plaintiff returned to work, he was discharged immediately. However, following negotiations with his union, the employer reinstated him. Subsequently, plaintiff was suspended for performance issues on two occasions. Plaintiff also claimed that after he returned to work, defendant assigned him to posts that required him to work outdoors for seventy days during winter months.

Plaintiff filed suit alleging the employer retaliated against him by terminating his employment and making him work outside in the winter. Defendant moved for summary judgment, which the court granted in part and denied in part. The district court found that, to the extent plaintiff's claims were based solely upon the earlier suspensions, those claims were time-barred under the FMLA limitations period. Nonetheless, the district court found that the proximity in time between plaintiff's FMLA leave and his suspension and termination was sufficient to establish the causal connection element of a prima facie case of retaliatory discharge. Furthermore, the court found that there was an issue of fact as to whether defendant's proffered reason for plaintiff's termination was pretext, because other employees who used vulgar language had not been disciplined similarly. Finally, the court acknowledged that the Sixth Circuit had recently adopted the less demanding "*Burlington*" standard for retaliation claims under the FMLA, which only required a plaintiff to show that a reasonable employee would have found the action materially adverse. Accordingly, the district court found an issue of fact existed as to whether posting plaintiff to work outside for seventy days in the winter was an adverse action.

**Flanner v. Chase Inv. Services Corp., 2013 WL 5533569 (W.D. La. Oct. 4, 2013)**

Plaintiff, a Financial Advisor, worked for the Defendant from for seven years. After Plaintiff was diagnosed with a heart condition, he was granted about two months of medical leave, which eventually was extended by a few weeks. A month or two after returning to work, Plaintiff used his personal funds to purchase a \$25 money order at the bank for a customer who was also his friend. On August 3, 2010, Plaintiff was asked to write a statement regarding the money order. Plaintiff was discharged less than a week later for violating the employer's Code of Conduct, which prohibited loaning money to a bank customer. He was replaced by a 32 year old person and a 53 year old person. Plaintiff filed suit against the employer alleging, among

other claims, that his termination was unlawful interference with his FMLA rights and/or retaliation under the FMLA.

On the employer's motion for summary judgment, the court held plaintiff could not establish a *prima facie* case of retaliation under the FMLA. The employee argued that causation was present because four months elapsed between her return from FMLA leave and her discharge, but the court found this period insufficient to establish a causal connection. Plaintiff conceded that he loaned \$25 to a bank customer, which was a clear violation of the Code of Conduct. Therefore, the court agreed with the employer that it had a legitimate, non-discriminatory and non-retaliatory reason for discharging Plaintiff. The employer also was granted summary judgment on the employee's interference claim. The employee admitted that the employer did not interfere with his rights, and that he was restored to the same position he held prior to taking medical leave.

**Ney v. Adventist Health System/Sunbelt, Inc., 2013 WL 3906553 (M.D. Fla. July 29, 2013)**

The employee took FMLA leave beginning on April 16, 2012. When her leave expired on June 15, 2012, she was unable to return to work. The employer accommodated her medical issues by granting an extended leave until September 22. When the employee had not returned to work by September 27, she was discharged.

The employee filed a complaint alleging a violation of the FMLA, and the employer moved to dismiss. The employee failed to respond to the employer's motion, and the court granted it. The employee's complaint did not allege causation, an essential element of either interference or retaliation under the FMLA. Although the employee alleged that an adverse action occurred fourteen weeks after her FMLA leave ended, mere temporal proximity, without more, "must be very close." A three to four month disparity was not considered the type of proximity that would support an inference of discrimination or retaliation. Noting that the employee was granted all the FMLA leave to which she was entitled, plus an additional 14 weeks, the court granted the employer's motion to dismiss the complaint.

**Dean v. One Life America, Inc., 2013 WL 870352 (S.D. Miss. Mar. 7, 2013)**

The employee filed this lawsuit because she believed that she was denied a promotion, and later fired, because of her ongoing battle with breast cancer. In her lawsuit, she raised four claims, two of which were related to the FMLA—that she was unlawfully retaliated against for taking FMLA leave and that her employer had unlawfully interfered with her right to approved leave under the FMLA.

The employee abandoned her FMLA interference claim because she failed to address it in her response to the employer's motion for summary judgment and her claim of FMLA-based retaliation was based solely on temporal proximity. As to her retaliation claim, the court found that a one month separation between her taking FMLA leave and defendant's decision to not promote her was sufficiently proximate to make her *prima facie* case. The burden therefore shifted to the employer to explain the adverse action and its timing, and the employer proffered un rebutted evidence that, despite the temporal proximity, the employee's use of FMLA leave was not considered in the decision not to promote her to HR Director.

The court then rejected plaintiff's argument that her employer's reasons were pretextual. Plaintiff attempted to show retaliatory animus by alleging that her supervisor based his evaluation of her performance on misinformation. However, the court found her allegations unsupported by any evidence in the record. Accordingly, the court concluded that there was insufficient evidence to support the inference that the employer failed to promote the employee because she took FMLA leave. The court then granted the employer's motion for summary judgment.

***Summarized Elsewhere:***

***Karaffa v. Montgomery Township, et al.*, 2013 WL 1157626 (E.D. Pa. Mar. 21, 2013)**

***Lukic v. Eisai Corp. of N. Am., Inc.*, 919 F. Supp. 2d 936 (W.D. Tenn. 2013)**

***Bagi v. AT&T Mobility Servs. LLC*, 20 WH Cases2d 1062 (W.D. Mich. 2013)**

***Wilson v. Cleveland Clinic Found.*, 2013 WL 486310 (N.D. Ohio Feb. 6, 2013)**

***Perez v. Cellco Partnership*, 2013 WL 4848070 (M.D. Fla. Sept. 10, 2013)**

***Moore v. County of Camden*, 20 WH Cases2d 1369 (D. N.J. 2013)**

***Apo v. HBE Corporation*, 2013 WL 4787748 (E.D. Mo. Sept. 9, 2013)**

***Rowe v. U.S. Bank National Association*, 2013 WL 3974330 (C.D. Ill. Aug. 1, 2013)**

***Hepner v. Thomas Jefferson University Hosps., Inc.*, 2013 WL 2334148 (E.D. Pa. May 29, 2013)**

***Smith v. City of Marion*, 2013 WL 5434133 (D. S.C. Sept. 27, 2013)**

***Walters v. Carson*, 2013 WL 6734257 (D. N.J., Dec. 19, 2013)**

***Davis v. Postmaster General*, 2013 WL 6671233 (11th Cir. Dec. 19, 2013)**

***Chaney v. Eberspaecher N. Am.*, 2013 WL 3381437 (E.D. Mich. Jul. 8, 2013)**

***Langenbach v. Wal-Mart Stores, Inc.*, 2013 WL 6827814 (E.D. Wisc. Dec. 23, 2013)**

***Holloway v. District of Columbia Government*, 2013 WL 6857415 (D. D.C. Dec. 30, 2013)**

***Wallner v. J.J.B. Hilliard, W.L. Lyons, LLC*, 2013 WL 5934145 (W.D. Ky. Nov. 5, 2013)**

***Morkoetter v. Sonoco Products Co.*, 936 F. Supp. 2d 995 (N.D. Ind. 2013)**

ii. Statements

***Summarized Elsewhere:***

***Shenk v. Pennsylvania*, 118 FEP Cases 1054 (M.D. Pa. 2013)**

***Ebersole v. Novo Nordisk, Inc.*, 2013 WL 1767977 (E.D. Mo. April 24, 2013)**

***Doucette v. Morrison County, Minn.*, 2013 WL 2359660 (D. Minn. May 29, 2013)**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Carter v. VNA, Inc.*, 2013 WL 3967925 (D. Md. July 30, 2013)**

Plaintiff, a nurse employed as a clinical consultant, advised her employer that she wished to take FMLA leave for her pregnancy. The leave was approved but within a month of the approval, defendant advised plaintiff that her employment would be terminated due to a reduction in force. The employee alleged that defendant retaliated against her for requesting FMLA leave.

The district court granted defendant's motion for summary judgment. During her deposition, plaintiff expressed her belief that she was terminated based on her pregnancy, rather than her request for FMLA leave. The court found that even if plaintiff had not withdrawn her FMLA claim, the claim would still be dismissed. The court reasoned that assuming, *arguendo*, that plaintiff did not withdraw her FMLA retaliation claim and that she can establish a prima facie case, defendant articulated a legitimate, non-retaliatory reason for the employee's termination. The court found that the reduction in force was a legitimate, non-retaliatory reason for the employee's termination. The court found that plaintiff's claims of pretext were unavailing because plaintiff's supervisor encouraged her to apply for FMLA leave once she learned of plaintiff's pregnancy, and plaintiff had applied for and taken FMLA leave in the past and was not subject to any retaliation.

**Reddy v. JPMorgan Chase Bank, N.A., 2013 WL 3147949 (S.D. Ohio June 19, 2013)**

The employee raised a number of federal claims in her complaint, including FMLA retaliation. The employee's FMLA claims previously faced two motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) before litigation proceeded on the merits. In 2010, the district court dismissed the employee's FMLA retaliation claims against two individual defendants, but the employee's claims remained intact following the second motion to dismiss in 2012.

On summary judgment, the court considered two alleged adverse employment actions: denial of short term disability benefits during one of the employee's FMLA leaves, and the employee's discharge. The court, however, determined that there were legitimate reasons for both of these actions that the employee could not overcome or prove pretextual. The court found that the employer denied the application for short term disability because the employee's application did not set forth objective medical findings that she could not perform her job functions. The court determined that the employee's discharge was based primarily on her having exhausted all of her available leave time, and failing to seek additional medical leave as an accommodation for her medical issues.

**Brushwood v. Wachovia Bank, N.A., 20 WH Cases2d 943 (4th Cir. 2013)**

Summary judgment was granted for one defendant in a case in which the employee claimed interference with FMLA rights and an ADA violation. The district court ruled that the employer was unaware of the "serious health condition" of the employee, and the Fourth Circuit affirmed. Defendant had adopted a point system in which points were added for consistent attendance and subtracted for unscheduled absences and tardiness. FMLA periods were exempted from deductions. The employee had been warned by her supervisor that additional absences would result in her termination before she injured her foot. The doctor told her to take one day off to allow a cut on her foot to heal. Her doctor did not extend the time off period, but she took additional time off and was terminated. The court determined that there was not sufficient notice that the FMLA would apply.



**Lee v. Lexicon, Inc., 2013 WL 1445656 (E.D. Ark. April 9, 2013)**

Plaintiff brought suit alleging interference and retaliation under the FMLA and race discrimination against the employer. The employer moved for summary judgment, which the court granted. Initially hired as a trainee, plaintiff was promoted to a welder fitter. After being injured at work, he was offered light duty for two months, which he accepted. He was subsequently released to full-duty, but was laid off with other employees and designated as not eligible for re-hire. The court dismissed the FMLA allegations because acceptance of light duty work is not the same as use of FMLA rights.

**O'Donnell v. Passport Health Communications, Inc., 2013 WL 1482621 (E.D. Pa. April 10, 2013)**

The employee's sales executive position was eliminated as part of a reorganization and she was offered the options of a severance package or relocation. She then began treatment for anxiety and panic attacks. The option period ran before she returned to work. She neither signed nor was terminated at that point, but was subsequently terminated after returning to work. She brought claims of FMLA interference and retaliation, among others, against the employer, indicating that she should not have been contacted by the employer during her FMLA leave. The employer moved for summary judgment on the issues of inadequate notice of the need for FMLA and retaliation for use of FMLA rights.

With regard to the retaliation claim, the court determined that the employee had failed to support her claim that she was entitled to a longer period of time to consider her employment options due to her leave. The court applied the McDonnell Douglas burden shifting analysis to her retaliation claim, and determined that there was no causal connection between her request for leave and her termination. She argued that the two days between the leave request and her termination suggested retaliation. The court disagreed because there was an established deadline. Further, the employer could articulate a legitimate, nondiscriminatory reason for her termination, her failure to execute the documents by that deadline. However, the court denied summary judgment on the notice issue because the employee had provided a letter from her doctor indicating the need for an absence of at least twelve days.

**Crowell v. Denver Health and Hospital Authority, 20 WH Cases2d 600 (D. Co., March 1, 2013)**

Plaintiff sued her former employer for denial of rights and retaliation for use of FMLA protected leave when it discharged her for excessive absenteeism. The discharge occurred after plaintiff left work early to determine whether she had a pulmonary embolism after a non-work related auto accident. The early leave would have been grounds for discharge under defendant's attendance policy. Defendant and plaintiff each moved for summary judgment. The motions included arguments on whether plaintiff established that she had a serious health condition. The court determined that there was a material issue of fact because a doctor's statement that a medical condition could cause periodic flare-ups up to seven times per week and for a day at a time could be a serious health condition. Thus, the court denied the summary judgment motions with respect to the FMLA interference claim.

In analyzing plaintiff's retaliation claim, the court applied the *McDonnell Douglas Corp. v. Green* burden shifting framework. The court found that plaintiff established a *prima facie* case and, thus, analyzed whether defendant's reliance on the attendance policy was a legitimate, non-discriminatory reason. The standard is not whether the decision to terminate plaintiff "was wise, fair or correct, but whether [defendant] honestly believed its reason and acted in good faith on those beliefs." The court found that defendant's previous grant of FMLA leave, the initial grant of FMLA leave for the absence triggering the discharge, plaintiff's admission that no defendant representative commented negatively on her use of FMLA leave, defendant's communications with plaintiff regarding her absences, need for leave, and the doctor's statement that she did not need time off from work refuted any claim of pre-text. Thus, defendant's reliance on its attendance policy as the basis for the discharge was not retaliatory and the court granted defendant's Motion for Summary Judgment as to this claim.

**Hornberger v. State of Tennessee, 2013 WL 652526 (M.D. Tenn. Feb. 21, 2013)**

Plaintiff, a claims examiner, took qualifying FMLA leave to take care of his father. Prior to taking FMLA qualifying leave to care for a family member with a serious health condition, the employee received numerous warnings for his poor performance. Upon his return from FMLA leave, plaintiff was suspended for poor performance and unpaid travel vouchers. The employee's performance did not improve and he was ultimately discharged. Plaintiff then filed suit, alleging that defendants retaliated against him for taking leave to care for his sick father. Defendants then moved for summary judgment, arguing that it had a legitimate, non-discriminatory reason for terminating plaintiff unrelated to his FMLA leave.

The district court granted defendants' motion for summary judgment. The court noted that the employee conceded that (1) he was aware of the need to process the travel vouchers, having been previously disciplined for the failure to do so, (2) he received numerous warnings about his poor performance, including warnings prior to his taking leave, and (3) his performance never improved after returning from leave. Thus, court reasoned that even if the employee could establish a *prima facie* case of retaliation, the employer had a legitimate non-discriminatory reason for discharging the employee. The court further held that plaintiff did not present any evidence of pretext, and therefore granted defendants' motion for summary judgment.

**Scott v. Sebelius, 2013 WL 709765 (D. Md. Feb. 25, 2013)**

The employee was a former Program Assistant for the Department of Health and Human Services who suffered from physical and mental disabilities. Over an eighteen-month period, the employee was absent from work for a total of 2,531 hours. Further, she requested, and was granted, FMLA leave for several extended periods of absence. However, the employer eventually terminated the employee for excessive absenteeism. After exhausting her administrative remedies against the employer, the employee eventually filed suit claiming, among other things, that the employer retaliated against her for taking FMLA leave.

The District Court granted the employer's motion for summary judgment on the FMLA retaliation claim. First, the court found no causal link between the employee's FMLA leave and her termination because her employer approved her FMLA leave and also waited over a year

after the employee first requested FMLA leave before terminating her employment. Second, and most importantly, the court reasoned that the vast majority of plaintiff's absences could not be counted as FMLA leave. Under the FMLA, the employee was entitled to a maximum of 12 weeks, or 480 hours, of leave per year. Thus, even if the employee took her full allotment of FMLA leave for the entire eighteen-month period at issue, she would only have been entitled to 960 hours of leave. Accordingly, 1,571 hours, or 62% of the employee's absences, could not legally be attributed to FMLA leave. The Court ultimately held that the employer had a legitimate, non-discriminatory reason for the firing, as the employer was "perfectly within its rights to terminate plaintiff based on her vast number of non-FMLA absences."

**Day v. Cole County Commission, 2013 WL 1189505 (W.D. Mo. Mar. 22, 2013)**

The employer was discovering and investigating numerous deficiencies in the employee's work performance at the time the employee was granted intermittent FMLA leave as a result of her heart condition. Eventually, the employee went on leave for several weeks to undergo heart surgery. While she was gone, the employer conducted a review of her work, which turned up numerous deficiencies and led to a negative performance review. Upon her return to work, the employer presented the review to the employee and discussed its findings with her. Eventually concluding that the employee was not completing her duties while she was present at work, the employer terminated her employment a few weeks after she returned from FMLA leave.

The employee brought a claim alleging retaliation under the FMLA, but the court granted summary judgment in favor of the employer because there was no evidence that discharging the employee for her poor work performance was pretext. Based on the timeline of the events, the employer had begun investigating the employee's performance a few days before she requested FMLA. Furthermore, the employer had legitimate reasons for reviewing the employee's work after noticing errors in specific instances. Finally, the court rejected the employee's argument that she was treated differently from her co-workers when the employer reviewed her case file. Rather, the employee was not similarly situated to these other employees because she was the only one accused of deficient work performance. Summary judgment was appropriate because there was no issue as to the legitimacy of the employer's proffered reason for her discharge.

**McCauley v. ASML US, Inc., 917 F. Supp. 2d 1143 (D. Or. 2013)**

Plaintiff supervised a number of on-site engineers for defendant's client. Plaintiff's job performance began to deteriorate around 2009 and continued up and until defendant terminated his employment two years later. Evidence of this deterioration included plaintiff's letter of apology for threatening a colleague at a supervisor training seminar, emails documenting management's disapproval of plaintiff's preparation and demeanor during at a post-crisis meeting defendant's client, and complaints from defendant's client about plaintiff's job performance. During this period, plaintiff sought and received medical leave under the FMLA, the Oregon Family Leave Act and also had an outstanding application for additional time off. On February 25th, 2011, plaintiff met with his immediate supervisor to discuss a "Performance Improvement Plan." Following a heated discussion and plaintiff's refusal to participate in the plan, the immediate supervisor's superior notified the appropriate human resources representative that he wanted to terminate plaintiff's employment. Defendant then terminated plaintiff's employment on February 28th, 2011.

Plaintiff brought several claims against defendant, including that defendant interfered with his rights under the FMLA by terminating him in retaliation for requesting and taking medical leave. The court denied plaintiff's motion for summary judgment. The court found that defendant established a genuine dispute of material fact as to whether plaintiff was exposed to any negative consequences because he requested and took FMLA leave. The court noted that defendant presented evidence that defendant terminated plaintiff's employment because of poor job performance, and that plaintiff failed to establish that the decision-maker who discharged plaintiff, as well as defendant's human resources representative, were aware of plaintiff's request for FMLA leave.

**Maletich v. La-Z-Boy Inc., 2013 WL 3328302 (E.D. Mich. July 2, 2013)**

The employee alleged that his employer violated the FMLA because his employment was terminated within one month after his return from leave. The employer moved for summary judgment on the basis that the employee could not produce evidence which would enable a fact finder to conclude that the employer's stated reason for the employee's termination - his failure to follow through on a corrective action plan - was not the true reason for his termination and was simply pretext for his termination.

The Court granted the employer's motion for summary judgment. The fact that his termination occurred within one month of his return from medical leave, by itself, was not enough to discredit the employer's legitimate, non-discriminatory basis for the employee's termination. Furthermore, the fact that the employee disagreed with the assessment of his job performance, upon which the corrective action plan was predicated, did not establish pretext. Furthermore, the court noted that the employee failed to identify any similarly situated employee who might have been treated differently than him.

**Ezzard v. Eatonton-Putnam Water & Sewer Authority, 2013 WL 5438604 (M.D. Ga. Sept. 27, 2013)**

Plaintiff brought a lawsuit against his former employer alleging he was discharged in violation of the FMLA, among other claims. The court granted the employer's motion for summary judgment. Specifically, the court dismissed plaintiff's claims against the Chairman of the Board in his individual capacity, reasoning that public officials sued in their individual capacities do not qualify as "employers" for purposes of the FMLA. Plaintiff's official capacity claims against the Chairman were dismissed as redundant, because he had brought the same claims against the employer.

The employer also was granted summary judgment on the employee's FMLA retaliation claim. Plaintiff did not rebut the testimony of two voting Board Members, who stated that they were unaware of his request for FMLA leave. Plaintiff's unsubstantiated assertions did not create a question of fact. For the same reason, plaintiff's FMLA interference claim against the employer was also dismissed. The un rebutted evidence demonstrated that the two Board Members terminated his employment without any knowledge of his request for FMLA leave.

**Wagner v. Baystate Health, Inc., 2013 WL 5873295 (D. Mass. Oct. 29, 2013)**

Plaintiff was a Lead Lab Assistant for the employer, responsible for supervising the lab and staff during her shift. Plaintiff began receiving mixed performance evaluations, including concerns over her interpersonal skills, her ability to accept criticism, and her attitude in dealing with difficult situations. She was told that she needed to address all comments and concerns directly with her coworkers or supervisors, and refrain from discussing those issues with staff. A number of employees began to complain about plaintiff as well, stating that she was unfair in the distribution of assignments, made the work environment very uncomfortable, and gossiped about the staff. Plaintiff took FMLA leave in September 2010, during which employees continued to complain about the work environment. Plaintiff was counseled on the teamwork issues when she returned from her leave. An office evaluation subsequently conducted by the employer's Human Resources department found that many of the workplace issues stemmed from plaintiff's behavior. Plaintiff was placed on a final written warning and performance improvement plan. She was subsequently discharged after it was determined that her conduct did not improve after receiving the final written warning.

Plaintiff filed suit against the employer claiming that her discharge was in retaliation for her taking FMLA leave. The employer then moved for summary judgment. The district court held that a two-month proximity between the FMLA leave and plaintiff's discharge was close enough to suggest a retaliatory motive. As a result, plaintiff established a prima facie case for retaliation. However, the court held that she failed to establish the reason for her termination was pretextual. The court looked to the increasingly negative performance evaluations, the HR office evaluation, and the timeline of complaints from employees as a legitimate reason for plaintiff's termination. The court did not change its opinion in light of plaintiff's allegation that some of the employee complaints may have been fabricated in retribution for plaintiff's reporting of violations of the employer's sexual harassment policy. The court held that even if the reports were fabricated, the employer's reliance on the number of reports coming in was sufficient to justify the reason for termination. As a result, the court entered summary judgment in favor of the employer.

**Taylor-Novotny v. Health Alliance Medical Plans, 2013 WL 5832670 (C.D. Ill. Oct. 30, 2013)**

Plaintiff was a Contract Specialist for the employer and was diagnosed with MS in April 2007. She requested and was granted FMLA leave beginning in 2008. Before her diagnosis, plaintiff had negative job evaluations beginning in January 2007 regarding her punctuality and work attendance. The issues with punctuality persisted through 2010, despite the employer's attempt to remedy the issue by pushing back plaintiff's start time twice. Plaintiff also failed on a number of occasions to notify her supervisor when she was going to be late, inaccurately reported her time, failed to complete negotiations with six medical providers, and failed to report her contract negotiations progress to her supervisor. The employer also received several complaints from providers about plaintiff's lack of responsiveness. As a result, the employer terminated plaintiff's employment on July 30, 2010.

Plaintiff filed suit, claiming her discharge was in retaliation for her taking of FMLA leave. Plaintiff also claimed that the employer interfered with her rights under the FMLA. The

employer filed for summary judgment, which the court granted on both counts. Regarding the retaliation claim, the court held that plaintiff's repeated instances of unexplained tardiness and her continued refusal to report to her supervisor failed to meet the employer's legitimate expectations. The court held that plaintiff's general lack of accountability meant that she could not establish a prima facie case of retaliation under the FMLA. As to the interference claim, the court found plaintiff failed to present any evidence that the employer denied her leave, including instances where plaintiff's notice for leave was untimely. Absent any leave being denied, plaintiff could not maintain a claim for interference.

**Cobb v. Florence City Board of Education, 2013 WL 5295777 (N.D. Ala. Sept. 18, 2013)**

Plaintiff worked first as a Special Needs Teaching Assistant and then as a Campus Security Officer with the employer from approximately 2004 through 2010. Plaintiff was on FMLA leave following surgery from February 22, 2010 until May 17, 2010. Due to budget cuts, the employer decided to eliminate plaintiff's position along with another security officer position in May 2010. Plaintiff subsequently applied for six positions with the employer-- two Special Education Teaching Assistant positions and four Custodian positions. He first applied for a Special Education Teaching Assistant position, but that position was awarded to another candidate on June 3, 2010. The employer argued that the other candidate received the position because he had a working history with the assigned facility, had developed good relationships with the students, had shown an ability to work with special needs children, and shown that he was a community leader outside of the school. Plaintiff did not receive an interview for any of the other positions.

The court granted summary judgment in favor of the employer. Regarding the first Special Education Teaching Assistant position, the court found that plaintiff had not provided any evidence that he was so much more qualified than the other candidate that no reasonable decisionmaker would have chosen the other candidate over plaintiff. The disparities between plaintiff's previous work responsibilities and the more instructional nature of the teaching positions showed that plaintiff did not have much more experience than the other candidate. Plaintiff had only worked one-on-one with students in the past, but the position required supervision of many students at once. As a result, plaintiff did not have previous experience for the exact position, and the employer could value the other candidate's experience and skill over plaintiff's only partially relevant skill set. As to the remaining positions, the court found that too much time had elapsed between plaintiff's FMLA leave and the filling of the open positions to create a causal connection between the two. Plaintiff argued that, during the year between his leave and his applications to these positions, the employer was consistently reminded of his FMLA leave due to his pending charge of discrimination. The court stated that there was no basis by which to "restart" the clock and there was no evidence that the pendency of the charge of discrimination led to repeated reminders of plaintiff's FMLA leave. Moreover, the court found that the candidates who did receive the five jobs were significantly more qualified than plaintiff due to their job experiences that corresponded exactly with the job responsibilities for the open positions.

**Attigbe-Tay v. SE Rolling Hills LLC, 2013 WL 5954685 (D. Minn. Nov. 7, 2013)**

The employee worked as a nurse at a senior living facility, and was granted twelve weeks of FMLA leave for knee surgery. The employer required her to return to work without restrictions. Pursuant to the employer's handbook, the employee also was required to provide certification from her health provider that she was able to resume work. The handbook further stated that if medical restrictions existed at the end of the leave, the company would "review and discuss the situation with the employee" and "determine whether the work restrictions can be reasonably accommodated." The employee returned to work as scheduled, but her physician's note stated that she could not kneel, squat or lift more than fifty pounds for a six-week period. The employee's job description noted that nurses are occasionally required to kneel, squat and lift up to 100 pounds. According to the employee, even though she was required to lift fallen patients, in the past, she had requested assistance from other staff members. The day after the employee returned from leave, the employer discharged her, and invited her to reapply once her temporary restrictions were lifted.

The employee filed a lawsuit alleging interference and retaliation under the FMLA, but the court granted summary judgment for the employer. The court rejected the employee's FMLA interference claim because, upon return from FMLA leave, an employer is under no obligation to reinstate the employee if she remains unable to perform the essential functions of her position. In addition to the handbook, the employee signed a "Physical Job Demands" document at the start of her employment, which reflected the company's expectation for its nurses to kneel, squat, and lift up to 100 pounds. The court found such physical tasks are inherent to the duties of nurses. Additionally, the court rejected the employee's FMLA retaliation claim because the company proffered a legitimate, non-retaliatory reason for her discharge—that the employee was unable to perform the essential functions of the position. Furthermore, the court held that the timing of the termination alone was insufficient to demonstrate pretext, particularly because the timing was entirely consistent with the company's proffered reason for terminating her employment.

**Travers v. Cellco Partnership, 2013 WL 6048177 (M.D. Tenn. Nov. 14, 2013)**

The employee worked for the employer as a senior customer service representative. She notified her employer that she was suffering from migraine headaches and needed to take intermittent FMLA leave. The following year, the employee began receiving treatment for a heart condition and took approved FMLA leave. When the employee returned to work after her FMLA leave, she was discharged for repeatedly engaging in violations of the employer's code of business conduct. The employer claimed that it warned and disciplined the employee for these acts, and that she was discharged because the employer discovered a the employee's latest and final violation—proactively waiving a mail-in rebate.

The court granted the employer's motion for summary judgment and dismissed the employee's FMLA interference and retaliation claims. The employee's interference claim was not viable because the employer did not deny her FMLA benefits to which she was entitled. As for the retaliation claim, the court found that the employer provided a legitimate, non-discriminatory reason for her discharge following her FMLA leave—repeated violations of the

employer's code of conduct. The employee failed to meet her burden to show that the articulated reason was pretext for retaliation. The court held that temporal proximity cannot be the sole basis for finding pretext. The employer demonstrated an honest belief in its proffered reason and showed that it based its decision on the particularized facts before it at the time—repeated verbal and written warnings before and after employee began her FMLA leave.

**Murphy v. Ohio State University, 21 WH Cases2d 914 (6th Cir. 2013)**

The employee worked as a public safety officer for defendant. She took FMLA leave from September 24, 2011 to December 2011. Before taking her leave, she was cited by the Columbus Police Department in connection with an incident relating to the employee's refusal to pay for parking in a parking lot. Defendant received a copy of the citation three days later on September 27, 2011. It also learned that the employee was working at another job while on FMLA leave. After returning from leave, defendant investigated the citation and misuse of FMLA leave and gave the employee a three-day unpaid suspension. She then filed suit for retaliation under the FMLA.

The Sixth Circuit affirmed the grant of summary judgment for defendant. It held that the investigation itself did not constitute an adverse employment action. While the suspension did constitute an adverse action, the court noted that defendant adduced a legitimate, non-discriminatory reason for the suspension, which was that its investigation showed that the employee used poor judgment with respect to the parking lot incident and that she was working during her FMLA leave. While the employee claimed the investigation was flawed (e.g., the university did not contact her doctor to clarify reasons underlying her leave), the court explained that because defendant honestly believed the facts supporting its investigation, employee's retaliation theory failed. More specifically, the employee did not offer any evidence rebutting defendant's articulated reasons for suspending her. Also, the employee contended that because her FMLA leave and suspension were in close proximity in time, she could demonstrate pretext. However, because she could not offer any evidence beyond this temporal proximity, that alone was not sufficient to prove retaliation.

**Mercer v. The Arc of Prince Georges County, Inc., 2013 WL 3470489 (4th Cir. July 11, 2013)**

Plaintiff, a Finance and Benefits Coordinator, went on several weeks of FMLA leave after an accident. While plaintiff was on leave, her co-workers performed her job duties and discovered that many eligible clients were not receiving benefits due to plaintiff's failure to submit paperwork over an extended period of time. On two previous occasions when plaintiff was on leave, the employer had noticed she failed to submit certain forms. When plaintiff returned to work, she was placed on administrative leave "due to unsatisfactory job performance and incomplete paperwork." About one month later, she was discharged for unsatisfactory job performance. Plaintiff sued, alleging interference and retaliation under the FMLA. The district court had granted the employer's motion for summary judgment on both FMLA claims, concluding plaintiff failed to perform her duties satisfactorily before she took her FMLA leave and that she failed to establish that the employer's proffered reason was pretext. Plaintiff appealed to the Fourth Circuit.



The Fourth Circuit affirmed the district court's decision granting summary judgment. Although plaintiff received a satisfactory performance review in October 2010, the court noted that the employer discovered her poor performance after the review. Further, the court decided it was irrelevant that the evidence might not have been discovered had plaintiff not taken FMLA leave. Additionally, plaintiff's subjective opinion that her performance was adequate was not sufficient to survive a motion for summary judgment in light of the substantial evidence presented by the employer that she was terminated for her poor performance. Finally, the Fourth Circuit found that the one month period between plaintiff's leave and her discharge was insufficient to demonstrate pretext on plaintiff's retaliation claim. The employer's proffered reason was consistent and demonstrated a legitimate business rationale for termination. Therefore, the Court affirmed the grant of summary judgment in favor of the employer.

**McCauley v. ASML US, Inc., 917 F. Supp. 2d 1143 (D. Or. 2013)**

Plaintiff supervised a number of on-site engineers for defendant's client. Plaintiff's job performance began to deteriorate around 2009 and continued up and until defendant terminated his employment two years later. Evidence of this deterioration included plaintiff's letter of apology for threatening a colleague at a supervisor training seminar, emails documenting management's disapproval of plaintiff's preparation and demeanor during at a post-crisis meeting defendant's client, and complaints from defendant's client about plaintiff's job performance. During this period, plaintiff sought and received medical leave under the FMLA, the Oregon Family Leave Act and also had an outstanding application for additional time off. On February 25th, 2011, plaintiff met with his immediate supervisor to discuss a "Performance Improvement Plan." Following a heated discussion and plaintiff's refusal to participate in the plan, the immediate supervisor's superior notified the appropriate human resources representative that he wanted to terminate plaintiff's employment. Defendant then terminated plaintiff's employment on February 28th, 2011.

Plaintiff brought several claims against defendant, including that defendant interfered with his rights under the FMLA by terminating him in retaliation for requesting and taking medical leave. The court denied plaintiff's motion for summary judgment. The court found that defendant established a genuine dispute of material fact as to whether plaintiff was exposed to any negative consequences because he requested and took FMLA leave. The court noted that defendant presented evidence that defendant terminated plaintiff's employment because of poor job performance, and that plaintiff failed to establish that the decision-maker who discharged plaintiff, as well as defendant's human resources representative, were aware of plaintiff's request for FMLA leave.

**Ray v. United Parcel Service, 2013 WL 5504419 (S.D. Miss. Sept. 30, 2013)**

During plaintiff's employment he was promoted to the position of hub feeder and air division manager at the employer's Jackson, Mississippi hub. In this position, plaintiff was responsible for managing others. After a year in the position, plaintiff was placed on successive periodic review periods (30, 60, and 90 days) in 2004 in order to prompt improvement in several areas. Thereafter, in 2006 plaintiff suffered two separate heart issues which necessitated his absence from work. In each instance, plaintiff's wife alleged she completed and sent paperwork

requesting leave. In 2007 plaintiff was placed on a Performance Improvement Plan and was informed that he would not receive stock options for 2007 nor would he receive a raise for the following year until his leadership skills improved.

Plaintiff's facility was also subject to a third-party audit in 2007. When the facility failed the audit its managers were informed of the seriousness of the failure and that another failing score would necessitate serious consequences for the management team. After the facility once again failed the 2008 audit, plaintiff was demoted.

Plaintiff alleged that the withholding of his annual stock options, raise and his demotion were in retaliation for taking FMLA leave. The District Court adopted the Magistrate Judge's report and recommendation granting defendant's motion for summary judgment dismissing, *inter alia*, plaintiff's FMLA retaliation claim because it was reasonable to conclude that FMLA leave was not a motivating factor in the employer's decisions. The Magistrate Judge concluded that defendant met its burden by articulating legitimate, nonretaliatory reasons for the adverse employment actions, and that there was sufficient, uncontroverted evidence that retaliation had not, in fact, occurred.

*Summarized Elsewhere:*

*Williams-Grant v. Wisconsin Bell, Inc.*, 2013 WL 5447952 (E.D. Wis. Sept. 30, 2013)

*Bradley v. Little Rock Wastewater Util.*, 517 Fed. Appx. 530 (8th Cir. 2013)

*Curry v. Goodwill Industries of Kentucky, Inc.*, 20 WH Cases2d 986 (W.D. Ky. April 8, 2013)

*Shreeve v. D.O. McComb & Sons, Inc.*, 2013 WL 5707196 (N.D. Ind. Oct. 21, 2013)

*Curry v. Brown*, 2013 WL 4809279 (E.D. Ky. Sept. 9, 2013)

*Vess v. Scott Medical Corp.*, 20 WH Cases2d 759 (N. D. Ohio March 15, 2013)

*Blosser v. AK Steel Corp.*, 20 WH Cases2d 835 (6th Cir. 2013)

*Duggins v. Appoquinimink Sch. Dist.*, 921 F. Supp.2d 283 (D. Del. 2013)

*Mercer v. Arc of Prince George's Cnty., Inc.*, 2013 WL 451814 (D. Md. Feb. 5, 2013)

*Coleman v. FFE Transp. Services, Inc.*, 2013 WL 1914932 (N.D. Tex. May 9, 2013)

*Clements v. Prudential Protective Services, LLC*, 20 WH Cases2d 1102 (E.D. Mich. 2013)

*Hardwick v. Amsted Railway Co., Inc.*, 929 F. Supp. 2d 1129, 20 WH Cases2d 778 (D. Kan. 2013)

March 7, 2013)

*Bagi v. AT&T Mobility Servs. LLC*, 20 WH Cases2d 1062 (W.D. Mich. 2013)

*Talbott v. Time Warner Entm't-Advance/Newhouse P'ship*, 2013 WL 152179 (W.D. Tex. Jan. 11, 2013)

*Jones v. Sharp Electronics Corp.*, 932 F. Supp. 2d 893 (W.D. Tenn. 2013)

*Nolen v. Fedex Techconnect, Inc.*, 2013 WL 4774771 (W.D. Tenn. Sept 4, 2013)

*Christmas v. Arc of the Piedmont*, 2013 WL 718812 (W.D. Va. Feb. 27, 2013)

*Scott v. Illinois Department of Revenue*, 2013 WL 5098059 (C.D. Ill. Sept. 12, 2013)

*Bright v. Evonik Cyro, LLC*, 2013 WL 2395264 (E.D. Ark. May 30, 2013)

*Boronda v. Moye*, 2013 WL 868300 (D. Or. Feb. 7, 2013)

*Benavides v. City of Oklahoma City*, 508 Fed. Appx. 720, 20 WH Cases2d 331 (10th Cir. 2013)

*Mathew v. North Shore-Long Island Jewish Health System, Inc.*, 2013 WL 5799883 (E.D. N.Y. Oct. 23, 2013)

**Lassalle v. Port Authority of New York & New Jersey, 2013 WL 6094339 (D. N.J. Nov. 19, 2013)**

**Maack v. School Board of Brevard County, 2013 WL 6050749 (M.D. Fla. Nov. 15, 2013)**

**Flanner v. Chase Inv. Services Corp., 2013 WL 5533569 (W.D. La. Oct. 4, 2013)**

**Tillman v. Ohio Bell Telephone Co., 2013 WL 5539612 (6th Cir. Oct. 8, 2013)**

3. Pretext

**Hiltabrand v. Direct Energy, LP, 2013 WL 3480523 (S.D. Tex. July 10, 2013)**

On November 19, 2010, the employee was notified that she had a position as an Internal Communications (“IC”) Manager that took effect on December 1, 2010 and would end on July 1, 2011 unless extended in writing. At that time, the employee and her supervisor agreed to meet on June 1, 2011 to discuss the status of plaintiff’s position. On June 6, 2011, the employee notified her new supervisor she would undergo eye surgery on July 11 and recovery would last three weeks. The following day, June 7, plaintiff’s supervisor recommended that plaintiff’s employment be terminated July 1. Plaintiff then filed an FMLA retaliation claim.

The court adopted the magistrate judge’s memorandum and recommendation, and denied defendant’s motion for summary judgment as to plaintiff’s FMLA retaliation claim. The court ruled that plaintiff satisfied her burden of showing that defendant’s articulated legitimate, non-retaliatory reason for terminating plaintiff was pretextual. Defendant argued that the decision to terminate plaintiff’s employment effective July 1, 2011 was made back in November 2012 so there was no temporal proximity between plaintiff’s request for FMLA-qualified leave and her termination. The court disagreed because the parties left open the possibility that plaintiff would hold the position beyond July 1, 2011. In addition, in internal company e-mails discussing the decision to terminate plaintiff, managers referred to not only plaintiff’s “less than ideal performance,” but to her intention to undergo surgery and the potential hardships of extended leave on the business. The court found that these statements, the fact that the position was not definitively going to end on July 1, 2011, and the temporal proximity between plaintiff’s notifying her supervisor of her surgery and defendant’s notification of plaintiff’s impending termination were sufficient to raise a question of fact as to the legitimacy of defendant’s legitimate, non-retaliatory reason for plaintiff’s termination.

**Vess v. Scott Medical Corp., 20 WH Cases2d 759 (N. D. Ohio March 15, 2013)**

Plaintiff, a respiratory therapist team leader, took FMLA leave for a workplace injury, and returned to work on May 10. During the leave, the employee was contacted several times for work-related questions and alleged she was required to enter data into the computer, work on performance evaluations, and complete educational competencies. On May 12, an incident occurred in which plaintiff thought a physician had confused one patient’s ventilation order with another’s so she canceled the order until she could confer with the physician. The physician became upset, human resources suspended plaintiff pending investigation, and she was then discharged. The employee sued, claiming FMLA discouragement, FMLA interference, and FMLA retaliation. The court granted summary judgment on the discouragement claim, noting plaintiff’s only evidence was that other employees were informing her that her boss was going to

replace her, but the employee contacted human resources, who assured her that her position was being held open for her, and she was reinstated.

The court denied summary judgment on the interference claim, concluding there were disputed issues of material fact as to how much work the employee was required to complete while on leave. The court stated, “The ability to take FMLA leave is not conditioned upon the willingness of the employee to remain ‘on call’ to the employer.” While occasional calls about one’s job while on leave is a professional courtesy, a jury could find the aggregate tasks plaintiff was required to complete exceeded the limited scope of passing along institutional knowledge and providing closure on completed assignments.

Finally, the court denied summary judgment on the FMLA retaliation claim, citing issues of material fact related to the incident with the errors on the patient respiratory order. While the employer argued that the “honest belief rule” required dismissal, the court found there was an issue of fact as to whether the employer held an honest belief in their reason for terminating plaintiff. Plaintiff presented evidence that the employer had a progressive disciplinary protocol and the incident at issue in which the incident received the lowest possible severity score. Additionally, there was testimony that the decisionmaker was upset with her for taking leave and had told others she was going to replace plaintiff.

**Anderson v. Discovery Commun., LLC, 20 WH Cases2d 947 (4th Cir. 2013)**

Plaintiff was an attorney for the employer. In October 2006, the employee took FMLA leave to consult a physician concerning a potential sleep disorder. She was released to return to work in late November with a full duty hour restriction to 8 hours per day. That restriction was subsequently lifted in mid-December. When the employee returned to work, she asked for a maximum 8 hour day. At her employer’s request, she submitted a proposal, but only committed to work in the office between 11 a.m. and 4 p.m. She also refused to track her personal, break or lunch time or account for her specific workload unless other members of her group were also required to do so. The employer rejected the proposal, stating that the proposal would not enable her to perform the responsibilities of her job. On January 3, 2007, the employer informed the employee it was terminating her employment. The employer testified that plaintiff was told she was being discharged because she was untrustworthy and had not accurately represented her time entries documenting her work hours as requested by her manager. During litigation, the employer also recounted several other factors underlying the decision, including the employee’s insubordination, combative attitude, and prior misrepresentations of discussions with co-workers and supervisors.

The employee filed suit alleging, among other things, retaliation and interference under the FMLA. She argued that the employer violated the FMLA by unlawfully interfering with her right to take a reduced work schedule upon her return to work in November, and that her subsequent termination constituted retaliation under the FMLA. The employer moved for summary judgment on both claims. The district court granted the motion. With respect to the interference claim, the court held that plaintiff was required to show not only the fact of interference, but also that the violation prejudiced her in some way. Here, the only injury plaintiff allegedly suffered as a result of the denial of her request for a reduced work schedule

was that she was not permitted to work a reduced schedule. Because she did not lose any compensation or benefits as a result of the denial of her request, her interference claim failed. The court also summarily rejected her retaliation claim, citing the absence of evidence of pretext. The court characterized the employer's reasons for the discharge as both consistent and supported by specific examples of objectionable behavior, including the issue with the timesheets. The fact that the employer only mentioned the issue with the timesheets in the termination meeting was simply the "proverbial straw that broke the camel's back" and not suggestive of changing explanations sufficient to give rise to an inference of pretext.

**Durden v. Ohio Bell Tel. Co., 2013 WL 1352620 (N.D. Ohio April 2, 2013)**

The employee was a unionized customer service representative for defendant. Following the termination of her employment for fraudulently using benefits under the FMLA, the employee sued her former employer for retaliation under the FMLA. Prior to her discharge, the employee sought and was granted intermittent FMLA leave for migraine headaches. Her certification stated that she might be out sick from work for two to three days per month. On July 14, 2011, the employee called in and requested a vacation day. When the request was denied, she stated she would take an FMLA day instead. The employer subsequently informed plaintiff that because she had more FMLA absences than specified in her certification, she would have to provide a certification from her physician that she was too incapacitated to work on that day. Plaintiff submitted the requested certification. Several weeks later, plaintiff submitted a marriage license to the employer for benefits purposes. The employer noticed that the date on the license was July 14, 2011, and initiated an investigation for potential misuse of FMLA. During the investigation and subsequent meeting between management and union officials, the employee confirmed that she obtained her marriage license on July 14, that she had pre-planned to get a license that day, and that she did not think there was anything wrong about reporting to the company that she was too incapacitated to work.

The employer moved for and was granted summary judgment on plaintiff's FMLA retaliation claim. The court concluded that the employer had articulated a legitimate non-discriminatory reason for the discharge which plaintiff failed to overcome with evidence of pretext. At best, plaintiff attempted to demonstrate pretext by pointing to the determination of Ohio's Unemployment Compensation Review Commission that there was insufficient evidence of a motive on her part to "fraudulently take an FMLA day off." The court held that the decision of the Review Commission was "not relevant" for purposes of deciding if plaintiff had carried her burden of proof. The court explained that where an employer reasonably and honestly relied on particularized facts in making an employment decision, "it is entitled to summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial, or baseless." Here, plaintiff failed to dispute the employer's honest belief as to the reasons for her discharge or otherwise point to any evidence demonstrating that employees outside of her protected class were treated differently. Finally, the court rejected plaintiff's attempt to re-characterize the retracted grant of FMLA leave for July 14, 2011 as interference, concluding that the facts and circumstances did not support such a claim.

**Hashemian v. Louisville Reg'l Airport Auth., 2013 WL 1788473 (W.D. Ky. Apr. 26, 2013)**

Plaintiff worked for the employer for twenty-three years as an environmental manager. Plaintiff began complaining about his supervisor in 2007 and continued to do so through 2009, when he filed a charge of discrimination. When plaintiff was placed on a performance improvement plan, he filed a second charge of discrimination, called into work sick, and then took FMLA leave. Plaintiff was on leave for two months for his medical condition of coronary artery disease with angioplasty and stenting placement. When plaintiff returned to work, he provided a note from his doctor releasing him to work but requesting that plaintiff avoid outside activity and unnecessary stress. The employer requested clarification from the doctor regarding the restrictions, which plaintiff provided. Approximately two weeks later, the employer terminated plaintiff's employment after determining that, with the city experiencing temperatures below forty degrees for approximately five months out of the year, the employer could not accommodate plaintiff's restrictions. The employer also determined that there were no open positions for which plaintiff was qualified.

Plaintiff filed suit, alleging FMLA retaliation, among other claims. The employer moved for summary judgment, which the court granted. The court found that plaintiff did not present sufficient evidence of pretext. Plaintiff claimed that the employer should have looked at the normal highs rather than the normal lows in determining how often the temperature would drop below forty degrees because the average lows often took place late at night or early morning—hours he would not be expected to work. The court rejected plaintiff's arguments. The evidence established that plaintiff had outdoor duties, which included responding to spills or environmental emergencies that could happen at any hour. Further, the record established that the employer gathered information from plaintiff's doctors and its own doctors about the extent of the restrictions and discussed the feasibility of accommodating the restrictions over a nearly three-week period before ultimately deciding to terminate plaintiff.

**Lorentz v. Alcon Laboratories, Inc., 2013 WL 3368987 (5th Cir. July 8, 2013)**

Plaintiff began working as an account manager for the employer in January 2007. Plaintiff's 2007 performance review indicated that she fully met expectations, but it also identified several areas that needed improvement. In May 2008, Plaintiff commenced an FMLA leave of absence to care for her daughter. Following her return from her FMLA leave of absence, Plaintiff struggled with her job performance. In addition, even though Plaintiff had exhausted all of her FMLA leave, Plaintiff missed additional days of work. Plaintiff and her superiors met and discussed her performance in August 2008, September 2008, and November 2008. Plaintiff was placed on a performance improvement plan on December 1, 2008, and she was terminated in May 2009 for failing to meet performance expectations.

The Fifth Circuit affirmed the district court's decision to grant summary judgment in the employer's favor. The sole issue before the court was whether plaintiff could show the employer's reason for terminating her was pretext. The court first examined retaliatory statements plaintiff alleged her managers made to her. The court determined the statements were not retaliatory in nature because the statements focused on how plaintiff failed to keep up with her work rather than on how plaintiff's FMLA leave interfered with her work. The court also

rejected plaintiff's contention that her performance was not deficient, noting that plaintiff failed to address, among other deficiencies, the deficiencies that were documented prior to her commencing FMLA leave. The court also noted that plaintiff failed to demonstrate pretext through a showing that she was subject to less favorable treatment than other similarly situated employees who struggled with the same performance issues.

**Hall v. Ohio Bell Telephone Company, 20 WH Cases2d 1540 (6th Cir. 2013)**

Plaintiff worked for the employer as a customer service representative between 2001 and 2010. Plaintiff began taking FMLA leave in September 2007 on an intermittent basis. An attendance manager suspected that plaintiff was misusing her FMLA leave because a newspaper article quoted plaintiff, a self-published novelist, as saying that it takes perseverance to publish a novel, including taking days off work to make your dream come true. The manager requested that the employer's asset protection department investigate whether plaintiff misused her FMLA leave in November 2007; that request was denied. In 2008 and in 2009, plaintiff exhausted her FMLA leave by mid-year but was able to work the rest of the year with regular attendance. And in early 2010, plaintiff reported FMLA leave every Monday she was supposed to work. The attendance manager again requested an investigation, which was conducted and uncovered no misuse. In August 2010, plaintiff's step-grandchild died. Plaintiff presented the attendance manager with a letter stating that her grandchild had died. Plaintiff sought and received two paid days of leave and two additional unpaid days of leave in accordance with the employer's funeral leave policy that provided for leave for the death of a biological grandchild. Later, following an investigation, the employer determined that plaintiff fraudulently represented her biological grandchild had died to improperly receive benefits under the funeral leave policy. Employer suspended plaintiff and later discharged her for intentionally engaging in fraud.

The Sixth Circuit affirmed the district court's decision to grant summary judgment in the employer's favor. The court held that plaintiff failed to show the reason for termination was pretext based on temporal proximity because three years had passed between the date plaintiff first requested FMLA leave and the date plaintiff was terminated. While plaintiff pointed to the close proximity between her initial request for leave and the attendance's manager's first request for an investigation, the court found that the employer presented evidence showing it had a good faith basis for believing plaintiff may have been abusing her FMLA leave and for investigating the same. The court also held that plaintiff failed to show that the employer's stated reason for termination was insufficient because (1) plaintiff failed to show that the employer knew that it was plaintiff's step-grandchild and not biological grandchild who died, and (2) plaintiff failed to show that a similarly situated employee was not fired for a similar funeral leave violation. Although the employee denied that she intentionally violated the funeral leave policy, the court found this was unavailing because the employer articulated sufficient facts to demonstrate that it had an honest belief that the employee engaged in intentional funeral leave fraud.

**Luckette v. F.M. Howell & Co., Inc., 2013 WL 1800190 (W.D. N.Y. Apr. 29, 2013)**

Plaintiff was an employee in defendant's marketing services business. On December 28, 2008, defendant learned that plaintiff sustained a back fracture and was diagnosed with a heart condition following a seizure. Plaintiff was immediately granted an FMLA leave, which lasted

into March 2009. While plaintiff was on FMLA leave, defendant discovered information which led the company to conclude that plaintiff violated his non-compete and intellectual property purchase agreements. Plaintiff's employment was terminated on March 23, 2009.

Plaintiff filed the instant action alleging defendant terminated him in retaliation for taking FMLA leave. The court noted that defendant would have violated the FMLA if its decision to terminate plaintiff was motivated by retaliatory animus, even if valid objective reasons for plaintiff's termination existed. However, the court determined that there was no indication that plaintiff's discharge was causally related to his FMLA leave. In fact, when defendant was notified of plaintiff's condition, the employer immediately approved his leave. The court concluded that there was no basis for a reasonable jury to infer that plaintiff's termination was motivated by retaliatory animus. Accordingly, the court granted defendant's motion for summary judgment on plaintiff's FMLA retaliation claim.

**Lukic v. Eisai Corp. of N. Am., Inc., 919 F. Supp. 2d 936 (W.D. Tenn. 2013)**

The employee, a pharmaceutical saleswoman, was terminated for falsification of sales call reports. She returned from a pregnancy and child-birth related FMLA leave in late February. On April 1, the employee was reassigned to a newly drawn sales territory as the result of a sales force restructure. On April 26, a call was made to the company's ethics hotline reporting that the employee falsified her sales call reports. The call information was forwarded to the Associate Director of Human Resources who could not begin the investigation until mid-June due to the volume of work she had in relation to the restructure as well as personal time off. During this time, the employee was denied a transfer to another territory based on restructure criteria. However, the employer then granted the transfer on second request due to lack of interest by other employees. The day before the investigation began, the employee received a performance review with an overall rating of exceeds expectations. The investigation included interviews with the employee as well as following up with doctors' offices on suspect call entries. The investigator concluded that the employee falsified her call activity records and the employer terminated her employment on July 16.

The employee filed multiple claims, including an FMLA retaliation claim. The court granted the employer's motion for summary judgment. The employee's basis for the FMLA retaliation claim was temporal proximity. She attempted to overcome the pretext burden by arguing that various aspects of the employer's investigation, including the delay in starting the investigation, and the fact that she received a "glowing performance review" the day before the investigation began created an issue of material fact. However, the court found that the evidence presented regarding the investigation did not present specific facts to create any issue of material fact. The court noted that it was undisputed that the employee agreed that the investigation should have been conducted, and she reported having spoken face-to-face with doctors at times when they were confirmed to have been out of town and unavailable. As to proximity, the employer terminated her employment five months after she returned from FMLA leave. The court found this insufficient to a triable issue of material fact regarding pretext, as such a length of time is not a strong indicator of pretext, is not supported by precedent, and the employee provided no other evidence to be bolstered by proximity.



**Yamamoto v. Panasonic Corp. N. Am., 2013 WL 3356214 (D. N.J. July 2, 2013)**

Plaintiff served in various non-exempt executive assistant roles for defendant for fourteen years. While employed at defendant, plaintiff took numerous leaves of absence to attend to her own health issues or that of a family member. In August 2011 and January 2012, plaintiff took leave to attend to her sick father in Japan. Plaintiff claimed she worked remotely while in Japan. According to the timekeeping system, defendant maintained that plaintiff was working a significant amount of hours while she was away and her manager stated that she had not been asked to do any work. In February 2012, plaintiff was contacted by a HR representative and told to stop working and to complete and submit paperwork to request the FMLA. Defendant then approved plaintiff's FMLA leave. Plaintiff returned in March 2012 and was given the option to resign or prove that she had actually worked the hours she claimed while in Japan. The following week plaintiff brought documentation to support the hours she worked. Defendant then terminated plaintiff's employment. Defendant maintained that plaintiff's employment was terminated because she exaggerated the hours she worked, while plaintiff maintained that her employment was terminated because of a trust issue. Plaintiff then brought multiple claims against defendant, including FMLA interference and retaliation claims.

The District Court granted in part and denied in part defendant's motion for summary judgment. The court denied defendant's motion for summary judgment as to plaintiff's retaliation claim. The court found that that evidence in the record created a triable issue of fact as to whether defendant's stated reasons were pretextual. On the other hand, the court granted defendant's motion for summary judgment as to plaintiff's interference claim. The court ruled that plaintiff's interference and retaliation claims were redundant. The court found that the premise of both claims "is that defendant wrongfully terminated plaintiff when she returned from FMLA leave," and therefore dismissed the interference claim.

**Bagi v. AT&T Mobility Servs. LLC, 20 WH Cases2d 1062 (W.D. Mich. 2013)**

Plaintiff, a retail account executive, notified her sales manager that she would need six weeks of FMLA leave to undergo surgery. According to plaintiff, her manager then requested that she return to work earlier, or reschedule her surgery. Before going on leave, plaintiff attended a client event, which defendant claimed she appeared at without permission. Plaintiff disagreed, alleging her manager had given her permission. Her manager investigated her conduct, and the employer terminated her two days after she returned from leave. Plaintiff's subsequent lawsuit alleged she was discharged in retaliation exercising her rights under the FMLA.

The court denied defendant's motion for summary judgment. Because there were only two to three months between her notifying her employer of the need for leave and her discharge, plaintiff showed temporal proximity between the adverse action and the protected activity. The court found this sufficient to establish a prima facie case under Sixth Circuit precedent, but even if it were not, the court found the supervisor's alleged resistance to the employee's request for leave strengthened the causal connection. Defendant proffered a legitimate, non-discriminatory reason for the discharge because plaintiff attended the client event without permission. However, the alleged evidence that the sales manager gave her permission to attend the event, together with the temporal proximity of the decision and the manager's initial resistance to the employer taking

FMLA leave, was sufficient to raise a question of fact as to defendant's true motive for termination. Accordingly, the court denied defendant's motion for summary judgment.

**Surprise v. The Innovation Group, Inc./First Notice Systems, Inc., et al., 925 F.Supp.2d 134, 20 WH Cases2d 443 (D. Mass. 2013)**

Plaintiff was a quality assurance associate at defendant's call-center, where he monitored calls, coached customer-service representatives, occasionally supervised temporary employees, and answered telephones when the center was understaffed (about which he complained on multiple occasions). In 2005, a chiropractor diagnosed plaintiff with subluxation of the cervical and lumbar regions of his spine. For years thereafter, plaintiff's supervisor routinely permitted him to leave work to receive treatment from his chiropractor, including arriving late for work or leaving early as he needed. During that time, plaintiff never requested FMLA leave. In June 2010, plaintiff's new supervisor did not permit him to come and go as he pleased, but plaintiff still managed to visit his chiropractor with the same frequency during non-working hours. In September 2010, plaintiff requested a meeting with a newly-hired senior vice-president and complained about a number of issues regarding changes to his department, about not getting time off for his chiropractic treatment, and plaintiff also informed the vice president that he would be applying for FMLA leave. After hearing from others that plaintiff may have been distorting the conversation when talking to others, the vice president became irritated with plaintiff and decided he would terminate his employment for insubordination. Due to a scheduling conflict, the vice president instead suspended plaintiff until his final paycheck could be processed. On the next day plaintiff was scheduled to work, but before being suspended, he arrived with the intention of requesting FMLA leave, and he advised his supervisor that he would turn in the paperwork at the end of his shift. Before the shift ended, however, plaintiff was suspended and defendant ultimately terminated his employment.

Plaintiff sued, alleging violations of the FMLA and the ADA. Under the FMLA, plaintiff asserted that he was improperly denied FMLA leave, and that defendant retaliated against him for exercising rights under the statute. Defendant moved for summary judgment, which the court granted in part and denied in part. According to the Court, "it is undisputed that plaintiff never submitted a medical certification" and, therefore, cannot maintain his interference claim. The court, however, permitted plaintiff's retaliation to survive, concluding that he had engaged in protected activity when he informed the vice president of his intent to request FMLA leave, and plaintiff further established an inference of causation based on the close temporal proximity – just days – between his protected activity and his suspension. Further, the court explained, the fact that plaintiff had informed his supervisor of his intent to submit his FMLA paperwork by the end of his shift, "only hours before he was suspended . . . makes it slightly more likely that a reasonable juror would conclude that defendants' proffered reason is pretextual."

**Wilson v. Cleveland Clinic Found., 2013 WL 486310 (N.D. Ohio Feb. 6, 2013)**

Plaintiff, a pharmacist at the employer's hospital, brought an action against her former employer alleging FMLA retaliation and various state law claims. The court granted defendant's motion for summary judgment on plaintiff's FMLA claims, and remanded plaintiff's state law claims. The court ruled that plaintiff failed to establish a prima facie claim for FMLA interference because plaintiff did not offer any evidence that she provided defendant with

FMLA medical certifications in response to defendant's notice requesting such certifications. The court found that an employer may require that a request for leave be supported by a certification issued by a health care provider, and that it is the employee's responsibility to provide the employer with the requisite medical certifications to support a leave request.

In considering plaintiff's discrimination/retaliation theory of recovery under the FMLA, the court examined whether plaintiff suffered an adverse employment action. The court found plaintiff's arguments on constructive discharge unpersuasive. First, plaintiff could not rely on evidence that she received a corrective action as evidence of constructive discharge when the corrective action was based on her own misconduct. Similarly, the court found plaintiff's argument that the working conditions were intolerable unpersuasive because defendants reassigned the co-worker four months before plaintiff's resignation. However, the court found that plaintiff's reassignment was an adverse employment action because she may have lost a bonus as a result of the reassignment. The court also held that plaintiff established a prima facie causal connection between the adverse employment action and the exercise of her FMLA rights because the corrective action and reassignment followed closely on the heels of her FMLA leave.

Although plaintiff met her burden of establishing a prima facie case of retaliation, she failed to rebut defendants' non-discriminatory explanation for her reassignment. The court found that defendants reassigned plaintiff based on several employee complaints and her recent unprofessional conduct. The court then noted that plaintiff was required to prove that the employer's stated reason for the adverse action was pretextual and that the true reason was plaintiff's medical leave. However, the court found that plaintiff failed to provide any evidence of pretext for the adverse action. Thus, the court granted defendants' motion for summary judgment as to the FMLA retaliation claim.

**Arnold v. Pfizer, Inc., 21 WH Cases2d 385 (D. Or. 2013)**

Plaintiff was a sales representative for her employer. One of her duties was to provide healthcare providers with samples of the employer's products. Plaintiff was required to document this activity by using a specific form. Plaintiff started her employment in 1996 and initially enjoyed success. Starting in 2001, plaintiff suffered a series of medical setbacks. Between 2001 and 2005 she went on three FMLA leaves for various reasons. Then, in September, 2005, she was involved in a serious car accident. When she tried to return in March, 2006, employer-selected doctors delayed her return. In April, 2006, she was returned to work. From approximately November 2006 until June 2007, she was off on another leave. During this time, the employer and plaintiff disputed her fitness to return. Plaintiff complained the employer-selected doctors unreasonably delayed fitness for duty exams. When she returned, she had various restrictions and there were delays in meeting her requested accommodations. In early 2009, plaintiff was assigned a new supervisor. By May 2009, the employer investigated plaintiff for improperly documenting samples of the employer's products given to doctors. According to plaintiff, this was the first time she ever was talked to regarding her documentation habits. She was terminated for what the employer characterized as "very serious" non-compliance with employer policy. However, the employer was largely unable to articulate precisely what she had done wrong.

Plaintiff then filed suit, alleging multiple claims, including violations of the FMLA. The employer moved for summary judgment. The court denied the employer's motion as to plaintiff's FMLA claims. The district court concluded that plaintiff asserted an interference claim. The district court found that plaintiff was only required to show that her exercise of FMLA rights "was a negative factor" in the discharge decision. At that point, the burden switched to employer to establish she would have been terminated in any event. The district court rejected the employer's claim that this matter could be resolved on summary judgment because the employer had a history of complicating plaintiff's return to work, made repeated inquiries about her need for additional surgery, plaintiff told her employer that she would need more surgery and leave, and the investigation into the alleged misconduct was conducted after plaintiff informed her employer of her need for more surgery and leave time. The court ruled that a reasonable factfinder could conclude that the employer interfered with plaintiff's FMLA rights and that genuine issues of material existed regarding whether leave was a negative factor in plaintiff's discharge.

**Williams v. Suntrust Banks, Inc., 2013 WL 3829654 (E.D. Ark. July 23, 2013)**

Plaintiff was a Regional Operations Manager for defendant for about four years. Beginning in late 2007, plaintiff regularly began taking FMLA leave for a variety of reasons. In June 2010, defendant discharged plaintiff after she allowed control violations to persist at one branch and omitted the violations from her reports. Plaintiff filed suit, claiming that she was discharged in retaliation for taking FMLA leave.

Defendant moved for summary judgment, but the court denied the motion and held that the discharge may have been pretext for unlawful retaliation. First, the branch employees who committed the control violations were not disciplined at all, undermining the Bank's assertion that the violations were serious. Second, while plaintiff was on leave, her supervisor called her and asked in an "exasperated tone" when she would return to work, and the FMLA coordinator also called to inquire when plaintiff was planning to return. Third, plaintiff's supervisor recommended the discharge shortly after issuing plaintiff a positive performance evaluation. Finally, the supervisor only issued a warning to, but did not discharge, another Regional Operations Manager whose negligent performance of a cash count resulted in an actual monetary loss to the Bank.

**Hashemian v. Louisville Reg'l Airport Auth., 2013 WL 1788473 (W.D. Ky. Apr. 26, 2013)**

Plaintiff worked for the employer as an environmental manager and went on leave because of coronary artery disease. Upon his return, plaintiff provided a note from his doctor that released him to work, but requested he avoid outdoor activity. After plaintiff had worked a complete day, the employer told him that he could not work again until he provided a clarification of his work restrictions. Although plaintiff's doctor provided clarification, plaintiff was discharged two weeks later. The employer determined that, with temperatures below forty degrees for approximately five months each year, it could not accommodate plaintiff's restrictions without undue hardship. Additionally, there were no open positions for which plaintiff was qualified.

Plaintiff filed a lawsuit alleging retaliation in violation of the FMLA. The court granted summary judgment for the employer, finding plaintiff did not present sufficient evidence of pretext. The employer asserted that plaintiff was discharged because his permanent medical restriction prevented him from working outdoors in temperatures below forty degrees, leaving him unable to perform essential functions of his position. Plaintiff claimed that the employer should have looked at the normal highs rather than the normal lows in determining how often the temperature would drop below forty degrees. Plaintiff further argued that the average lows often took place late at night or early morning—hours he would not be expected to work. The court rejected these arguments. The evidence established that plaintiff had outdoor duties, which included responding to emergencies at any hour of the day. Further, the record established that the employer gathered information from plaintiff’s doctors and its own doctors about the extent of the restrictions and discussed the feasibility of accommodations for nearly three-weeks before ultimately deciding to discharge plaintiff. The employer’s decision was “reasonably informed and considered,” and ultimately the court refused to question the employer’s business judgment.

**Wright v. City of Topeka, Kansas, 2013 WL 5860724 (10th Cir. Nov. 1, 2013)**

Plaintiff, a manager for a city housing department, went on FMLA leave so she could donate a kidney. After returning from leave, plaintiff claimed that her supervisor, who used to stop by her office and talk to her, became evasive and barely spoke to her. Prior to taking FMLA leave, plaintiff indicated her desire to be promoted to the position of Deputy Director. The then-Deputy Director retired immediately before plaintiff went on FMLA leave. When plaintiff returned from FMLA leave, her supervisor convened two panels to interview candidates. One panel was made up of city employees, and the other of members of the neighborhood organization that participated in the city’s housing program. At the end of the interview process, both panels recommended another employee for the position, and plaintiff was ranked second by both panels. In her subsequent lawsuit, plaintiff claimed that her employer retaliated against her for taking FMLA leave by not promoting her to the deputy director position.

The district court had held that plaintiff failed to establish a retaliation claim under the FMLA, and the Tenth Circuit affirmed. The court found that, under the burden-shifting analysis, the employer believed that the other candidate was more qualified, and acted on the panel’s recommendation. The court rejected plaintiff’s claim that the employer’s reason was pretext. First, the court found that the four months between her leave and the adverse action was not sufficient, on its own, to establish pretext. Second, the court rejected plaintiff’s argument that she had more certification and experience, because it did not matter whether she subjectively felt that she was better qualified. Rather, it only mattered who the employer believed was more qualified for the position. Finally, plaintiff claimed that the city failed to follow its own policies, which stated that “vacancies shall be filled when possible by promotion from current City employees in lower classifications.” The court found that the phrase “when possible” gave the city discretion, and established that the policy was not a requirement.

**Palmieri v. City of Hartford, 947 F. Supp. 2d 187 (D. Conn. 2013)**

Plaintiff, a police officer, suffered from a back injury. Plaintiff could not successfully complete his firearms authorization training, and had a number of absences, which he attributed

to the injury. As a result, plaintiff was placed on desk duty. Eventually, the chief of police discharged plaintiff, allegedly claiming that he did not need cops behind desks, but instead needed them on the street. Following his discharge, plaintiff filed suit against the city under the FMLA.

The employer moved for summary judgment. At the outset, the court noted that plaintiff's complaint asserted a single FMLA count based on interference, discrimination, and retaliation. The court determined that the facts set forth by plaintiff were actually styled only as a claim for retaliation. Therefore, the court deemed abandoned plaintiff's interference claim, to the extent it was made. The employer's arguments, however, had mostly responded to a claim of FMLA interference, and did not directly address retaliation. The court denied summary judgment, noting to a number of negative comments allegedly made by supervisors. Based on this evidence, there was an issue of fact as to whether the purported reasons for the employee's discharge were pretext for retaliation.

**Terry v. County of Cayuga, 2013 WL 5464395 (N.D. N.Y. Sept. 30, 2013)**

The employee was a former assistant county attorney who sued the county for retaliating against her after she exercised her right to take FMLA leave. The county attorney had terminated her employment on the day she returned from leave. The employer filed a motion for summary judgment, claiming the true reason for the employee's discharge was a variety of different performance issues, including excessive personal phone usage, disorganized files, and missed court filings. The court denied the motion, however, finding the employee presented sufficient evidence to cast doubt on some of the employer's proffered reasons. The court cited the temporal proximity between the employee's leave and discharge, the county attorney's alleged expressions of hostility towards the employee's previous leaves, and the county attorney's failure to mention performance issues when he discharged the employee. The court did not give significant weight to the testimony supporting the employer, which described the employee's performance issues. The court noted that concerns about the employee's performance had been raised for years, but the county attorney took no action until the employee went on FMLA leave. The employer also pointed out that the county attorney had previously approved the employee's leaves of absence under the FMLA, but the court found this unpersuasive because the employee had "changed" over time by taking cumulatively more leave, and by going on intermittent leave.

**Cann v. Pierce Township, 2013 WL 5744945 (S.D. Ohio Oct. 23, 2013)**

The employee, a former zoning manager for a township, filed suit against her former employer alleging FMLA retaliation. In early January or February 2011, the employee advised her supervisor that she would need to be off for two weeks in April 2011 for shoulder surgery and that she would have limited use of her left arm when she returned. During the employee's medical leave, her supervisor recommended to the Board of Trustees that she be discharged. His recommendation was based upon several instances in which the employee undermined her superiors and exceeded her duties as a zoning manager. The employee returned to work on April 18, 2011 and was placed on administrative leave. The Board of Trustees held a special meeting the following day and voted to terminate the employee's employment.

The employee subsequently filed suit alleging FMLA retaliation and other claims pursuant to Title VII. The employer filed for summary judgment and the court granted the motion. The court specifically held that it was unnecessary to determine whether the employee could establish a prima facie case of FMLA retaliation, because even if she did, she could not establish that the employer's legitimate, non-discriminatory reason for her discharge was pretextual. The court noted that the evidence suggested that the township supported the employee when she requested a medical leave and the employee's supervisor ordered and had installed an under-the-counter computer keyboard tray for the employee's desk to accommodate any physical limitations that she might have upon her return from leave. In addition, no one discouraged her from taking leave or made disparaging remarks about her leave and the employee took a previous leave in 2010 without any negative consequences. The court concluded that no reasonable jury would find on the evidence presented that the township discharged the employee because she took a medical leave of absence.

**Henderson v. Grand Prairie Ind. School Dist., 2013 WL 4804300 (N.D. Tex. Sep 6, 2013)**

The employee, a special education teacher, notified her employer that she would need to go on FMLA leave. The next day, the employer opened an investigation to determine whether the employee was operating a business from her classroom during school hours. When the employer confirmed that this was the case, it terminated her probationary contract. The employee filed a lawsuit claiming the employer unlawfully interfered with her FMLA rights and retaliated against her because she went on FMLA leave.

The court granted summary judgment for the employer on both claims. Regarding the interference claim, the employee was granted the full amount of FMLA leave to which she was entitled. The employee's allegations of interference were inadequate. They merely described conduct by the employer's management that occurred simultaneously with the employee's request for and taking of leave, without showing that any adverse action was taken for illegitimate reasons. The employer's legitimate, non-discriminatory actions did not prejudice the employee's FMLA rights. The court also granted summary judgment on the retaliation claim. The employee could not show that other employees who did not exercise FMLA rights were treated more favorably, nor could she show that the decision to terminate her contract was made because she took FMLA leave. In fact, the administrator who recommended her discharge and the Board of Trustees that approved it had no knowledge of the employee's request for leave. Given the legitimate, non-discriminatory reason revealed in the employer's investigation of the employee, summary judgment was granted for the employer.

**Chase v. U.S. Postal Service, 2013 WL 5948373 (D. Mass. Nov. 4, 2013)**

The employee, a letter carrier, took multiple leaves of absence from 2006 through 2011 for physical injuries. His supervisor made multiple comments about the employee's leaves of absence over the post office's public address system, including: "Will ... the injury fraud specialist[] please report to the office"; "There's a job posted on the bulletin board for an injury compensation specialist since you're the biggest fraud when it comes to injuries." The supervisor also commented to the head of the employee's union that the employee was the "biggest fraud when it comes to workers' comp," and that he was concerned how injured

workers out on medical leave were negatively impacting the branch's statistics. While on FMLA leave, the employee was arrested and charged with possession of cocaine and related criminal charges. The supervisor learned of the arrest and read an Internet article about it that referenced his employment with the Post Office. A postal customer also called the supervisor to ask if her mail was safe. Five months after the arrest, the employer issued a "notice of removal" that initiated a termination process. The employee filed a civil action against the employer and his supervisor alleging claims of interference and retaliation under the FMLA.

The court granted summary judgment as to the employee's FMLA interference claim because the employee had testified that he was physically unable to return to work for more than a year after his termination, well after the expiration of his 2011 FMLA leave period. But the court denied summary judgment as to the employee's FMLA retaliation claim. The court concluded that the employee had presented sufficient evidence of pretext based on the animus exhibited by the supervisor about the employee's leave, including the statements broadcast on the public address system. Additionally, there was evidence that the supervisor had asked the employee to return to work even after learning of his arrest, undermining the employer's argument that the arrest and criminal charges motivated the discharge. In addition, the employee presented evidence that three other employees with the same supervisor had been arrested on drug-related charges, but were not discharged. The court also denied the supervisor's motion for summary judgment on the question of his individual liability under the FMLA. The statutory definition of "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(1). Based on this definition, the court held that, if a public employee "acts directly or indirectly, in the interest of an employer," he becomes subject to liability in his individual capacity.

***Esparza v. Bank of America, N.A., 2013 WL 5208024 (N.D. Tex. Sept. 17, 2013)***

The employee, who had a history of physical ailments and had recently taken leave for surgery, was promoted to a branch management position in November 2010. In May 2011, a mock audit of the employee's branch identified multiple policy violations. The following month, an actual audit identified fifteen violations, including the same ones identified in the mock audit. As a result, the employee was issued a formal warning. Two days after the warning, the employee requested and was approved for intermittent FMLA leave. The month after the warning, the employee's assistant manager complained that the employee was failing to attend weekly meetings, was interviewing for jobs with other employers, was leaving the bank without a supervisor being present, and that multiple bank associates had complained about the employee. The employee's supervisor interviewed associates at the branch and confirmed that the employee had left the branch without a supervisor present on several occasions, which resulted into customers being turned away. Associates also told the supervisor that the employee screamed at associates, was unable to answer job-related questions, and harassed associates who called in sick. The employer subsequently issued the employee a final warning. Over the next two months, the employer learned that the employee had violated a policy by using another employee's username and password to open a customer account; caused a \$2,240 loss by accepting improper identification from an individual impersonating a customer, and then attempted to blame another branch employee; and a mock audit revealed that multiple policy



violations continued to occur at the branch. The bank then discharged the employee, and she filed suit for interference and retaliation under the FMLA.

The court granted summary judgment in favor of the employer. As to the employee's FMLA interference claim, the employee did not dispute that all of her FMLA leave requests were granted in full and that she received all requested FMLA entitlements. The fact that she was discharged three days before a scheduled FMLA leave was insufficient. As to the retaliation claim, the court concluded that there was no causal connection because the bank articulated legitimate, nondiscriminatory reasons for the discharge that the employee was unable to establish were pretextual. The court rejected the employee's argument that her supervisor's statements that he attributed some of her performance problems to her "not being there" established pretext. The court also held that the employee's failure to address each legitimate, nondiscriminatory reason offered by an employer meant the employee could not establish pretext.

**Ameen v. Amphenol Printed Circuits, Inc., 2013 WL 6834648 (D. N.H. Dec. 23, 2013)**

The employee took twelve weeks of FMLA leave to care for his newborn child. After he returned from leave, he refused to work overtime. In addition, the employer discovered that he had been falsifying his time record for at least two years by leaving work for an extra fifteen minutes during his meal period. As a result, the employee was discharged. The employee asserted an FMLA interference claim against the employer, alleging that his discharge was in retaliation for exercising his FMLA rights. The employer moved for summary judgment.

The court observed that the decisionmaker in this case was not aware of the employee's FMLA leave when he discharged plaintiff, and therefore, lacked personal retaliatory animus. Typically, the court stated, this would be fatal to the employee's claim. The employee, however, invoked the cat's paw theory, attempting to impute retaliatory animus from a supervisor and a co-worker who reported and investigated the misconduct. The court considered the cat's paw theory, citing *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011), but held that the employee had no evidence to show that the supervisor or co-worker either concealed relevant information from the decisionmaker or fed false information to the decisionmaker to influence the decision. Rather, the supervisor and co-worker provided accurate information to the decisionmaker, and the decisionmaker discharged the employee on this basis. Thus, the court concluded that without any retaliatory animus, it was unnecessary to even consider the third stage of the *McDonnell Douglas* framework and determine if the employer's stated reason was pretextual.

**Pearrow v. Abbot Laboratories, 2013 WL 1305329 (W.D. Mich., Mar. 28, 2013)**

The employee, a forklift driver, incurred three safety violations in a six-month period. After his second violation, the employee indicated that he was under stress because of his home life, and he requested a leave of absence. The employer's occupational health nurse told the employee that he should be evaluated by a physician and go on FMLA leave. Five days later, the employee had his third safety violation. Before the employer could discharge him, the employee went on FMLA leave. The employer investigated further, learning that plaintiff may have misled his supervisor about some of the facts regarding one of the safety violations. When the employee returned to work, his employment was terminated.

The employee sued the employer, alleging FMLA interference and retaliation. The employer moved for summary judgment, which the court granted. The court reasoned that plaintiff's allegations were better analyzed as a retaliation claim because the employer allowed the employee to take FMLA leave and did not discharge him until he returned. Although the employee did not mention the FMLA in his initial leave discussions, the employer was on notice that the leave was related to a health condition. Accordingly, the employee established a prima facie case, and the court analyzed whether the employer had established a good faith basis for the termination decision. The employee tried to establish that the employer's basis for its decision—the safety incidents involving fork lift operation—was pretext because several other co-workers had worse safety records. However, the court found that none of the safety violations alleged against the other individuals were as serious as plaintiff's. Unlike plaintiff's case, the other individuals mostly self-reported their incidents. Therefore, there was no comparable individual with a similar record that was not discharged as a result of similar incidents. The court granted summary judgment for the employer on the employee's FMLA claims.

**Meyer v. Lincare, 2013 WL 5657449 (M.D. Ala. Oct. 16, 2013)**

The employee was a sales associate of a respiratory care products company until her discharge on November 14, 2011. Before her discharge, she took FMLA leave from June 30, 2011 to August 15, 2011. A few days before returning, the employee asked for additional FMLA leave to care for her father, who was suffering from severe respiratory failure. Her immediate supervisor angrily rejected her request. The employee called the employer's human resources department, who then granted her several days of intermittent FMLA leave. After returning from her leave, her supervisor issued her a written warning about the employee's failure to properly report personal leave she was taking. While on her intermittent FMLA leave, the employer also put her on probation for failure to meet sales goals. It then was advised of an incident where the employee was wearing a see-through shirt without a bra while at the same time making a sexually suggestive statement to a co-worker. After investigating the incident, the employer discharged her for wearing unprofessional attire and making sexually suggestive comments to the co-worker.

The employee filed suit, claiming that she was discharged in retaliation for taking FMLA leave. The court granted the employer's motion for summary judgment, holding that she could not demonstrate that the employer's reason for discharging her were pretextual. It reasoned that although her supervisor expressed frustration at her taking FMLA leave, that was not sufficient to prove pretext. In addition, she was later granted the FMLA leave she requested. The court also rejected employee's argument that pretext could be inferred from the temporal proximity between her written warning and leave. It noted that she offered no other evidence and the temporal proximity alone was insufficient in demonstrating pretext. Neither was pretext established by the fact that her supervisor did not meet with her after being put on probation to improve upon her sales goals because her sales performance was not the reason for her discharge. Finally, the employee argued that she could show pretext on grounds that her co-worker was not discharged, even though he also made a sexually suggestive comment. The court disagreed, noting that he was not a supervisor and no complaint of sexual harassment was made against him. She also did not report the co-worker's behavior until the date she was discharged and conceded her attire did not comply with the company's dress code.

**Dunavant v. Frito Lay, 2013 WL 816673 (M.D. Tenn. Mar. 5, 2013)**

The employee worked as an at-will employee. During the twelve-month period before her termination, she had many performance issues, including oral and written warnings, in keeping with the employer's Progressive Coaching Policy. In April 2010, she took approved FMLA leave, and she was cleared to return to work in June 2010. However, the employee claimed that her medical practitioner released her to work full time and without restrictions as an accommodation to her because the employer had a requirement that employees return to work "without restriction," and further claimed that her doctor told her that she was still "extremely ill" and would have a relapse requiring a medical intervention if she did not continue to take her prescribed medications. After the employee returned to work, defendant found that she failed to properly code cracker boxes, and ultimately terminated her employment because she had already been issued a final warning for poor job performance.

In her lawsuit, the employee claimed that she was terminated in violation of the FMLA, the ADA, and the Tennessee Disability Act. As to her FMLA retaliation claim, the court found that the FMLA claim failed because the employer had "plenty" of reasons to terminate her employment, and the employee had not shown them to be pretextual. The court noted that plaintiff's poor performance problems began well before she used FMLA leave. The court therefore granted defendant's motion for summary judgment as to her retaliation claim.

**Stokes v. Dallas Cnty. Juvenile Dep't, 509 F. App'x 319 (5th Cir. 2013)**

The employee had performance issues at work. After suffering a back injury, the employee went on FMLA leave for twenty days. A few months later, she went on FMLA leave for a week to care for her mother. Upon her return, she was discharged for several instances of insubordination.

The employee filed a lawsuit under the FLMA. The district court granted summary judgment for the employer, and the Fifth Circuit affirmed. The court found that even though the employee stated a *prima facie* claim of retaliation, she could not offer evidence that the employer's legitimate, non-discriminatory reasons for her discharge were pretext. The only evidence she used to argue otherwise was her own affidavit, which was "rich in bare denials" regarding her alleged workplace behavior. Furthermore, the employer presented uncontested evidence that the officer responsible for discharging her did not know she was on FMLA leave. Because the only evidence she could offer was "temporal coincidence"—that she was discharged upon returning from leave—the court upheld the decision granting summary judgment for the employer.

**Medley v. Cnty. of Montgomery, 2013 WL 300741 (E.D. Pa. Jan. 25, 2013).**

The employee began accruing absences to care for her son, who had Asperger's Syndrome. The employee accrued points under the employer's absenteeism policy, but some of the points were excused. Even though she was approved for intermittent FMLA leave, the employee was charged for points when she called less than two hours before her shift started to

indicate she would be absent. Following a written warning, the employee wanted to file a grievance. Before she could, she was discharged.

The employee filed a claim against the employer under the FMLA. The court denied the employer's motion for summary judgment. The employee had been granted intermittent FMLA leave, and her discharge appeared to be causally related to her attempts to invoke the leave that she had been granted. The employer argued that the employee did not comply with its notice requirements for using FMLA leave, and that there were no unusual circumstances to excuse her failure to comply because she had resources to help care for her son. The court disagreed. The employee was the only person who could care for her son when he was having anxiety attacks, and she provided evidence that on each day she failed to comply with the notice requirements, the son was experiencing an anxiety attack. When the son's condition caused certain unforeseeable episodes, she was unable to comply with the employer's usual notice procedures. The court therefore found that the employee provided sufficient evidence that the employer's articulated reason for her discharge was pretextual. Therefore, the court denied the employer's motion for summary judgment.

**Haley v. Community Mercy Health Partners, 20 WH Cases2d 502 (S.D. Ohio 2013)**

Plaintiff, a nurse, went on FMLA leave on several occasions during her long tenure of employment. In her final years of employment, she took intermittent FMLA leave to care for her mother and father. Soon after, the employee was diagnosed with breast cancer, and took about five weeks of FMLA leave as a result. In her final years of employment, the employee experienced performance issues, and was placed on the employer's corrective action plan. On one occasion, her husband was transported to the hospital where she worked due to a heart condition. The employee reported that she could not work that day, but the absence was marked "unexcused." A few months later, the employee went on FMLA leave for one day. Three days after returning to work, she was discharged. Twelve instances of tardiness and three absences (including the one for her husband's heart condition) were listed as the reason for her discharge. Her supervisor had not discussed her excessive absences or tardiness with her before terminating her employment.

The employee filed a claim for interference and retaliation under the FMLA, arguing that the corrective actions were issued because she went on FMLA leave for her illness and her husband's illness. The employer moved for summary judgment. For the interference claim, the employer argued that the employee did not provide sufficient notice of her absence when she took leave to be with her husband. Noting the "unusual fact" that the employee's husband was admitted to the hospital where she was employed, the court concluded that a jury could find that the employee provided timely notice with sufficient facts for the employer to know that her absence was FMLA-covered. As to Plaintiff's retaliation claim, the court concluded that plaintiff presented sufficient evidence to permit a jury to conclude there was a causal connection between Plaintiff's FMLA leave and her termination. It was undisputed that the employee took intermittent leave, and was discharged only a few days later. Accordingly, the court denied the employer's motion for summary judgment as to both claims.

*Summarized Elsewhere:*

*Carter v. VNA, Inc.*, 2013 WL 3967925 (D. Md. July 30, 2013)  
*Carter v. Chicago State Univ.*, 2013 WL 3975009 (N.D. Ill. Aug. 1, 2013)  
*Hagler v. True Mfg., Inc.*, 20 WH Cases2d 1552 (E.D. Mo. 2013)  
*Crawford v. JP Morgan Chase*, 2013 WL 4670639 (W.D. Wash. Aug. 30, 2013)  
*Brown v. Humana Insurance Co.*, 2013 WL 1831308 (W.D. Ky. Apr. 30, 2013)  
*Brown v. Children's Hosp. of Philadelphia*, 20 WH Cases2d 1249 (E.D. Pa. 2013)  
*Dooling v. Bank of the W.*, 2012 WL 2921370 (E.D. Tex. July 17, 2013)  
*Madry v. Gibraltar National Corp.*, 526 Fed. Appx. 593 (6th Cir. 2013)  
*Travis v. Deming, Malone, Livesay, & Ostroff, P.S.C.*, 20 WH Cases2d 1792 (W.D. Ky. 2013)  
*Laing v. Federal Exp. Corp.*, 703 F.3d 713, 20 WH Cases2d 1 (4th Cir. 2013)  
*Nicely v. E. Kentucky Power Co-op., Inc.*, 2013 WL 142430 (E.D. Ky. Jan. 11, 2013)  
*Talbott v. Time Warner Entm't-Advance/Newhouse P'ship*, 2013 WL 152179 (W.D. Tex. Jan. 11, 2013)  
*Shaw v. Tennessee Department of Transportation*, 2013 WL 1910313 (M.D. Tenn., May 7, 2013)  
*Jones v. Bracco Ltd. P'ship*, 20 WH Cases2d 606 (D. S.D. 2013)  
*Day v. Cole County Commission*, 2013 WL 1189505 (W.D. Mo. Mar. 22, 2013)  
*Croy v. Blue Ridge Bread, Inc.*, 20 WH Cases2d 1798 (W.D. Va. 2013)  
*Incorvati v. Best Buy Co., Inc.*, 118 FEP Cases 1837 (D.N.J. 2013)  
*Sparks v. Sunshine Mills, Inc.*, 2013 WL 4760964 (N.D. Ala. Sept. 4, 2013)  
*Henson v. U.S. Foodservice*, 2013 WL 6080359 (D. N.J. Nov. 19, 2013)  
*Schummer v. Black Bear Distribution, LLC*, 2013 WL 443136 (D. N.J. Aug. 15, 2013)  
*Bellone v. Southwick-Tolland Reg'l Sch. Dist.*, 915 F. Supp. 2d 187 (D. Mass. 2013)  
*Klein v. L-3 Communications Corp. et al*, 2013 WL 5913776 (M.D. Ala. Nov. 1, 2013)  
*Ward v. City of Birmingham*, 2013 WL 541429 (N.D. Ala. Feb. 8, 2013)  
*Green v. Wal-Mart Stores, East, L.P.*, 2013 WL 3223629 (S.D. Ohio June 25, 2013)  
*Mezu v. Morgan State University*, 2013 WL 3934013 (D. Md. July 29, 2013)  
*Holloway v. District of Columbia Government*, 2013 WL 6857415 (D. D.C. Dec. 30, 2013)  
*Campbell v. Costco Wholesale Corp.*, 21 WH Cases2d 358 (M.D. Tenn. 2013)  
*Attiogbe-Tay v. SE Rolling Hills LLC*, 2013 WL 5954685 (D. Minn. Nov. 7, 2013)  
*Metroka-Cantelli v. Postmaster General*, 2013 WL 5939776 (N.D. Ohio Nov. 5, 2013)  
*Travers v. Cellco Partnership*, 2013 WL 6048177 (M.D. Tenn. Nov. 14, 2013)  
*Wallner v. J.J.B. Hilliard, W.L. Lyons, LLC*, 2013 WL 5934145 (W.D. Ky. Nov. 5, 2013)  
*Ray v. United Parcel Service*, 2013 WL 5504419 (S.D. Miss. Sept. 30, 2013)  
*Clark v. Jackson Hospital & Clinic, Inc.*, 2013 WL 5347450 (M.D. Ala. Sept. 23, 2013)  
*Colon v. Fashion Institute of Technology*, 2013 WL 5677047 (S.D. N.Y. Oct. 18, 2013)

a. Timing

*Borwick v. T-Mobile West Corp.*, 119 FEP Cases 1194 (10th Cir. 2013)

Plaintiff was a customer service representative handling billing-related inquiries for the employer. In mid-January 2011, a manager reviewing the employee's calls noticed that her average call length was significantly shorter than expected. One of the employee's direct supervisors was asked to investigate her calls. The supervisor also learned that the employee was pregnant and was planning to take 12 weeks of maternity leave. The supervisor concluded after review of the employee's calls that she had hung up on customers and confronted her with these findings. The employee responded by filing a discrimination complaint with the employer's human resources department. After the complaint was filed, the employer removed the accused supervisor from responsibility over the employee, investigated the employee's discrimination complaint, and assigned a call center director to conduct the investigation of plaintiff's work. The director also concluded the employee had violated procedures by hanging up on customers and falsely reporting them as dead-air calls, resulting in the employee's discharge.

The Tenth Circuit affirmed summary judgment in favor of the employer on the employee's FMLA interference claim. Both the district court and the Tenth Circuit assumed that the employee had established her entitlement to FMLA leave and that her termination had interfered with her rights, but concluded the employer had established that it would have terminated her employment regardless on the grounds of misconduct. Plaintiff was unable to introduce sufficient evidence of pretext, as the mere temporal proximity between her announced pregnancy and her termination was not sufficient. The employee had no other probative evidence, as the court rejected her contention that her prior year performance evaluation, issued before her call manipulation came to light, demonstrated pretext. The court also rejected her unsupported speculation that the audio recordings the employer produced could have been altered.

**Curry v. Brown, 2013 WL 4809279 (E.D. Ky. Sept. 9, 2013)**

The employee alleged FMLA interference and retaliation with respect to her demotion and termination in February 2011 following her FMLA leave for breast cancer treatment in 2010. The employee was demoted after coworkers alleged verbal and physical abuse. Her supervisor told her "she should probably focus on her health rather than worry about the stress of supervising people." Her employment was terminated after the employer discovered the employee, who was a deputy clerk in the county clerk's office, had voted in the wrong county in an election 5 years earlier. The court found the interference claim merged with her retaliation argument, as her sole argument was that her termination prevented her from further using the FMLA. The court rejected her retaliation claim, as the employee could not establish the reasons for her demotion or termination were pretextual. The fact that the employee was ultimately indicted on and convicted of wrongful registration bolstered the court's findings. The court granted summary judgment in favor of the employer on all claims.

**Megivern v. Glacier Hills Inc., 519 Fed. Appx. 385 (6th Cir. 2013)**

The former employee of nonprofit senior living facility sued her former employer, alleging the employer interfered with her rights under the FMLA. Defendant discharged plaintiff for performance reasons after she became pregnant with twins and inquired about FMLA leave. The district court granted defendant's motion for summary judgment, and plaintiff appealed.

The Sixth Circuit affirmed, finding no evidence that defendant's articulated reason for plaintiff's termination was pretextual. Plaintiff argued that there was temporal proximity between her inquiry into FMLA leave and her termination of employment. The employee also claimed that the employer's stated reason was pretext because the employer provided shifting rationales for her discharge, and because the supervisor who decided to discharge plaintiff never congratulated her on her pregnancy. In addition, the employee claimed the employer had a pattern or practice of discriminating against employees who sought medical leave. Analyzing the facts in the record, the court rejected plaintiff's interpretation of events and distinguished the case law presented in support of her position. Because plaintiff presented no other evidence weighing in her favor, temporal proximity alone was insufficient to warrant a finding of pretext.

***Pu v. Columbia College Chicago, 117 FEP Cases 1880 (N.D. Ill. 2013)***

The employee worked in a college IT department and suffered from chronic interstitial lung disease, pulmonary hypertension, and Sjorgen's Syndrome. She received intermittent FMLA leave, which she then extended. After she returned to work, she was transferred to a new position, where there were concerns about her performance. Approximately one year later she again requested and received FMLA leave. While on leave she filed an internal complaint of discrimination as well as a charge of discrimination with the EEOC. After she returned to work, there were more issues regarding her performance and she filed another internal complaint. Less than a month after she returned from FMLA leave she failed to complete a project and her employment was terminated.

The employee filed suit alleging retaliation for taking FMLA leave and the employer moved for summary judgment. The Court held that the employee must show her decision to take FMLA leave was a substantial or motivating factor in the employer's decision to discharge her. Suspicious timing is not enough, but an adverse action on the heels of a protected activity can raise the inference necessary to show causation. The Court held that the employee met her burden to avoid summary judgment on her FMLA claim because she showed her supervisor negatively commented on the FMLA leave, the employee was criticized for leaving work without completing her assignments, and her discharge was less than one month after she returned from FMLA leave.

***Smith v. City of Marion, 2013 WL 5434133 (D. S.C. Sept. 27, 2013)***

The employee had served as defendant's chief of police for nearly 20 years. The new mayor believed the police department needed reform, and a year into his term, the mayor gave the employee his first ever negative performance review. Later on, the employee went on FMLA leave because he was experiencing heart trouble. Approximately one month into the employee's leave and before he had returned to work, he asked to be placed on the agenda for the next City Council meeting. The mayor, concerned that the employee was going to publicly discuss private employment matters relating to the police department, instead asked the employee for a private audience. The employee appeared at the meeting, but the parties disputed what happened there. The mayor claimed the employee screamed and became violent, but the employee claimed the mayor continually interrupted him. Both parties had corroborating eye witnesses. After the City Council meeting, the mayor decided that he could no longer work with the employee, and terminated his employment.

The employee sued his former employer, alleging FMLA retaliation and various forms of discrimination arising under other laws. The district court adopted the opinion of a magistrate, denying the employer's motion for summary judgment. The employee established the causal connection element of his prima facie claim by showing that his discharge occurred in close temporal proximity to his FMLA leave. In fact, the employee was still on FLMA leave at the time of his separation. In addition, there was a disputed issue of material fact as to what occurred at the City Council meeting. Because defendant cited the employee's behavior at that meeting as the reason for his termination, the factual differences in the parties' stories precluded summary judgment. Additionally, the magistrate noted that close temporal proximity could also serve as evidence of pretext.

**Kiniropoulos v. County Child Welfare, 917 F.Supp.2d 377 (E.D. Pa. 2013)**

The employee advised the employer of an injury to his leg which limited his ability to walk, thus preventing him from performing certain duties necessary in his position as a caseworker. A couple weeks later, the employee contacted the employer to request medical leave due to his inability to work, and at that time the employer suspended him due to recently located documentation of alleged poor work performance. The employee then filed a complaint alleging, among other things, that the employer had retaliated against him for requesting FMLA leave and interfered with his right to take FMLA leave.

The district court granted in part the employer's motion to dismiss. The district court found that the employee had failed to state whether he was an eligible employee under the FMLA and the district court could not therefore determine whether he had worked the requisite 1,250 hours in the specific 12-month period. However, the district court found that the causation element survived the employer's motion to dismiss, since the employer had not proffered a legitimate nondiscriminatory reason for terminating the employee since the suspension for the alleged poor work performance was not timely. Nonetheless, the court dismissed the count without prejudice.

**Fisher v. Westinghouse Electric Company LLC, 2013 WL 1303098 (D. S.C. Mar. 29, 2013)**

Plaintiff worked in defendant's medical department. Plaintiff was discharged for performance issues, but was later reinstated when she asked for reconsideration. After her reinstatement, defendant decided to outsource the entire medical department. One month later, plaintiff told defendant that she required knee surgery, which would require three to four weeks of medical leave. Plaintiff's request for leave was approved. During her medical leave, plaintiff scheduled a second surgery to treat carpal tunnel syndrome, and her supervisor once again approved her leave request. Plaintiff's employment was terminated one day before the outsourcing agreement went into effect, and while plaintiff was still on medical leave.

Plaintiff then filed suit, claiming that defendant retaliated against her for taking FMLA leave. The court found that defendant proffered a legitimate, non-discriminatory reason for her discharge because it was outsourcing the department. However, plaintiff argued that there was evidence of pretext because defendant did not inform her of its decision until a day before the outsourcing took place. The court rejected plaintiff's argument, finding that plaintiff failed to



establish pretext because defendant made the decision to outsource the department before plaintiff invoked her rights under the FMLA.

*Summarized Elsewhere*

*Hanson v. Mental Health Resources, Inc.*, 118 FEP Cases 1364 (D. Minn. 2013)

*Moore v. County of Camden*, 20 WH Cases2d 1369 (D. N.J. 2013)

*Terpo v. RBC Bank*, 2013 WL 5519704 (N.D. Ala. Oct. 2, 2013)

*Attiogbe-Tay v. SE Rolling Hills LLC*, 2013 WL 5954685 (D. Minn. Nov. 7, 2013)

*Jehling v. A. H. Belo Corp.*, 2013 WL 5803813 (N.D. Tex. Oct. 28, 2013)

*Murphy v. Ohio State University*, 21 WH Cases2d 914 (6th Cir. 2013)

*Meyer v. Lincare*, 2013 WL 5657449 (M.D. Ala. Oct. 16, 2013)

*Turner v. Florida Prepaid College Board*, 522 Fed. Appx. 829, 20 WH Cases2d 1688 (11th Cir. 2013)

b. Statements and Stray Remarks

*Branch v. Schostak Bros. & Co., Inc.*, 20 WH Cases2d 1141 (E.D. Mich. 2013)

Following his termination of employment, an operations manager sued his employer and his former supervisor under the FMLA. Plaintiff had used three stints of FMLA leave during his employment, and his complaint alleged interference and retaliation under the FMLA.

The court granted summary judgment for the employer on the interference claim, but not the retaliation claim. The employer prevailed on the interference claim because the employee was granted the leave he requested, and upon returning from each period of leave he was reinstated to the same position. Plaintiff argued that his responsibilities were reduced after he returned, but the court stated that this allegation was more appropriately analyzed under the retaliation analysis. The court denied summary judgment on plaintiff's retaliation claim, finding there was a genuine issue of material fact as to whether defendant's stated reason for terminating plaintiff (poor performance) was pretext for a retaliatory motive. In support of this conclusion, the court cited numerous comments made by plaintiff's supervisor that were overtly hostile to plaintiff's medical leaves and health issues.

*Summarized Elsewhere:*

*Pu v. Columbia College Chicago*, 117 FEP Cases 1880 (N.D. Ill. 2013)

*Palmieri v. City of Hartford*, 947 F. Supp. 2d 187 (D. Conn. 2013)

4. Comparative Treatment

*Laing v. Federal Exp. Corp.*, 703 F.3d 713, 20 WH Cases2d 1 (4th Cir. 2013)

The employee worked as a mail courier for the employer, a package delivery company. While making a delivery, the employee suffered an injury that required surgery. Two months

later, the employer started investigating the employee for falsifying records. Before the investigation was completed, the employer granted the employee's request for FMLA leave. The employee asked two supervisors if her position would be available when she returned, and both indicated that they would try to keep it open. However, when the employee's leave ended, the employer put her on investigatory suspension. Approximately one month later, the employee was discharged for falsifying company records. The employee sued the employer for interference and retaliation under the FMLA.

The district court had granted summary judgment for the employer as to both claims, and the Fourth Circuit affirmed. Because the supervisors' statements were not evidence of discrimination, the court turned to the *McDonnell Douglas* burden shifting framework. The employee established a prima facie case, and the employer stated a legitimate, nondiscriminatory reason for its decision. Examining the only similarly-situated co-worker, the court found virtually no difference between the way the employee and the comparator were treated by the employer. The employee argued that pretext existed because she disagreed with the results of the employer's investigation, but the court distinguished disagreeing with the disciplinary action and the existence of pretext. As to the employee's retaliation claim, the Fourth Circuit reiterated the principle that the FMLA does not require an employee be restored to a prior job if an employer would have taken the same disciplinary action had no leave been taken. Because there was ample evidence that the employer would have placed the employee on suspension because of the record-falsification investigation, the employee's suspension was not pretext for FMLA retaliation.

**Norris v. GKN Westland Aero., Inc., 921 F. Supp. 2d 1308 (M.D. Ala. 2013).**

Plaintiff was diagnosed with high blood pressure and Type II diabetes. His supervisor permitted him to take frequent restroom breaks and breaks to eat snacks to control his blood sugar. A subsequent series of supervisors progressively teased him regarding his need for breaks and confronted him about time away from work. Following his transfer from first to third shift, plaintiff took an increased amount of FMLA leave for because the shift transfer allegedly interfered with his routine. Following his termination for poor workmanship, plaintiff brought claims under the ADA and FMLA.

The district court denied defendant's motion for summary judgment on plaintiff's interference and retaliation claims. The court denied summary judgment on both claims because the court found that sufficient evidence existed permitting a reasonable jury to disregard defendant's stated rationale for discharging plaintiff as pretext, and that the real reason defendant discharged plaintiff was his use of FMLA leave. The court noted that defendant suspended, and then terminated plaintiff's employment while he made use of FMLA leave even though he had a statutory right to reinstatement.

***Summarized Elsewhere:***

**Carter v. Chicago State Univ., 2013 WL 3975009 (N.D. Ill. Aug. 1, 2013)**

**Durden v. Ohio Bell Tel. Co., 2013 WL 1352620 (N.D. Ohio April 2, 2013)**

**Allen v. Nutrisystem, Inc., 118 FEP Cases 310 (E.D. Pa. 2013)**

**Arnold v. Pfizer, Inc., 21 WH Cases2d 385 (D. Or. 2013)**  
**Allen v. Nutrisystem, Inc., 118 FEP Cases 310 (E.D. Pa. 2013)**  
**Terpo v. RBC Bank, 2013 WL 5519704 (N.D. Ala. Oct. 2, 2013)**  
**Rhodes v. The Arc of Madison County, Inc., 920 F.Supp.2d 1202 (N.D. Ala. 2013)**  
**Jackson v. Motorcity, 2013 WL 5566684 (E.D. Mich. Oct. 9, 2013)**

C. Mixed Motive

**Johnson v. Benton Cnty. Sch. Dist., 926 F. Supp. 2d 899 (N.D. Miss. 2013)**

The court analyzed whether a plaintiff may still be entitled to a "mixed-motive" jury instruction in ADA and FMLA discrimination claims. Ultimately, the court found that a mixed-motive jury instruction is still available in FMLA discrimination cases. The court adopted the reasoning of the Sixth Circuit's decision in *Hunter v. Valley View Local Schools*, 579 F.3d 688 (6th Cir. 2009), which held that mixed-motive is still available in FMLA discrimination cases in the post-*Gross* world. In *Hunter*, the court found that the Department of Labor regulations governing the implementation of the FMLA forbid an employer from considering FMLA leave as a "negative factor" in employment decisions. 29 C.F.R. § 825.220(c). Accordingly, the court held regulations contemplate that other, permissible factors may underlie an employment decision.

Again, the court emphasized that the Fifth Circuit has not yet clarified whether the mixed-motive option remains available for ADA and FMLA discrimination cases. The court stated that it was required to make a ruling so that the parties could proceed to trial, but that it was certifying its decision for interlocutory appeal to the Fifth Circuit should the employee or employer wish to appeal.

**Ion v. Chevron USA, Inc., 731 F.3d 379, 21 WH Cases2d 512 (5th Cir. 2013)**

Plaintiff, who was going through a divorce, informed his supervisor that he had been granted custody of his son for six months and that he wanted to discuss taking leave from work because his son was crying, refusing to eat, and was not adjusting well. Plaintiff also asked the supervisor if he could visit his son during his lunch hour at a nearby day care to help with the adjustment. The supervisor allowed plaintiff to leave to visit his son during lunch that day and agreed to meet with the employee discuss leave, but the supervisor kept cancelling their scheduled meetings. A few weeks later, plaintiff's supervisors suspended him for five days and put him on a performance improvement plan because of performance deficiencies and his extended lunch breaks. Before he left for his suspension, plaintiff removed his company laptop, blackberry and credits cards from his office. Plaintiff called in sick the day he was to return from suspension, submitting FMLA certification from his doctor. Plaintiff was informed that he would have to sign a medical records release form at the employer's clinic; when he went to the clinic, he was disruptive and refused to sign the form. That same day, a co-worker informed plaintiff's supervisor that plaintiff mentioned faking a nervous breakdown so he would take FMLA leave. As a result of these two incidents, defendant decided to discharge plaintiff. Plaintiff filed FMLA interference and retaliation claims and the district court granted the

employer's summary judgment motion on both claims. Plaintiff appealed the grant of summary judgment as to his retaliation claim.

The Fifth Circuit, applying the mixed-motive framework, reversed the district court, finding a dispute as to whether the employer's articulated reasons truly motivated the decision to discharge plaintiff. The Court pointed to an email sent by the employer's General Manager, stating that plaintiff was playing games with them after his suspension by looking for a doctor who would approve FMLA leave and asking plaintiff's supervisor for options. The employer also could not establish that it would have made the discharge decision despite its discriminatory animus. The Court determined the employer could not rely on plaintiff's performance deficiencies because it decided to suspend him instead of discharging him for these deficiencies before he requested leave. And the fact that the clinic incident was not even mentioned in the termination notice given to plaintiff raised doubts that the employer would have discharged him for that reason absent his leave. Lastly, the employer's failure to investigate the co-worker's allegations called into doubt whether the employer reasonably relied on the allegations in deciding to discharge plaintiff.

*Summarized Elsewhere:*

*Wallner v. J.J.B. Hilliard, W.L. Lyons, LLC, 2013 WL 5934145 (W.D. Ky. Nov. 5, 2013)*

*Lichtenstein v. University of Pittsburgh Medical Center, 2013 WL 6577401 (W.D. Pa. Dec. 16, 2013)*

**D.** Pattern or Practice

## CHAPTER 11. ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

### I. OVERVIEW

### II. ENFORCEMENT ALTERNATIVES

#### A. Civil Actions

##### 1. Who Can Bring a Civil Action

#### *Summarized Elsewhere:*

#### **Sharma v. Howard County, 2013 WL 530948 (D. Md., Feb. 12, 2013)**

- a. Secretary
- b. Employees
- c. Class Actions

##### 2. Possible Defendants

#### **White v. Eberle & BCI Services, LLC, et al., 2013 WL 211249 (D. N.J. Jan. 17, 2013)**

Plaintiff, a kitchen aide, requested a four week leave of absence to bond with his newborn son. When plaintiff was preparing to return to work, his supervisor's secretary told him that he must provide a doctor's note clearing him to return. Plaintiff explained that his leave was to care for his newborn, and not a medical condition. Nevertheless, the employer suspended plaintiff without pay until he provided a note. After five days of unpaid suspension, the employer told plaintiff that he could return to work, and that a doctor's note was not necessary. Upon his return to work, plaintiff requested compensation for the unpaid suspension, and allegedly complained that he thought the suspension was in retaliation for having taken leave. Approximately two months after returning to work, plaintiff was fired for tardiness.

Plaintiff filed suit against the employer and his supervisor, alleging FMLA interference and retaliation. The employer and supervisor filed a motion to dismiss, arguing that the technical violations FMLA were barred by the statute of limitations, and that plaintiff had not pled sufficient facts to support a claim against his supervisor. The court denied without prejudice the employer's motion to dismiss the FMLA interference claim, because it could not determine from the face of the complaint whether the claim was timely. However, the court dismissed the supervisor from the lawsuit, again without prejudice. The allegations were not sufficient to establish that the supervisor exercised supervisory authority over plaintiff, or that he was responsible for the alleged violation while acting in the employer's interest.

**Reed v. Maryland, Dep't of Human Res., 2013 WL 489985 (D. Md. Feb. 7, 2013)**

Plaintiff, an income maintenance specialist, sued Department of Human Resources (the "Department") for illegal employment practices and discrimination based on race, gender, and disability. Specifically, plaintiff claimed that the Department violated the FMLA by refusing to grant him more than one month of leave for mental illness, and by terminating him for remaining on leave for longer than one month.

The Department moved to dismiss for failure to state a claim, arguing that the Eleventh Amendment barred plaintiff's FMLA claim for money damages. Plaintiff opposed the motion to dismiss and moved to file an amended complaint, so as to substitute two supervisors at the Department in their individual and official capacities with respect to the FMLA claim. The court granted the Department's motion to dismiss, but granted plaintiff's motion for leave to amend the FMLA claims. The court found the Eleventh Amendment precluded plaintiff from recovering monetary damages from the Department under the FMLA. After consideration of the disagreement among circuit courts, the court found, however, that individual liability applies to supervisors at public agencies under the FMLA. Accordingly, the court granted plaintiff's motion to amend his FMLA claims to add two supervisors at the Department as defendants in their individual capacities.

With respect to plaintiff's request for reinstatement, he was entitled to amend the complaint so as to add one supervisor, in her official capacity, as a defendant. The court held the Eleventh Amendment only precludes plaintiff from adding a supervisor in his/her official capacity when plaintiff is claiming monetary damages. A claim for injunctive relief, such as reinstatement, is permitted against a state official in his/her official capacity.

***Summarized Elsewhere:***

**Smith v. St. Francis Hospital, 2013 WL 3973170 (D. S.C. July 31, 2013)**

**Bonzani v. Shinseki, 2013 WL 5486808 (E.D. Cal. Sept. 30, 2013)**

**Ginwright v. Dept. of Rev. for the State of Ala., 2013 WL 1187943 (M.D. Ala. Mar. 21, 2013)**

**Ezzard v. Eatonton-Putnam Water & Sewer Authority, 2013 WL 5438604 (M.D. Ga. Sept. 27, 2013)**

3. Jurisdiction

***Summarized Elsewhere:***

**Dalton v. Manor Care of W. Des Moines IA, LLC, 2013 WL 599979 (S.D. Iowa Jan. 29, 2013)**

**B. Arbitration**

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

**Morgan v. United Healthcare Services, Inc., 20 WH Cases2d 1197 (S.D. Ohio Apr. 30, 2013)**

Plaintiff, a medical benefits administrator who had been approved for intermittent FMLA leave, was discharged for violating the employer's written attendance policy. Plaintiff filed an FMLA claim in Ohio State Court challenging her termination. The employer removed the action to federal court and filed a motion to compel arbitration. The court granted the employer's motion to compel arbitration and dismissed the complaint.

As a condition of employment, plaintiff entered into to a written arbitration policy, whereby she agreed to resolve all covered employment disputes through final and binding arbitration with the American Arbitration Association. The Arbitration Policy expressly provided that FMLA claims were subject to arbitration. The court noted that the Supreme Court has found that parties should be held to arbitration agreements, unless Congress has "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." The court also noted that the Supreme Court has held that employment-related statutory claims, such as FMLA claims, may be validly subject to an arbitration agreement enforceable under the Federal Arbitration Act. In this case, plaintiff was unable to demonstrate that Congress intended FMLA claims to be nonarbitrable. Moreover, the court noted that nothing in the text of the FMLA suggests that agreements to arbitrate FMLA claims are unenforceable, nor is there legislative history to support that contention. Accordingly, the court held that plaintiff's FMLA claims were properly subject to arbitration.

**Noffsinger-Harrison v. LP Spring City, LLC, 2013 WL 499210 (E.D. Tenn. Feb. 7, 2013)**

Defendants brought a motion to compel arbitration and stay the proceedings with respect to plaintiff employee's action alleging violations of the Family Medical Leave Act ("FMLA") and its regulations.

In her opposition to the motion to compel, plaintiff contended that the arbitration agreement she entered into with defendants at the commencement of her employment could not be enforced because it was part of a larger scheme to interfere with employees' rights under the FMLA. The court declined to address plaintiff's argument, restricting itself solely to matters pertaining to arbitrability and not the merits of plaintiff's FMLA claim. The court found that the cost-splitting provisions of the arbitration agreement were cost-prohibitive to plaintiff and similarly situated employees and were, therefore, unenforceable, as they would deter plaintiff from vindicating her statutory rights. The court severed the cost-splitting provisions from the rest of the arbitration agreement, deeming the remainder of the arbitration agreement enforceable.

3. Arbitration Under a Collective Bargaining Agreement

**Acevedo v. Tishman Speyer Properties, L.P., 2013 WL 1234953 (S.D. N.Y. March 26, 2013)**

Union employee filed suit, claiming the employer violated the FMLA. The court compelled arbitration of the FMLA claim because the collective bargaining agreement specifically provided that "all claims of discrimination, including those under the FMLA, 'shall be subject to the grievance and arbitration procedure (Articles VII and VIII) as the sole and

exclusive remedy for violations.” The court rejected plaintiff’s claim that 29 U.S.C. §2617(a)(2), which provides for a right of action under the FMLA in state or federal court, was any bar to a specific agreement to arbitrate FMLA claims.

### III. REMEDIES

#### *Summarized Elsewhere:*

**Osborne v. Suminoe Textile of America Corporation, 2013 WL 2897053 (D. S.C. June 13, 2013)**

#### A. Damages

##### 1. Denied or Lost Compensation

**Fath v. Heritage Valley Med. Grp., 20 WH Cases2d 494 (W.D. Pa. 2013)**

Plaintiff was a current employee of Defendant Medical Group. In July 2011, plaintiff requested and was approved for intermittent FMLA leave to care for her mother, and provided certification of her mother’s serious health condition. Defendant required her to exhaust her vacation and personal time off before taking unpaid FMLA leave. Plaintiff brought claims for FMLA interference and retaliation, alleging that defendant would not allow her to take FMLA leave on Mondays or Fridays, that her supervisor yelled at her about her leave, and that defendant started issuing to her trumped-up written warnings. She further alleged seven types of damages: (a) loss of sick time; (b) loss of vacation; (c) loss of time to treat her own medical conditions; (d) loss of husband’s overtime wages due to his transportation of her mother to medical appointments; (e) increased travel and fuel costs to her mother’s medical appointments; (f) loss of rent from her mother’s home; (g) denial of a raise in retaliation for taking protected leave. Defendant moved to dismiss on two grounds: (1) plaintiff had not sufficiently pled that her mother had a serious medical condition because her pleadings only stated that her mother was “ailing;” and (2) plaintiff’s alleged damages were not cognizable.

The court granted the motion in part and denied it in part. It rejected defendant’s argument that plaintiff had insufficiently pled that her mother had a serious medical condition. The court reasoned that because plaintiff had provided defendant with certification and defendant had granted FMLA leave, defendant was on notice of the serious medical condition. The court granted defendant’s motion to dismiss in regard to plaintiff’s allegations of lost time off ((a)-(c)), because the FMLA specifically allows employers to require employees to take paid leave during FMLA leave. The court denied defendant’s motion regarding plaintiff’s other alleged damages. The court reasoned that loss of her husband’s wages, increased fuel costs, and loss of rent could conceivably constitute “actual monetary loss sustained by the employee as a direct result of [an FMLA] violation,” and was unwilling to dismiss those claims at the Rule 12 stage. With regard to plaintiff’s claim that she suffered the denial of an anticipated review and accompanying raise in retaliation for her alleged protected activity, the court concluded that such claim was clearly cognizable under the FMLA, as it could constitute a denial of wages that is prohibited by the Act.

##### 2. Actual Monetary Losses



**Mohl v. Lebanon, 939 F. Supp. 2d 504 (M.D. Pa. 2013)**

Plaintiff was a deputy sheriff employed by defendant. Plaintiff suffered a heart attack and required surgery. As a result, he was out of work for four weeks, but was granted FMLA leave for this absence. Plaintiff alleged that his supervisor retaliated against him because he took FMLA leave, including claims that his supervisor cursed at him, threatened him with discharge, imposed meritless discipline on him, and denied him training opportunities. Plaintiff filed grievances against his supervisor. Immediately after the grievance hearing, plaintiff suffered a panic attack and was taken to the hospital, where he was diagnosed with anxiety and depression, and was prescribed medication. Plaintiff's physician informed defendant that the employee was disabled as a result of stress and anxiety caused by his hostile work environment, and he would not return to work until the hostility was eliminated. After some time, defendant sent plaintiff a letter advising him that his leave was about to expire and that failure to return would result in termination. Plaintiff failed to return, and defendant terminated his employment. Plaintiff brought claims under the FMLA.

The court, which had previously dismissed plaintiff's interference claim, denied summary judgment on plaintiff's retaliation claims because of the unwarranted discipline and denial of training opportunities. Defendants then moved for judgment on the pleadings. Because the court found plaintiff's claims failed to plead recoverable damages under the FMLA, the court granted the motion and dismissed plaintiff's amended complaint with prejudice. The court held that stress-related medical expenses resulting from an FMLA violation are not compensable under the FMLA. Thus, plaintiff's claim for his panic attack and related costs failed to support his retaliation claim. Additionally, since plaintiff did not argue his termination was unlawful, front pay damages from the time of termination were unavailable. Furthermore, the court found no evidence that plaintiff suffered any monetary loss directly attributable to the disciplinary treatment or denial of training opportunities, and the FMLA does not make nominal or symbolic damages available to plaintiffs. Lastly, the court would not permit plaintiff's insufficient claim to proceed to trial merely because the FMLA permits an award of attorneys' fees at the conclusion of trial.

**Pettaway v. International Paper, 2013 WL 1154520 (N.D. Ill. Mar. 19, 2013)**

In violation of the employer's attendance policy, the employee was absent from work for a number of days without giving notice to the employer. The employee was subsequently discharged, but filed a grievance under the collective bargaining agreement and was ultimately reinstated. He requested that the period of his absence be designated FMLA leave, and the employer granted his request. Nevertheless, the employee filed a lawsuit against the employer and, proceeding *pro se*, requested "40 million dollars in Punitive Damages" under the FMLA.

The court granted the employer's motion for summary judgment. Although the court initially recognized that the employee may not have stated a prima facie case, it disposed of the case because the employee was asking for damages that were unavailable under the FMLA. The employee's complaint did not allege any actual monetary loss suffered, and as a result he failed to establish a cognizable claim.

***Summarized Elsewhere:***

***Fath v. Heritage Valley Med. Grp.*, 20 WH Cases2d 494 (W.D. Pa. 2013)**

***Murray v. JELD-WEN, Inc.*, 922 F. Supp. 2d 497, 21 WH Cases2d 1145 (M.D. Pa. 2013)**

3. Interest
4. Liquidated Damages
  - a. Award

***Diaz v. Saucon Valley Manor*, 2013 WL 4564300 (E.D. Pa. Aug. 27, 2013)**

Following a five-day jury trial, the jury concluded that defendants had violated the FMLA by interfering with plaintiff's right to take a leave of absence. The jury also decided that the employer had not retaliated against plaintiff for seeking a leave of absence.

Plaintiff sought liquidated damages for defendants' FMLA violations. Defendants argued that liquidated damages were inappropriate because they acted in good faith by taking steps to ascertain whether plaintiff sought an FMLA leave of absence and granted leaves of absence, including to plaintiff, in the past. The court disagreed, finding that defendants had failed to properly train their directors and supervisors about employees' rights under the FMLA. As a result, when plaintiff informed her supervisor that she would need a leave of absence to enter a treatment program, the supervisor was unable to properly advise the employee of her FMLA rights and how she could effectively exercise those rights. Accordingly, the court ordered defendants to pay liquidated damages in the amount of \$10,684.62, based on the sum of plaintiff's back-pay damages and interest awards.

- b. Calculation
5. Other Damages

***Klein v. County of Bucks*, 2013 WL 1310877 (E.D. Pa. April 1, 2013)**

Plaintiff was a former deputy sheriff. Following his discharge, he filed multiple state law and constitutional claims against the county, along with a claim for violation of the FMLA. The county defendants filed a motion to dismiss the request for punitive damages under the FMLA, among other things. Citing the absence of any authorization for punitive damages in the statutory language of the FMLA or any contrary argument from plaintiff, the court agreed with numerous district court decisions in the Third Circuit and held that punitive damages are not available under the FMLA.

**B. Equitable Relief**

***Summarized Elsewhere:***

***Turner v. McKesson Corp.*, 2013 WL 4727651 (N.D. Ala. Sept. 3, 2013)**

1. Equitable Relief Available in Actions by the Secretary

## 2. Equitable Relief Available in All Actions

### **Patel v. Saint Vincent Health Ctr., 2013 WL 4591271 (W.D. Pa. Aug. 28, 2013)**

The employee was a medical resident for defendant, a hospital. In her second year of residency, the employer granted her about one month of FMLA leave to undergo heart surgery. The employee was told that she would be discharged if she did not return to work after her leave ended. Following a successful surgery, her doctor stated that she could return to work three days later. The employee did not return to work, however, and instead requested an indefinite leave of absence. The employer requested medical documentation, and after some delay by the employee, her heart specialist refused to give her a medical certification to cover her extended leave period. As a result, the employee was discharged for taking an unauthorized absence. She subsequently obtained a physician's license and began working on a part-time basis, but she was not eligible for board certification.

About sixteen months after her discharge, the employee filed a lawsuit under the FMLA and sought a preliminary injunction from the court reinstating her to the medical residency program. As evidence, plaintiff offered testimony from several doctors who stated it was unreasonable for her treating specialist to send her back to work so quickly after surgery. However, the court gave limited weight to this evidence, because the expert had never conducted an examination of the employee. Ultimately, the court denied the preliminary injunction because the employee could not demonstrate a likelihood of success on the merits of her FMLA claim. She failed to establish that she was entitled to an extension of her FMLA leave for the time period at issue, and she failed to respond in a timely manner to the employer's repeated requests for medical documentation. Additionally, she failed to demonstrate any imminent irreparable harm, since she filed the lawsuit nearly sixteen months after she was discharged.

#### a. Reinstatement

##### ***Summarized Elsewhere:***

**Diaz v. Michigan Dept. of Corrections, et al., 703 F.3d 956, 20 WH Cases2d 9 (6th Cir. 2013)**

**Reed v. Maryland, Dep't of Human Res., 2013 WL 489985 (D. Md. Feb. 7, 2013)**

**Martinez v. City of Weslaco Tex., 2013 WL 2951060 (S.D. Tex. June 14, 2013)**

#### b. Front Pay

##### ***Summarized Elsewhere:***

**Mohl v. Lebanon, 939 F. Supp. 2d 504 (M.D. Pa. 2013)**

#### c. Other Equitable Relief

### C. Attorneys' Fees

### **Murphy v. Samson Resources, Co., 2013 WL 3179092 (N.D. Okla. Jun. 21, 2013)**

The employee filed FMLA retaliation claims against her former employer. The court dismissed the employee's claims on summary judgment, finding that the employer had

legitimate, nondiscriminatory, and non-pretextual reasons for the employment actions it took with respect to the employee.

After the Tenth Circuit affirmed the district court's ruling, the employer moved for attorneys' fees at the district court level, claiming that the employee's claims were frivolous at the outset since the court held that there was no evidence of pretext. The district court denied the employer's motion, citing to fact intensive and complex nature of employment discrimination cases and the detailed treatment the court gave each claim in its original opinion on summary judgment. The court stated that the employee's "failure to produce admissible evidence establishing ... pretext with respect to the FMLA retaliation claim does not render the lawsuit frivolous or without foundation."

**Bertrand v. City of Lake Charles, 2013 WL 1790089 (W.D. La., Feb. 25, 2013).**

This decision, limited solely to the issue of the prevailing plaintiff's fee award, followed trial and a judgment for a former city employee who sued the City for denial of FMLA leave and retaliation for asserting her rights under the FMLA. The employee also claimed sexual harassment under Title VII, but that claim was dismissed. The Court found the City violated the FMLA and awarded the employee \$129,357.01 in lost wages, benefits and liquidated damages with the award of attorneys' fees decided in the instant case.

In determining a reasonable fee award, the court examined the employee's attorney's fee in light of 12 factors approved by the Fifth Circuit, and found the fees to be reasonable. The court then took the lodestar figure and considered upward or downward adjustments. The court denied the employee's attorneys' request for an upward adjustment based on a purported shortage of attorneys experienced in FMLA litigation in the area, but granted the city attorneys' request for a downward adjustment based on the employee's failed Title VII claim. Because the employee's attorneys failed to "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims," the court reduced the hours billed by 25%, finding that 75% of the original hours billed reasonably reflects the number of hours counsel would have been expected to spend pursuing the successful FMLA claims. The court also awarded fees for time spent in post-trial settlement discussions.

**Bell v. Prefix, Inc., 20 WH Cases2d 1032 (6<sup>th</sup> Cir. 2013)**

Plaintiff appealed the district court's determination of attorney's fees, costs and sanctions. In 2009, the employee won a jury trial after protracted and contentious litigation. The jury awarded the employee \$14,563.00 in damages. One month later, the employee filed a motion for attorneys' fees in the amount of \$512,953.43, and costs of \$30,060.68. The employee requested, in the alternative, that the court reconsider his earlier pre-trial motion for frivolous and vexatious pleading sanctions pursuant to Rule 11 or section 1927. The district court partially granted and partially denied the motion and ordered the employee to produce documentation on both fees and costs. The court awarded \$101,600 in attorneys' fees and \$3,171.52 in costs. The court denied the request for sanctions.

The 6th Circuit affirmed the district court's judgment. The employee argued that the court failed to apply the correct standard in awarding attorney fees and costs, violated the Due

Process Clause for his property interest in attorney fees when it reduced attorney fees by 80% without a hearing, and made and contradicted uncontroverted affidavits in reaching its calculation on fees. In reaching its award of attorney fees, the court used established 6th Circuit precedent of multiplying a reasonable number of hours by a reasonable billing rate, which is accepted by and not contradicted by more recent Supreme Court case law. The rate used was based on a 2007 State Bar survey that defined the “reasonable rate” of compensation in Michigan. The number of hours was based on the court’s finding that “both parties [were] responsible for the antagonism and resulting protracted litigation.” As to whether or not Due Process is required and was met, the 6th Circuit found that the employee had an adequate opportunity to be heard on his motion. Furthermore, the employee acknowledged the process by requesting a decision based solely on the briefs submitted. As to costs, the employee provided inadequate documentation to determine whether or not costs beyond those allowed in Rule 54(d) and 28 U.S.C. §1920, should be awarded. The court found most to be typical overhead expenses incurred by law firms and thus not reimbursable. Finally, the court denied the employee’s request to resubmit his prior motion on sanctions because he provided no new basis for consideration of such sanctions.

**Rodriguez ex rel. Fogel v. City of Chicago, 2013 WL 5348307 (N.D. Ill. Sept. 24, 2013)**

The employee sued the City of Chicago, alleging interference with her rights and retaliation under the FMLA, among other claims. On the employer’s motion for summary judgment, the court permitted the employee’s FMLA claims to proceed. Shortly before trial, the parties reached a settlement on the employee’s remaining FMLA claims, which included a \$99,000.00 lump-sum payment and a provision for reasonable attorney’s fees and costs. The parties could not agree on the amount of attorney’s fees, so the employee filed a petition seeking \$270,755.00 in attorney’s fees and \$7,011.64 in costs.

The FMLA provides that a prevailing party can recover an award of reasonable attorney’s fees and costs. To ascertain the amount of an award, the court determines the lodestar amount and may then adjust that amount upward or downward depending on a variety of factors, such as the degree of success, the novelty and difficulty of the issues, and awards in similar cases.

The case was litigated for six years. The court decided that it was simpler to use the current market rates for the employee’s attorneys rather than the historical hourly rates. The employee established the reasonableness of her attorneys’ hourly rates with personal affidavits, affidavits from other practicing attorneys, and representative client contracts. The employer failed to rebut this evidence. However, the court reduced the hourly rate of the associate attorneys who worked on the case, because the employee failed to substantiate their hourly rates. As for the number of hours expended, the court determined that the employee was not entitled to fees connected to her motion to strike, her motion to enforce settlement, and her contemplated motion to reconsider a ruling denying a motion, because the court determined that all of these motions were unnecessary. Finally, although the settlement agreement provided monetary relief for the employee, it did not provide the full relief the employee requested in her amended complaint. Accordingly, the court concluded the agreement was a partial success, reduced the lodestar amount by ten percent, and awarded attorneys’ fees in the amount of \$217,053.00.

***Summarized Elsewhere:***

***Mohl v. Lebanon*, 939 F. Supp. 2d 504 (M.D. Pa. 2013)**

D. Tax Consequences

**IV. OTHER LITIGATION ISSUES**

A. Pleadings

***Santiago v. Citywide Community Counseling Services, Inc.*, 2013 WL 4051223 (E.D.Pa. Aug. 12, 2013)**

After plaintiff was laid off for financial reasons, she filed suit alleging that her termination was related to her involvement in a former employee's sexual harassment claim and in retaliation for using FMLA leave. Defendant filed a motion to dismiss. The court held that plaintiff had adequately set forth facts to support her claim for relief under the FMLA. Plaintiff alleged that (1) she was eligible for FMLA leave, (2) she took a qualifying leave, (3) she was treated with hostility when she returned from her leave and asked to take a demotion, and (4) defendant discharged plaintiff twenty-four days after her return from FMLA leave. The court found that it was able to draw a reasonable inference that defendant may be culpable for violations of plaintiff's FMLA rights and denied defendant's motion to dismiss.

***Mayorga v. Sonoco Prods. Co.*, 2013 WL 1792554 (D. N.J. Apr. 26, 2013)**

Plaintiff alleged he stopped working on July 28, 2011 due to medical reasons when he underwent surgery relating to a tumor. Plaintiff alleged he was entitled to leave under the FMLA for the surgery, and that the employer did not provide documents or advise him about FMLA leave. Plaintiff further alleged that when he returned to work, he proceeded to report the faulty workmanship of a co-worker. The co-worker attacked him, and shortly after the altercation, the employer terminated plaintiff's employment on the pretext of engaging in a fight with a co-worker.

Plaintiff filed a lawsuit asserting, among other claims, a claim for retaliation in violation of the FMLA. The employer moved to dismiss the lawsuit based on a failure to state a claim. The court denied the employer's motion, finding the allegations, although convoluted, were sufficient to allege a retaliation claim given the close temporal proximity between the leave and discharge. Construing these allegations in the light most favorable to plaintiff, the court found that plaintiff satisfied the plausibility requirement of *Iqbal* and *Twombly* as to his FMLA retaliation claim.

***Rodriguez v. JSPLTC, LLC*, 2013 WL 1791145 (D. N.J. Apr. 25, 2013)**

Plaintiff alleged that during the course of her employment, she informed the Human Resources Manager that she had a special needs child and required a scheduling accommodation in order to properly care for him. The employer denied the request. Thereafter, plaintiff was disciplined for tardiness and absences from work. Upon arriving to work late one day, plaintiff

was given a final warning and instructed she could not be late for the rest of the year. In response, plaintiff suffered a “complete breakdown,” culminating with her doctor placing her on a two week work leave due to stress, anxiety, and depression. Plaintiff notified the employer of the restriction and that she would drop off the doctor’s note the next day attesting to the condition. Plaintiff however could not get to work because medication prevented her from driving. Because plaintiff did not provide the note, her employment was terminated.

Plaintiff filed a lawsuit asserting, among other claims, a claim for interference in violation of the FMLA. The employer moved to dismiss the lawsuit based on a failure to state a claim. The court dismissed the FMLA claim because, although plaintiff alleged that she had worked for the employer for more than twelve months, the complaint did not include any allegations that she had worked more than 1,250 hours during the previous twelve month period. As such, plaintiff failed to allege facts supporting a plausible inference that she was an eligible employee.

**Hollenbach, et. al. v. Burbank, et. al., 2013 WL 1842453 (D. Utah May 1, 2013)**

Plaintiffs, a group of police officers, brought various claims against defendants, which defendants moved to partially dismiss. In particular, defendants moved the court to dismiss plaintiffs’ cause of action for interference with plaintiff Hollenbach’s FMLA rights. Defendants argued that the interference claim should be dismissed because plaintiffs’ allegation that defendants failed to comply with the FMLA employer notice requirements was insufficient to state a claim for interference. Plaintiffs contended that this allegation was sufficient and noted that the Amended Complaint also stated that defendants refused to grant plaintiff Hollenbach FMLA leave as requested.

The court found that the allegations in the Amended Complaint, including the claim that defendants refused to grant plaintiff Hollenbach FMLA leave, were sufficient to state a claim for FMLA interference. Accordingly, the court denied defendants’ Motion to Dismiss as it related to this claim.

**Lindsey v. Hardee’s Food Systems, Inc., 2013 WL 837527 (N.D. Ala., March 4, 2013)**

Plaintiff, a former employee of defendant, filed multiple claims against defendant, including denial of right to take FMLA leave. Defendant moved to dismiss the complaint for failure to state a claim. Defendant challenged the sufficiency of the complaint by disputing a factual assertion, i.e., that plaintiff requested leave. The court denied the motion because a challenge to a factual assertion is a matter for a Motion for Summary Judgment and not a Motion to Dismiss.

**Windham v. Dominion East Ohio Gas, 2013 WL 123798 (N.D. Ohio Jan. 9, 2013)**

Plaintiff took FMLA leave on several occasions during his employment. He was discharged in 2011 after he failed to return to work following a leave of absence. Plaintiff filed suit *pro se*, and the employer filed a motion to dismiss. The district court granted the motion, finding that the complaint was devoid of any allegation that the employer denied the employee any benefit to which he was entitled under the FMLA.

**Jackson v. Texas Southern University, 2013 WL 593412 (S.D. Tex. Feb. 14, 2013)**

Plaintiff, a faculty member of defendant for over twenty years, filed a multi-count complaint, alleging that defendant violated the FMLA and a host of other statutes and constitutional provisions over the last five years by treating her differently than others. Defendant moved to dismiss plaintiff's FMLA claim for failure to state a claim. The district court granted defendant's motion, but permitted plaintiff to amend. Specifically, according to the court, "[t]he First Amended Complaint states that [defendant] failed to restore her to her position following leave under the FMLA on or about May 1, 2012; yet it also states that Plaintiff 'presently holds the rank of associate professor.' Given this contradiction, she fails to state a plausible FMLA claim."

**Sharma v. Howard County, 2013 WL 530948 (D. Md., Feb. 12, 2013)**

Plaintiff suffered from a severe asthmatic condition and was employed by defendant as an engineer in its department of planning and zoning. In October 2008, plaintiff requested intermittent FMLA leave, which was granted and he took without issue until August 2010. At that time, plaintiff received a negative performance evaluation, including a negative score for "accountability/attendance/punctuality." In September 2010, defendant issued a disciplinary action and implemented a procedure by which plaintiff was required to notify his supervisor when he took FMLA leave. Defendant disciplined plaintiff under this new policy in October 2010, and he subsequently submitted written complaints to defendant over the next few months. Defendant then instructed plaintiff "to immediately stop making FMLA complaints." It notified plaintiff of its intent to discharge him in December 2010, which was affirmed after a pre-termination hearing and made final on January 4, 2011. Plaintiff sued alleging, among other things, interference with his FMLA rights (which he "incorrectly describe[d] as FMLA discrimination," according to the court).

Defendant moved to dismiss for failure to plead an FMLA claim. According to the district court, "[t]he amended complaint does not state a claim for FMLA interference because it fails to allege that the [defendant] denied Plaintiff any benefits to which he was entitled under the FMLA. In fact, the amended complaint recounts that Plaintiff requested and was granted leave to which he was entitled under the FMLA." The court, however, concluded that plaintiff did adequately state a claim for retaliation under the FMLA because he alleged that his employer gave him a negative performance review based on "accountability/attendance/punctuality," he later complained that his evaluation inaccurately reported the number of non-FMLA leave hours he had taken, and defendant later refused to adjust his negative evaluation. The court explained that "the necessary implication of these allegations is that the original negative performance review counted Plaintiff's FMLA leave hours as non-FMLA leave hours. Registering a complaint with an employer about such a practice is the most basic way that an employee could oppose a practice made unlawful by the FMLA."



**Segura v. TLC Learning Center, 2013 WL 1283827 (N.D. Ill. March 26, 2013)**

The employee, a kindergarten teacher, took a leave of absence under the FMLA to care for her ill husband in April of 2012. On June 5, 2012 she was informed that her employment was terminated. The employee filed suit *pro se* against her former employer and supervisor based on multiple theories under the FMLA. The employer moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). The employer argued one of the employee's FMLA claims should be dismissed because she did not allege in her complaint that she worked the requisite 1,250 hours preceding her leave. In her complaint, however, she alleged she began working for defendants in June of 2008 and began her leave in April of 2012. The district court found that this pleading was sufficient because the employer was on reasonable notice as to her claims and because the complaint stated she was granted FMLA leave by her employer, which supports her allegation that she was an FMLA-eligible employee.

The employee also brought claims for discrimination based on race and national origin through the FMLA. The District Court dismissed the employee's claims based on race and national origin, explaining there is no separate cause of action for discrimination based on race or national origin in the FMLA.

**Hodges v. District of Columbia, 2013 WL 4047197 (D. D.C. Aug. 12, 2013)**

Plaintiff was employed as a supervisory auditor. In 2010, he experienced significant back pain which, he claimed, limited his ability to sit, work, sleep, walk and concentrate. By late July 2010, plaintiff claimed he needed leave without pay and short term disability. At the request of the employer, he submitted medical documentation. The documentation stated that his condition would last three to six months and he would experience a six to eight week "incapacity duration". The employer rejected his request for leave. Instead, it offered an accommodation that it believed would allow him to work. The employee, however, failed to report to work and was ultimately terminated for being absent without leave.

The employee then brought suit alleging multiple claims, including violations of the FMLA. The court denied the employer's motion for summary judgment. The court rejected the employer's argument that the employee failed to properly plead a "serious health condition". The court found that the employee was incapacitated for more than three consecutive days and underwent further treatment at least twice. The court also found that it could be inferred that the employee's condition would be continuing and rendered him unable to perform his job duties. The district also noted that employer did not even address employee's retaliation claim. Accordingly, the court denied the employer's motion for summary judgment.

**Jacobs v. York Union Rescue Mission, Inc., 2013 WL 433327 (M.D. Penn. Feb. 5, 2013)**

Plaintiff filed a complaint alleging multiple claims, including violations of the FMLA. Defendant filed a motion to dismiss, or in the alternative, a motion for summary judgment. The district court held that plaintiff failed to adequately plead an interference claim. The court found that plaintiff failed to provide any specific allegations relating to how she provided defendant with sufficient notice of her intent to take leave. The court also found that, even though plaintiff

alleged that she was discouraged from taking leave, that management did not advise her of her rights, and that defendant terminated her employment because of her requests for leave, she still failed to plead an interference claim because there was no allegation of any prejudice or injury. Thus, her complaint was insufficient to survive a motion to dismiss for interference.

The court also ruled that plaintiff failed to adequately plead a retaliation claim. Like her interference claim, the court found that she failed to allege that she provided adequate notice to defendant regarding her intent to use FMLA leave. In addition, the court found that plaintiff also failed to allege sufficient causation. The court noted that plaintiff alleged that defendant terminated her employment following discriminatory comments about her need for time off for her serious health conditions. However, the court also noted that plaintiff did not attribute those comments to defendant or any agent of defendant. Thus, the court ruled that her complaint failed to adequately plead FMLA retaliation. Nonetheless, the court granted plaintiff leave to amend her complaint.

**Mayorga v. Sonoco Prods. Co., 2013 WL 1792554 (D. N.J. Apr. 26, 2013)**

Plaintiff filed a lawsuit for retaliation in violation of the FMLA, and the court denied the employer's motion to dismiss. Plaintiff claimed he stopped working to undergo mastoidectomy surgery because of a tumor. Plaintiff alleged he was entitled to leave under the FMLA, and that the employer did not provide documents or advise him regarding FMLA leave. Plaintiff further alleged that after he returned to work, he reported faulty workmanship by one of his co-workers. The co-worker subsequently attacked him, and shortly after the altercation, the employer terminated plaintiff's employment for fighting.

The court found that the allegations, although "convoluted," were sufficient to allege a FMLA retaliation claim. Plaintiff alleged that that he went on FMLA leave and suffered an adverse employment action because he was discharged. His termination of employment occurred in close temporal proximity to when he returned to work. Construing these allegations in the light most favorable to plaintiff, the court found that plaintiff satisfied the plausibility requirement of *Iqbal* and *Twombly* as to his FMLA retaliation claim.

**Rodriguez v. JSPLTC, LLC, 2013 WL 1791145 (D. N.J. Apr. 25, 2013)**

Plaintiff filed a lawsuit alleging interference in violation of the FMLA. The court granted the employer's motion to dismiss for failure to state a claim. The employee had a child with special needs and requested a scheduling accommodation to properly care for him. The employer denied this request, and subsequently disciplined the employee for tardiness and absences. On one occasion, the employee received a final warning after arriving late to work. As a result, she suffered a "complete breakdown," and her doctor placed her on two weeks of leave due to stress, anxiety and depression. Plaintiff notified the employer of the restriction, and agreed to drop off the doctor's note the next day. However, plaintiff could not deliver the note because medication prevented her from driving. Because plaintiff did not provide the note, her employment was terminated. Despite her discharge, plaintiff subsequently delivered the note to the employer.

The court dismissed the employee's FMLA claim. Although plaintiff alleged that she had worked for the employer for more than twelve months, the complaint did not include any allegations that plaintiff had worked more than 1,250 hours during the previous twelve month period. Accordingly, plaintiff failed to allege facts supporting a plausible inference that she was an eligible employee, and she could not proceed with her FMLA claim.

**Goff v. State Military Department, 2013 WL 5352755 (M.D. Ala. Sept. 24, 2013)**

The employee, proceeding pro se, had suffered a back injury after slipping on wet paint in the employer's parking lot. Around that same time, the employee complained to her supervisor about incidents of harassment allegedly perpetrated against her by other employees. Despite these complaints, one of the alleged harassers was assigned to be the employee's supervisor during an office restructuring that occurred around the time of her back injury. In the months following the employee's injury, she sought various forms of medical treatment and eventually was granted FMLA leave for her condition. During this same time period, the employee also began to accrue written reprimands from her new supervisor. The day after she returned from FMLA leave, her employment was terminated.

In addition to various other causes of action, the employee sued her employer and three of her co-workers, alleging interference and retaliation under the FMLA. The individual defendants moved to dismiss the entire complaint, including the FMLA claims, for failure to state a claim upon which relief can be granted. The district court, in adopting the magistrate's recommendation, granted the motion to dismiss and noted that the employee's FMLA interference claim was doomed by her own admissions in the complaint. To state a claim for FMLA interference, a plaintiff must only show that she was entitled to FMLA leave and that her employer prevented or otherwise interfered with her ability to take it. The employee had admitted that she had taken the FMLA leave to which she was legally entitled. Thus, even applying the liberal construction of pleadings afforded to pro se litigants, the court found that there was no way for plaintiff to show that defendants had prevented her from exercising her FMLA rights. The court also noted that, notwithstanding the factual underpinning of plaintiff's FMLA claims, neither could survive the motion to dismiss because the individual defendants were not "employers" for purposes of the FMLA.

**Phelps v. Balfour, Commemorative Brands Inc., 2013 WL 653542 (W.D. Ky. Feb. 21, 2013)**

The employee alleged that the employer hired her in August 1997, but the employer's records indicated that the employee was hired in June 1997. In January, April, May, June and July of 2009, the employee filed for short-term disability and FMLA leave. On June 29, the employer notified the employee that she exhausted her FMLA leave on June 15, 2009 and that she was being placed on a six-month leave of absence. The employee's doctor cleared her to return to work on July 22, 2009. Two days before the employee could return to work, the employer notified her that her position was eliminated and she did not need to come back to work. Subsequently, the employee requested to return to work, or, in the alternative, to be placed on furlough or transferred to the night shift. The employer denied all of those requests. The employee claimed that the employer and various individual defendants discharged her prior to the end of her statutory twelve-week leave permitted by the FMLA, willfully discriminated

against her, and willfully retaliated against her for taking medical leave. The employer filed a motion to dismiss the claim, arguing it was time-barred because the two year statute of limitations had expired. The court denied the motion because the employee alleged a willful violation of the FMLA, which entitled her to an extended three year statute of limitations.

The employer moved to dismiss the employee's FMLA retaliation and interference claims for failure to state a claim. The court denied the employer's motions to dismiss the FMLA retaliation claim, but granted the employer's other motions to dismiss. The court declined to dismiss the FMLA retaliation claim because the employee presented evidence that gave rise to an inference that there was a minimal causal connection between protected activity she engaged in and the adverse employment action she suffered. The court dismissed the FMLA interference claim, explaining that the employee did not adequately plead a violation of the FMLA notice requirements. She also failed to allege she was entitled to additional FMLA leave or that she still had available FMLA leave at the time of her discharge. Individual defendants also moved to dismiss the employee's FMLA claims. Regarding the retaliation and the interference FMLA claims, the court declined to accept the individual defendants' argument that they were not employers under the FMLA. However, because the employee did not plead adequately for an FMLA interference claim, the court dismissed the employee's interference claim against the individual defendants as well.

**Martinez v. City of Weslaco Tex., 2013 WL 2951060 (S.D. Tex. June 14, 2013)**

An employee was discharged at the conclusion of his FMLA leave for exhausting his FMLA leave. The employee subsequently filed a lawsuit alleging that his termination violated the FMLA. The Court ordered the employee to amend his complaint given his failure to allege sufficient facts in support of his allegations. The employee filed an amended complaint, and the employer then filed a motion to dismiss, which the court treated as a motion for judgment on the pleadings because the employer had already answered the complaint.

The Court granted the employer's motion to dismiss the complaint because the employee did not state a claim under the FMLA. The employee admitted that he received his full FMLA leave for the statutorily-required duration. Furthermore, the employee failed to allege that he attempted to return to the position that he was assigned when his leave began. Instead he sought to be reassigned to a different position - which he was not entitled to under the FMLA. With respect to his retaliation claim, the employee failed to allege any facts showing that he was treated less favorably than an employee who had not requested leave under the FMLA or that the adverse action was made because he sought protection under the FMLA. Instead, the employee alleged that he was terminated for exhausting his FMLA leave which was fatal to his claim as the FMLA relieves employers of the duty to reinstate an employee who does not return to the same or equivalent position, or at least seek to do so, by the end of the FMLA period.

**Herskowitz v. County of Lebanon, 2013 WL 5719250 (M.D. Pa. Oct. 21, 2013)**

Plaintiff filed a lengthy complaint against his employer, alleging violations of various federal and state statutes. The employee included a claim of FMLA interference because the employer did not grant him leave to care for his wife and infant son, and a claim that the

employer retaliated against him because he attempted to exercise his rights under the FMLA. The employer filed a motion to dismiss the complaint, arguing that plaintiff's claims for discrimination and harassment failed at the pleading stage for lack of sufficient factual allegations and reliance on "hollow" legal conclusions.

The Report and Recommendation of the Magistrate Judge denied the employer's motion. The Magistrate Judge concluded that plaintiff had included sufficient plausible factual detail in his complaint to support his claims of FMLA retaliation. The employer's motion relied upon a skeptical and narrow interpretation of the complaint, which not the standard applied by the court when reviewing motions to dismiss pursuant to Rule 12(b)(6).

**Greene v. YRC, Inc., 2013 WL 6537742 (D. Md. Dec. 12, 2013)**

During a conversation with his supervisor about a pay shortage, plaintiff, a truck driver, experienced pain and pressure in his chest, stomach pain, stress, and anxiety. Following the conversation, plaintiff prepared his truck for an out-of-state delivery. Plaintiff then asked a co-worker to tell his supervisor that he was seeking medical treatment because he was experiencing chest pain, chest pressure, and anxiety to the point that it impaired his ability to make the scheduled delivery. Plaintiff immediately called his supervisor directly and reiterated the same information. Plaintiff sought medical treatment and his physician placed him off of work for one week due to high blood pressure. Plaintiff's physician submitted a doctor's excuse to his supervisor. Plaintiff's supervisor phoned plaintiff the same day and informed him that his leaving company premise would be treated "as a voluntary quit." Plaintiff understood this to mean he was discharged, but subsequently requested FMLA forms, which defendant refused to provide.

Plaintiff filed suit alleging claims for interference and retaliation under the FMLA. Defendant moved to dismiss, arguing that plaintiff failed to adequately allege the eligibility, entitlement, and notice elements of his FMLA interference claim and the causation element of his FMLA retaliation claim. The court granted the employer's motion to dismiss, in part, and ordered plaintiff to supplement an amended complaint alleging sufficient facts to demonstrate he met the 1,250 hour standard. The court noted that plaintiff pled adequate facts to demonstrate he satisfied the one-year of employment requirement, but failed to state explicitly that he worked the requisite 1,250 hours necessary to qualify as an eligible employee under the FMLA. With regard to the "serious health condition" element, the court explained that it would be unreasonable to require plaintiff "to allege detailed facts as to every element required to establish that he had a serious health condition." Rather, the court held that plaintiff's allegations were sufficient at the pleading stage to show that he had a serious health condition on the date of his discharge. The court went on to find that plaintiff sufficiently plead facts to support the notice element of his FMLA claim, where it was alleged that plaintiff asked a co-worker to notify his supervisor of his condition, immediately contacted his supervisor directly to relay the same information, and faxed a doctor's excuse the same day. The court explained that while plaintiff's doctor's note was "by no means detailed" it was at least plausible that the note, combined with plaintiff's notice to his colleague and supervisor, were sufficient to put defendant on notice that plaintiff was requesting FMLA leave and/or trigger defendant's obligation under the FMLA to request additional information. Turning to the retaliation claim, the court held that the close temporal proximity between plaintiff's attempt to exercise his rights under the FMLA and his

discharge (the same day) satisfied “the pleading standard for a causal connection between the protected activity and the adverse action.”

**Wallace v. Fisher & Ludlow, 2013 WL 5291785 (S.D. Ill. Sept. 19, 2013)**

Plaintiff was employed as a general production worker for the employer up until his discharge on December 7, 2011. Plaintiff returned from FMLA leave on March 8, 2011 after undergoing back surgery. Plaintiff’s supervisor denied his request for further leave for follow-up care and physical therapy, explaining the denial on grounds that employee’s back problems were not work-related. After missing several days of work to seek further treatment for his back, the employee was written up on November 14, 2011 and then discharged on December 7, 2011 for absenteeism. He then filed suit, claiming that his discharge violated FMLA.

The court denied the employer’s motion for judgment on the pleadings. The employer first argued that that employee was not an “eligible employee” because he failed to specifically allege that he worked 1,250 hours in the 12 months preceding his FMLA leave. The court disagreed, reasoning that “such specific allegations are not necessary to provide company adequate notice of the claims against it” and that the employee’s complaint satisfied the pleading standards under *Twombly* and *Iqbal*. Turning to the complaint itself, the court held that the facts alleged in his complaint plausibly met the 1,250 hour requirement and stated a claim for denial of intermittent leave under the FMLA. In doing so, the court also denied the employer’s attempt to attach a declaration and time records to its motion, documents which were not part of the employee’s complaint. The court stated that, while it is proper for a moving party to present “concededly authentic” documents referred to in a complaint that are central to a plaintiff’s claims, the documents the employer attached were not referred to in the employee’s complaint and were therefore improper.

**Merical v. Valor Healthcare Inc., 2013 WL 5332145 (W.D. Pa., Sept. 23, 2013)**

The employee, a behavioral therapist, experienced panic attacks, severe stress, and depression at work. She underwent medical treatment and subsequently advised the employer she would not return to work “until further notice.” The employer approved the employee’s unpaid medical leave and requested she provide a more certain date for her return. The employee provided a medical certificate stating she would not return for at least three months. Before the expiration of the three months, the employer discharged the employee based upon “business needs” and the employee’s “inappropriate behavior” to other employees. The employee filed suit under the FMLA and the employer filed a motion to dismiss, arguing it was exempt from the FMLA obligations because it did not employ at least 50 employees within a 75 mile radius from the employee’s worksite.

The court denied the employer’s motion to dismiss, finding the employee alleged sufficient facts to support her FMLA claim. Specifically, the employee alleged “at the time of her request for leave pursuant to the FMLA, [she] met all requirements for qualifications under the FMLA” and the employer “*erroneously* claimed that the FMLA did not apply to it because it did not have the requisite number of employees within a 75 mile radius of the Greensburg clinic to be covered by the FMLA.” She also alleged the employer granted FMLA leave to other

employees during and shortly after her employment. According to the court, discovery would reveal whether the FMLA applied to the employer.

**Hathorn v. Sodexo, Inc., 2013 WL 5516140 (W.D. Okla. Oct. 2, 2013)**

In March 2011, the employee's mother underwent surgery requiring the employee to alter her work schedule. The employer was allegedly aware of the employee's need to care for her parent, but still demanded her work be top priority. The employee claimed these demands interfered with her FMLA rights because it pressured her to return to work. The employee also alleged the employer retaliated against her by verbally berating her about tasks that were never assigned or not her responsibility and that the stress of the employer's demands caused her to suffer asthma attacks, for which she sought medical treatment. The employee further claimed that when she complained to the employer regarding this treatment, she was ignored.

The employer moved to dismiss the employee's FMLA claims on grounds that the employee failed to plead sufficient facts to state her claims and that the claims were time-barred. The court applied the "plausibility standard"—whether the facts alleged allow the court to draw a reasonable inference the employer is liable for the alleged misconduct. According to the court, the above allegations sufficiently met this standard. The court held none of the claims were time-barred and applied the 3 year statute of limitations to the interference claim because the above alleged facts sufficiently demonstrated the employer knew or showed reckless disregard for whether its conduct was prohibited by the FMLA. The court, however, granted the motion to dismiss with leave to amend, as to allegations grounded in the employer's failure to notify the employee of her FMLA rights and to claims involving her own health conditions. According to the court, an employee must sufficiently allege she was prejudiced by the employer's failure to follow the FMLA notice requirements, which here the employee neglected to do. Additionally, the employee failed to sufficiently allege facts surrounding FMLA violations regarding her own health conditions because her complaint primarily focused on the time off associated with her mother's health.

***Summarized Elsewhere:***

**Gonzalez v. Wells Fargo Bank, N.A., 21 WH Cases2d 535 (S.D. Fla. 2013)**

**Fath v. Heritage Valley Med. Grp., 20 WH Cases2d 494 (W.D. Pa. 2013)**

**Montgomery v. Wal-Mart Stores East, L.P., 2013 WL 4602523 (C.D. Ind. Aug. 29, 2013)**

**Attakora v. District of Columbia, 2013 WL 3291438 (D. D.C. July 1, 2013)**

**Barbieri v. Wynn, 2013 WL 257290 (D. Nev. Jan. 29, 2013)**

**Bell v. Univ. of Cal. Davis Med. Ctr., 2013 WL 1896318 (E.D. Cal. May 6, 2013)**

**Van Horn v. Martin, 2013 WL 4516665 (E.D. Ark. Aug. 20, 2013)**

**Nathan v. Ohio State University, 21 WH Cases2d 813 (S.D. Ohio 2013)**

**Nordby v. Shane Company, Inc., 2013 WL 4519350 (D. Minn. Aug. 26, 2013)**

**B. Right to Jury Trial**

**Poore v. Caidan Management Co., LLC, 2013 WL 765301 (E.D. Mich., Feb. 28, 2013)**

Plaintiff filed suit against defendant after she was discharged in connection with her taking leave to care for her daughter. At the beginning of her employment, plaintiff signed a waiver of her right to a jury trial under state and federal law, including the FMLA. Nevertheless, plaintiff made a demand for a jury in her complaint. Defendant filed a motion to strike the demand for a jury and the court granted the motion. The court found that the waiver of a right to trial by jury did not waive any substantive rights under the FMLA. Instead, the waiver only impacted the manner in which the trial was conducted. The court analogized the waiver of a jury to an agreement to arbitrate claims. Courts have found agreements to arbitrate FMLA claims lawful because it only impacts the forum in which the complaint is brought. Additionally, an agreement to arbitrate necessarily includes a waiver of the right to a jury of one's peers.

C. Protections Afforded

D. Defenses

1. Statute of Limitations

***Summarized Elsewhere:***

**Coleman v. Illinois Dept. of Human Services, 2013 WL 5348314 (N.D. Ill. Sept. 24, 2013)**

**Parson v. Homer, 2013 WL 5441734 (S.D. Ohio Sept. 27, 2013)**

**Akin-Taylor v. Kaiser Foundation Health Plan Inc., 2013 WL 4456152 (N.D. Cal. Aug. 16, 2013)**

**Hathorn v. Sodexo, Inc., 2013 WL 5516140 (W.D. Okla. Oct. 2, 2013)**

a. General

**Barrett v. Illinois Dep't of Corr., 2013 WL 3874078 (C.D. Ill. July 26, 2013)**

Over a span of several years, the employee accumulated twelve unauthorized absences. The employee was then discharged in accordance with the employer's policy. The employee argued that three absences were misclassified as unauthorized because she was entitled to FMLA leave on those dates. The employee argued that the absences on December 15, 2003, December 22, 2004, and August 10, 2005 were misclassified. The court held that the employee's FMLA claim was time-barred.

The court first noted that the FMLA has a two-year statute of limitations and requires that claims be brought within two years after the date of the last event constituting the alleged violation. In an issue of first impression, the court ruled that the "last event constituting the alleged violation" means the denial of FMLA protected leave rather than the employee's ultimate discharge. The court noted that, under the FMLA, a violation occurs when an employer denies benefits. The court also found that, even though the statutes are not identical, the statute of limitations under Title VII, which is similar to the statute of limitations under the FMLA, also starts a new clock for each alleged violation that the employee challenges. In addition, the court found that the "continuing violations" doctrine cannot be applied to FMLA claims because the focus is properly upon the discriminatory acts themselves, not the ultimate consequences of the



acts. The court also noted that the employee should have contested the absences at the time her absence was classified as unauthorized. Because the absences the employee challenged occurred more than seven years before she filed her claim, the court ruled that the employee's claims were barred by the statute of limitations.

The court acknowledged that the ruling may have the unintended consequence of clogging the federal courts with premature claims. The court, however, noted that because the inevitable consequence of unauthorized absences is discharge, an employee that believes an absence is protected under the FMLA should contest that decision in a timely manner.

**Hite v. Hill Dermaceuticals, Inc., 2013 WL 93199 (M.D. Fla. Jan. 8, 2013)**

Plaintiff's employment was terminated on November 11, 2010, following her second leave for childbirth in March, 2010. The employer maintained that her employment was terminated due to low sales numbers. Plaintiff filed suit on October 5, 2012, alleging violations of the FMLA, and the employer filed a motion to dismiss the complaint in part. The court noted that plaintiff had failed to allege a willful violation of the FMLA, and thus the two-year statute of limitations applied. Although some of the employer's alleged actions occurred before October 5, 2010 (two years before suit was filed), the termination date was within the limitations period. Therefore, the court denied the motion to dismiss.

**Robinson v. United Parcel Service, Inc., 2013 WL 592671 (E.D. Ark. Feb. 14, 2013)**

On June 25, 2010, the employer allegedly refused to grant FMLA leave to plaintiff for seven days while he was off work due to a serious health condition. The employer, counting those days as absences under its attendance policy, discharged the employee for excessive absenteeism. On October 31, 2011, the employee sued the employer in U.S. District Court, claiming that the employer's attendance policy and therefore the employee's discharge were racially discriminatory in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. On December 13, 2012, the employee filed an amended complaint alleging that his discharge had also violated the FMLA because it was triggered by the employer's failure on June 25, 2010 to grant him FMLA leave.

The employer moved to dismiss the employee's FMLA claim as barred by the statute of limitations. Title 29 U.S.C. § 2617(c) establishes a two-year statute of limitations for FMLA actions, except that actions involving willful FMLA violations are subject to a three-year statute of limitations. The court, however, did not reach that issue.

Instead, the court decided that the employee's amended complaint related back to the time of his filing of the original complaint, and that his FMLA claim was therefore timely regardless of whether or not it alleged a willful violation. Under Fed.R.Civ.P. 15(c)(2), an amendment to a pleading relates back to the date of the original pleading when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading." The court acknowledged that the original complaint did not reference the FMLA or the employer's refusal to excuse the employee's medically related absences as a basis for his lawsuit. The court nevertheless concluded that the

employee's FMLA claim alleged in his amended complaint arose from the same conduct or occurrence as the claim stated in his original complaint – that he was wrongfully discharged for violating the employer's attendance policy. The court denied the employer's motion to dismiss.

**Marshall v. Donahoe, 2013 WL 597596 (D. Md. Feb. 15, 2013)**

On February 13, 2012, the employee sued her employer in U.S. District Court alleging that the employer violated the FMLA when it had denied her request for medical leave and disciplined her for absenteeism on July 21, 2007. The court granted the employer's motion to dismiss based on the statute of limitations. FMLA claims are subject to a two-year statute of limitations, which is extended to three-years for willful violations. The court ruled that the employee's complaint, filed more than four and one-half years after the last event she claimed to constitute an FMLA violation, was time barred.

**Wonasue v. University of Maryland Alumni Ass'n, 2013 WL 3009316 (D. Md. June 14, 2013)**

An employee brought a lawsuit alleging her employer refused to grant her leave in violation of the FMLA. After the deadline set by the court's discovery order, the employee moved for leave file an amended complaint to add a new defendant. The court denied the motion as futile because, among other things, the statute of limitations on the FMLA claim had expired. The court concluded that the addition of the new defendant did not relate back to the original pleading because the employee could not show that the new defendant had notice within the limitations period of the FMLA suit brought against the original defendant.

**Gauer v. Gallaudet University, 915 F. Supp. 2d 145 (D. D.C. 2013)**

Plaintiff sued his former employer, alleging a violation of his FMLA rights in 2009. In February 2009, while on leave and pursuant to a clause in his contract allowing him to seek a promotion, plaintiff applied to become an assistant professor. On March 19, 2009, plaintiff was allegedly notified over the phone that his request for a promotion was denied, and that he would not be retained for the following academic year. Plaintiff received written confirmation of the decision six days later.

Plaintiff filed a lawsuit against his former employer on April 24, 2012, claiming it willfully violated the FMLA by denying his request for promotion and terminating his contract. Defendant moved to dismiss the claims as untimely, arguing that plaintiff received notice of its intent to end the contract on March 19, 2009 or when he received written notice less than a week later, effectively starting the clock on the FMLA's three year statutory limitations period on either of those dates. Plaintiff claimed that the operative date was August 16, 2009, when defendant's decision to terminate his contract would become effective. He argued that the phone call and the letter merely provided notice of his employer's intent to terminate his contract at the beginning of the new academic year. The court disagreed. The court concluded that the statute of limitations began to run when plaintiff received notice of his discharge, and not on the effective date of the termination. Because plaintiff's claim was filed on April 24, 2012, more than three years after he received notice of his discharge, the court granted defendant's motion to dismiss.

**Franklin v. Tuthill Corp./Transfer Sys., 2013 WL 3353933 (N.D. Ind. July 3, 2013)**

The employee alleged that his employer discriminated against him for exercising his FMLA rights at various times throughout his employment. Specifically, the employee alleged that at various presentations given by the company it spoke about the negative effects that FMLA leave has on its operations, and that production problems were the result of its employees taking FMLA leave. The employee alleged that after his FMLA leave, the employer discriminated against him by refusing to allow him to transfer jobs, unfairly disciplining him as compared to his co-workers who did not take FMLA leave and for refusing to grant him tuition reimbursement. Eventually, the employee was subsequently informed that his employment was being terminated after missing a day of work.

The employer argued that the employee's FMLA claims were time-barred as the last specific reference in the complaint to an alleged FMLA violation occurred more than two years before the filing of the Complaint, and thus outside the applicable statute of limitations. The Court rejected the employer's motion because it failed to consider the context of the employee's allegations. The court noted that the employee's complaint could be read as alleging all of the negative actions he suffered on the job, up to and including his termination, were due to his FMLA leave. Therefore, the Court refused to dismiss the employee's claims as time-barred.

The Court did, however, grant the employer's motion to dismiss the employee's FMLA claims against one of his former supervisors because the employee failed to allege that this supervisor possessed control over his FMLA rights. Specifically, the employee's complaint failed to allege that this supervisor had influence over the employee's ability to take FMLA leave or his right to return to his position following leave and contained no specific allegations about his supervisor whatsoever.

***Summarized Elsewhere:***

**Sproul v. Washoe Barton Med. Ctr., 2013 WL 1792187 (D. Nev. April 26, 2013)**

b. Willful Violation

**Phillips v. Raytheon Applied Signal Tech., Inc., 2013 WL 5440802 (D. Md. Sept. 27, 2013)**

Plaintiff had met with an HR representative to sign an agreement granting her request for FMLA leave. The agreement required her to obtain medical clearance prior to returning to work. Four weeks after exhausting her FMLA leave, plaintiff received clearance to return to work. Several weeks later, however, the employer told her the position no longer existed. The company agreed to pay her in full for her period of extended leave and to assist her in finding a new position with the company. However, after plaintiff was unable to secure a new position, she was dismissed. More than two years after her termination, she brought suit against her employer under the FMLA. Asserting her claim was time-barred, the employer moved for summary judgment.

The court granted summary judgment for the employer. Plaintiff claimed her employer's willful violation of the FMLA extended the statute of limitations on her claim. Her employer

maintained that it did not willfully violate the FMLA, and thus the claim was barred after two years. The court recognized that a willful violation would extend the statute of limitations to three years if the employer “knew or showed reckless disregard that its conduct violated the FMLA.” The court further noted that an employer does not show willfulness when it grants a request for leave, attempts to accommodate an employee’s disability, or supplies the necessary FMLA forms and keeps the employee apprised of their job status. The employer granted the leave request, kept the employee apprised of her job status, provided paid leave during the period between expiration of her FMLA leave and her medical clearance, granted her four additional weeks of paid leave, and made an effort to find a new position for plaintiff. The court found that if any FMLA violation had occurred, it was not willful.

**Abbott v. Verizon Communications of New Jersey, 2013 WL 594466 (D. N.J. Feb. 15, 2013)**

The employee filed a ten-count pro se complaint in U.S. District Court against her former employer, including one claim based on the FMLA. The court noted that FMLA claims are subject to a two-year statute of limitations, which is extended to three-years for willful violations. The employee had been discharged more than three years before she filed her FMLA claim against the employer. Thus, the court ruled that the employee’s claim was barred by the statute of limitations.

**Darville v. Children’s Hosp. Corp., 2013 WL 4098756 (D. Mass. Aug. 14, 2013)**

Plaintiff filed his FMLA action two years and two days after he was notified of his discharge. The court analyzed whether the employer committed a “willful” violation in satisfaction of the FMLA’s three year statute of limitation. To establish a willful violation of the FMLA, “a plaintiff must show that ‘the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.’” *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 33 (1<sup>st</sup> Cir. 2003)(quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). The court found that plaintiff had presented no evidence to create a genuine dispute of material fact that the employer knew that its conduct was prohibited by the FMLA or that it acted recklessly in allegedly not complying with its legal obligations, and granted the employer’s motion for summary judgment.

***Summarized Elsewhere:***

**Anusie-Howard v. Todd, 2013 WL 363205 (D. Md. Jan. 29, 2013)**

**Shulman v. Amazon.com, Inc., 2013 WL 2403256 (W.D. Wash. May 30, 2013)**

**Schultz v. Wells Fargo Bank, Nat’l. Assoc., 2013 WL 4782157 (D. Or. Sept. 5, 2013)**

2. Sovereign Immunity

**Smith v. Grady, 117 FEP Cases 737 (S.D. Ohio 2013)**

The employee was originally employed for about nine years as a security officer at a juvenile court youth center. Her duties in that position required her to be able to physically intervene with juvenile residents who were “acting out.” The employee underwent knee surgery, and she requested and received a change in her position to a lobby reception posting which did not require regular

physical intervention. The employee also took FMLA leave on various occasions to care for herself and her grandson. The employee was eventually discharged for alleged poor performance in the reception position. The employee then filed a seven-count complaint against the county, the county board of commissioners, the county juvenile court youth center, the administrative law judge who oversaw the juvenile court, and the superintendent of the youth center. The two individual defendants were named in their official capacities.

Defendants moved to dismiss the complaint on numerous grounds, including arguing that several defendants were not the employee's "employer" and also arguing that Eleventh Amendment immunity barred many of the claims. The court analyzed which defendants were subject to suit as employers as well as which were protected by Eleventh Amendment immunity as arms of the state. The court found the factual record insufficient to determine whether certain defendants were covered by Eleventh Amendment immunity and denied the motions in part. With respect to the FMLA claims, the court applied existing Supreme Court precedent to conclude that the employee's FMLA "family-care" claims were not barred by Eleventh Amendment immunity, but that the self-care claims were.

**Hubbard v. St. Louis Psychiatric Rehab. Ctr., 2013 WL 1351435 (E.D. Mo. Apr. 2, 2013)**

The employee sustained an ankle sprain and took sick leave. While out on leave, the employee fell again and injured his back. He was unable to return to work before the expiration of his leave under the FMLA. The court ruled that the Department of Mental Health and the St. Louis Psychiatric Rehabilitation Center, as state agencies, were entitled to Eleventh Amendment immunity from the employee's FMLA claim. The court also rejected the employee's claim that the employer violated the Due Process Clause because the employer failed to provide him with notice of his eligibility for FMLA protection. The court ruled that the Department of Labor regulations do not create a civil cause of action that is not authorized by the FMLA itself. Thus, the employee failed to state an FMLA claim.

**Ginwright v. Dept. of Rev. for the State of Ala., 2013 WL 1187943 (M.D. Ala. Mar. 21, 2013)**

Plaintiff brought claims under the family-care and self-care provisions of the FMLA. Defendants were the Alabama Department of Revenue as well as the Department's Commissioner, Human Resources Director and Family Medical Leave Act Coordinator, in both their individual and official capacities.

In deciding defendants' motion to dismiss, the court dismissed all claims against individual defendants. The court first noted that under Eleventh Circuit precedent, state officials acting within their individual capacity cannot be held liable under the FMLA. The court then addressed claims against the individuals in their official capacity, holding that such suits are actually suits against the state agency. The court dismissed the claims, reasoning that it is unnecessary to name specific agents when attempting to impose liability on a government entity.

The court dismissed the self-care provision claim against the State Agency and allowed the family-care provision claim to survive. The court rested its decision wholly on the existence of Eleventh Amendment immunity, holding that Congress abrogated Eleventh Amendment

immunity for claims brought under the family-care provision, but not for claims brought under the self-care provision.

**Lalack v. Oregon, 2013 WL 819789 (D. Or. Mar. 5, 2013)**

Plaintiff, an office specialist, had documented performance problems between 2003 and 2010. Plaintiff took FMLA leave in January and February 2010 and in July 2010, the employer, an Oregon Youth Authority facility, issued plaintiff a pre-dismissal letter after several more reprimands concerning performance problems. After defendant discharged plaintiff in September 2010, plaintiff filed suit against the state of Oregon alleging violations of the ADA and the FMLA, among many other claims. Defendant filed a motion to dismiss or for summary judgment, but did not assert sovereign immunity as a defense to the FMLA claim. Both parties then filed supplemental memoranda at the direction of the court. Defendant's supplemental memorandum asserted that sovereign immunity barred plaintiff's FMLA claim, and relied on *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012). Plaintiff argued that defendant waived its immunity because it did not raise the immunity defense until seven months after *Coleman* was decided. The court found no unmistakably clear waiver of sovereign immunity, nor any attempt to gain an advantage in the litigation on defendant's part. The court reasoned that plaintiff had the opportunity to address defendant's *Coleman* argument in her supplemental memorandum and at oral argument. The court held that defendant did not waive its immunity, and granted defendant's motion to dismiss.

**Van Horn v. Martin, 2013 WL 4516665 (E.D. Ark. Aug. 20, 2013)**

The employee served for more than ten years as an officer with the State Capitol Police, but was discharged after the employer caught her sleeping on the job. The employee claimed that she fell asleep due to her prescription medication, and that her employer knew about the medicine. She also claimed that the chief of police openly shared his discontent because she had taken FMLA leave, and had stated his desire to discharge her for the same. The employee also pointed out that another officer was neither disciplined nor terminated when he was discovered sleeping on duty.

Defendants moved to dismiss the employee's claims based upon the adequacy of her pleadings, as well the sovereign immunity and qualified immunity defenses. The court concluded that the employee sufficiently plead her FMLA retaliation claim because, according to the her complaint, the police chief expressed his desire to discharge her because she went on FMLA leave. The court also refused to apply the sovereign immunity defense to dismiss the case at this stage of the proceedings, noting the defense does not apply to "certain FMLA cases." Similarly, as to qualified immunity, the court accepted as true the employee's assertions that defendant police chief stated his discontent with her use of FMLA leave, as well as her claim that a male officer received no discipline for similar conduct. Accordingly, the court denied the motion to dismiss and concluded that the employee's FMLA retaliation claim against the individual defendants should be permitted to proceed.

**Taylor v. Texas Southern University, 2013 WL 3157529 (S.D. Tex. Jun. 20, 2013)**

The employee worked for a state university. In her lawsuit against the employer, she claimed that a hostile work environment caused her to go on FMLA leave from May 2011 until August 2011. When she returned from leave, the employer informed her that she was permanently assigned to a different position, which she considered a demotion in retaliation for her taking leave. The employer subsequently terminated her employment in June 2012.

The employer moved to dismiss the employee's FMLA claim, arguing it was subject to sovereign immunity under the Eleventh Amendment. The court agreed, dismissing the employee's claim. The court noted that an eligible employee may take FMLA leave for family-care issues or for the employee's own health condition. Citing prior Supreme Court precedent, the court noted that Congress abrogated the State's sovereign immunity as to family-care claims under the FMLA, but not with respect to claims arising under the self-care provision. Because the employee's claim arose under the self-care provision, the court granted the employer's motion to dismiss, concluding that sovereign immunity barred her recovery.

**Nathan v. Ohio State University, 21 WH Cases2d 813 (S.D. Ohio 2013)**

The employee, a cardiac anesthesiologist, worked as an Associate Professor and practicing physician for defendant, a university. Throughout her employment, the employee routinely engaged in a variety of behavior that her supervisors and colleagues found disruptive. The employee's poor performance and behavioral issues yielded a series of unfavorable evaluations, and eventually contributed to the decision to terminate her employment. The employer's breaking point came when the employee claimed to be suffering from food poisoning and called in sick on a day she had previously requested to take off numerous times. After she was discharged, the employee filed suit against her employer asserting, among other things, that her termination violated the FMLA because it was in retaliation for her calling in sick.

After protracted litigation that included lengthy discovery disputes, defendant moved for summary judgment. After filing its reply brief, the employee sought leave from the district court to file a sur-reply in opposition. In her proposed sur-reply, the employee alleged, for the first time, that the FMLA leave underpinning her claim was a request for time off to care for her sick mother, not for her calling in sick due to food poisoning. The employer cried foul, claiming that the employee's new theory was wholly fabricated, and arguing it was a transparent attempt to circumvent the employer's sovereign immunity defense. The district court agreed, noting that the employee's new claim directly conflicted with the allegations of her complaint and her deposition testimony. The court rejected the employee's attempt to salvage her FMLA claim, holding she was bound to stand on her complaint. Furthermore, as the non-moving party, she was not entitled to raise a new legal theory for the first time in response to a motion for summary judgment. Because suits against states under the self-care provision of the FMLA are barred by the Eleventh Amendment, the district court granted defendant's motion and declined to address parties' substantive arguments on the FMLA retaliation claim.

***Summarized Elsewhere:***

**LaFleur v. Hugine, 2013 WL 5355035 (N.D. Ala. Sept. 24, 2013)**

3. Waiver

***Summarized Elsewhere:***

***Quinlan v. Elysian Hotel Co. LLC, 916 F. Supp.2d 843, 116 FEP Cases 1731 (N.D. Ill. 2013)***

4. Res Judicata and Collateral Estoppel

***Summarized Elsewhere:***

***Bell v. Prefix, Inc., 20 WH Cases2d 1032 (6th Cir. 2013)***

5. Equitable Estoppel as a Bar to Certain Defenses

***Allen v. Midsouth Bank, 2013 WL 708029 (S.D. Tex. Feb. 25, 2013)***

The employer notified the employee in writing in July 2008 that she was eligible for FMLA leave. Thereafter, the employee took extended FMLA leave in January 2009, finally returning to work in March 2009. Upon returning to work, the employee alleged that the employer transferred her job to another location and, unable to relocate, the employee was given an inferior position at her current site and was eventually terminated in June 2009. After the employer terminated her employment, the employee filed suit against the employer alleging interference under the FMLA.

The employer filed a motion to dismiss and alternative motion for summary judgment, arguing that the employee was not an "eligible employee" under the FMLA. Specifically, the employer argued that the employee's worksite did not meet the 50 employee requirement for FMLA coverage under 29 U.S.C. § 2611(2). The employer asserted that the employee worked at a worksite with fewer than 50 employees and the total number of company employees within 75 miles of that worksite was less than 50.

The District Court denied both of the employer's motions. The court noted that an employer may be equitably estopped from later denying an employee's right to FMLA leave when it previously informed the employee that she was entitled to FMLA leave and the employee reasonably relied on the employer's assertion. In the instant case, because the employer had acknowledged the employee's right to FMLA leave by letter in July 2008, and the employee relied on that assertion in subsequently taking FMLA leave, the Court held that a genuine issue of material fact existed as to whether the employer should be equitably estopped from claiming that the employee was not an eligible employee under the FMLA.

***Leese v. Adelphoi Village, Inc., 2013 WL 1113347 (3d Cir. Mar. 19, 2013)***

Following her termination of employment, the employee brought claims for damages under the FMLA, and the employer moved for summary judgment. The employee conceded that she was not an "eligible employee," because less than 50 employees worked for the employer. However, the employee argued that summary judgment was inappropriate under a theory of equitable estoppel, because the employer made a misrepresentation that FMLA leave was available to her.



On appeal, the Third Circuit affirmed the district court's decision to grant summary judgment for the employer. In a matter of first impression, the Third Circuit recognized that an employee could use equitable estoppel to avoid dismissal of his case for failure to be an "eligible employee." The court pointed out that other circuit courts had reached the same conclusion. The court further stated that the elements of equitable estoppel under the FMLA are: (1) a misrepresentation by another party; (2) which a party reasonably relied upon; (3) to their detriment. The Third Circuit affirmed summary judgment for the employer, however, because the employee failed to satisfy the third prong of the test for equitable estoppel. The employee failed to offer sufficient evidence that she relied to her detriment upon the employer's misrepresentation that it did in fact provide FMLA leave. Because she could not prove the requisite detrimental reliance, she failed to establish entitlement to equitable estoppel.

**Schweitzer v. Forward Air, Inc. et al., 2013 WL 4647499 (M.D. Pa. Aug. 29 2013)**

The employee was informed by her employer that she was eligible for FMLA leave, and as a result, she took leave beginning October 6, 2011. Shortly thereafter, the employer realized that it did not employ at least fifty workers within seventy-five miles of the employee's worksite, and based on that information it concluded that the employee was not eligible for FMLA leave. Because the employee was therefore absent on leave that did not qualify under the FMLA, the employer terminated her employment.

The court held that summary judgment was inappropriate with respect to the employer's motion seeking dismissal of the employee's equitable estoppel argument. To determine whether the employee set forth a cognizable equitable estoppel claim, the court must decide whether: (1) the employee reasonably relied on the employer's misrepresentation that she was eligible for and entitled to FMLA leave; and (2) such reliance caused the employee's termination. The employer did not refute originally telling the employee that she was eligible for FMLA leave. Here, the court held that the employee presented disputed issues of fact regarding her reliance on her employer's representations. As such, the court denied the employer's motion for summary judgment.

**Richetti v. Sakes & Company et al., 2013 WL 3802476 (W.D. Pa. July 18, 2013)**

The employee requested, and was granted, medical leave associated with surgery for an injury to her knee. The parties dispute whether this leave was FMLA leave, which would entitle the employee to reinstatement rights after her recovery from surgery. While the FMLA box was not checked on the employer's leave of absence form that the employee signed, on subsequent internal paperwork filled out by the employer it indicated the employee's leave was in fact FMLA leave, and a letter was subsequently sent to the employee characterizing her time off from work as medical leave in accordance with FMLA guidelines. As it turned out, the employee was not eligible for FMLA leave based on her part-time work schedule and failure to work the requisite number of hours to be eligible for leave under the FMLA.

The employee argued that she was entitled to FMLA protections based on the doctrine of equitable estoppel - as she relied on the employer's factual misrepresentation that she was eligible for FMLA leave, and she reasonably relied on such misrepresentation and was harmed as

a result given that she claimed to have been terminated at the conclusion of her leave. The court denied the employer's motion for summary judgment as issues of material fact regarding the employee's reliance on the employer's representations, and whether such representations were even made.

***Dawkins v. Fulton County Government*, 21 WH Cases2d 495 (11th Cir. 2013)**

The employer decided to temporarily reassign plaintiff, a Building Maintenance Manager, to a Building Mechanic Maintenance position for ninety days. A ten percent salary increase accompanied the new position. Two weeks after the reassignment, plaintiff requested FMLA leave by email, stating that her uncle was terminally ill. Her supervisor responded to the email, stating simply "approved." Four days later, the employer rescinded the temporary assignment because of plaintiff's absence. Upon plaintiff's return from leave, she was reinstated to the Building Maintenance Manager position. Plaintiff filed suit, alleging defendants rescinded the temporary assignment in retaliation for her leave. Defendants filed a motion for summary judgment and, in opposition, plaintiff asserted that defendants should be estopped from denying her leave was FMLA-qualifying. The district court granted defendants' motion and plaintiff appealed.

The Eleventh Circuit acknowledged that it has never determined whether equitable estoppel can extend FMLA coverage to otherwise uncovered absences. But the Court found it did not have to determine whether federal common law equitable estoppel applies to the FMLA because plaintiff did not contend that she reasonably and detrimentally relied on any misrepresentation; a required element of federal common law equitable estoppel in the Eleventh Circuit. The Court determined that, because plaintiff asked that the FMLA paperwork be sent to her uncle's out-of-state address, she intended to take leave from work regardless of whether it was covered by the FMLA. In addition, because plaintiff had previously taken FMLA leave, any reliance on her supervisor's email would not have been reasonable.

***Summarized Elsewhere:***

***O'Hara v. GBS Corporation*, 2013 WL 1399258 (N.D. Ohio Mar. 13, 2013)**

***Vangas v. Montefiore Medical Center*, 925 F. Supp. 2d 574 (S.D. N.Y. 2013)**

***Dooling v. Bank of the W.*, 2012 WL 2921370 (E.D. Tex. July 17, 2013)**

***Gillis v. Wal-Mart Stores Inc.*, 117 FEP Cases 1744 (D. Or. 2013)**

***Hill v. Walker*, 737 F.3d 1209 (8th Cir. 2013)**