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I. OVERVIEW

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3. The Family and Medical Leave Act of 1987
4. The Parental and Medical Leave Act of 1988
5. The Family and Medical Leave Act of 1989
6. The Family and Medical Leave Act of 1991

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

1. The 103rd Congress
2. Congressional Findings

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

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

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

III. PROVISIONS OF THE FMLA

A. General Structure

B. Provisions of Title I

C. Effective Date

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1. Effect on Employer Coverage and Employee Eligibility

2. Effect on Leave in Progress on, or Taken Before, the Effective Date

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

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

Summarized Elsewhere:

Wallace v. FEDEX Corp., 764 F.3d 571, 23 WH Cases2d 342 (6th Cir. 2014)

- a. Interim Final Regulations
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- A.** Administrative Action
 1. Initiation of Administrative Complaints
 2. DOL Investigation
 - a. Investigation Authority
 - b. Subpoena Power
 3. Resolution of Complaints
 4. Posting Violations

- a. Appealing a Penalty Assessment for a Posting Violation
- b. Consequences of Not Paying the Penalty Assessed

B. Enforcement Action

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

C. Wage and Hour Division Opinion Letters

VI. THE COMMISSION ON LEAVE

CHAPTER 2. COVERAGE OF EMPLOYERS

I. OVERVIEW

II. PRIVATE SECTOR EMPLOYERS

A. Basic Coverage Standard

Coder v. Medicus Laboratories, LLC, 2014 WH Cases2d 162 (E.D. Tex. July 2, 2014)

Plaintiff filed a complaint alleging discrimination claims under the FMLA and the Americans with Disabilities Act. The defendant moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Specifically, the defendant argued that the plaintiff's complaint failed to allege that it was an "employer" because plaintiff failed to allege that it employed the requisite number of employees. The court agreed, and dismissed plaintiff's FMLA claims. In doing so, the court held that the threshold number of employees is an element of the plaintiff's claim for relief, and not a jurisdictional limitation. As such, the plaintiff failed to allege that the defendant was an eligible employer under the statute, and the plaintiff's complaint failed to state a claim.

Summarized Elsewhere:

Weinstein v. AutoZoners LLC, 2014 WL 898081 (D. Nev. Mar. 6, 2014)

B. Who Is Counted as an Employee

1. Location of Employment
2. Payroll Status
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III. PUBLIC EMPLOYERS

A. Federal Government Subdivisions and Agencies

1. Coverage Under Title I
2. Civil Service Employee

Summarized Elsewhere:

Owens v. City of Barnsdall, 2014 WL 2197798 (N.D. Okla. May 27, 2014)

3. Congressional and Judicial Employees

B. State and Local Governments and Agencies

Huynh v. Harris Health Sys., 2014 WL 1379912 (S.D. Tex. Apr. 8, 2014)

Plaintiff worked as a staff pharmacist at the Casa de Amigo Clinic on a shift that normally commenced around 8:00 a.m. Shortly after a period of FMLA leave, Plaintiff was informed that she had been reassigned to a shift at Lyndon B. Johnson Hospital that began at 2:00 p.m. She brought an interference claim against her employer, an admitted political subdivision of the State of Texas. On summary judgment, the district court, citing the Texas Supreme Court and other federal courts in Texas, held that defendant was immune under the 11th Amendment for FMLA claims in connection with the employee's own serious health condition and that Texas's adoption of FMLA-like provisions for state employees did not abrogate the state's immunity.

Arbogast v. Kansas, 2014 WL 1304939 (D. Kan. Mar. 31, 2014)

An employee brought an action against the former head of a state agency, in her individual capacity, alleging that the head of the agency interfered with her FMLA rights and retaliated against her when the state agency terminated her employment. Defendant moved to dismiss, asserting that she was not an "employer" under the FMLA and that the employee's claims were barred by Eleventh Amendment immunity.

In granting the motion to dismiss, the court concluded that "public officials are not 'employers' subject to liability under the FMLA." The court noted that the Tenth Circuit has not yet addressed this issue and the other circuit courts are split. In adopting the Sixth Circuit's analysis, the court explained that the statutory definition of "employer" provides four separate categories of entities within the definition and to commingle these categories would render a nonsensical and redundant definition of employer. Thus, while the definition of "employer" includes any "public agency," the statutory definition fails to include public officials within that category. Indeed, the court noted that the definition "expressly segregates the clauses related to individual liability from those related to public agency." Additionally, it found that, while the FMLA borrows heavily from the FLSA, the definitional sections of the statutes are not identical, evidenced by the differing definitions of "employer." Thus, the interpretations under the FLSA are inapposite.

In addressing the claim of Eleventh Amendment immunity, the district court concluded that the claim for monetary damages against the former head of the agency was not barred by the Eleventh Amendment. Although defendant argued that this action against her in her individual capacity was an attempt to circumvent the Eleventh Amendment immunity, the district court rejected this argument because defendant failed to show that a judgment against her "for monetary damages would legally require the state to comply with the FMLA." However, the court found that the employee's claim for prospective relief against defendant was barred by the Eleventh Amendment because defendant was no longer employed by the state and thus lacked the power to reinstate the employee.

Hemminghaus v. Missouri, 756 F.3d 1100, 22 WH Cases2d 1658 (8th Cir. 2014)

The employee was a court reporter for a state circuit court judge. After the employee's children were abused by their nanny, the employee requested leave on numerous occasions for doctor's appointments and emotional distress. The judge did not always allow the employee to take the time off. When the employee's relationship with the judge became strained, she was discharged. Just one day before, the judge had denied another request for leave.

In her subsequent lawsuit, the employee alleged that the judge violated the FMLA by denying her leave to care for her children, and by discharging her for taking leave. The district court dismissed the employee's case, and the Eighth Circuit affirmed. The FMLA excludes from its protection those employees who are selected by the holder of a public elective office of that State to be a member of his personal staff. As a matter of first impression, the court held that the judge was a public elective office holder. Even though he had been appointed, he had been retained once in an election before hiring the court reporter. Further, applying a six-factor test, the court concluded that the court reporter was a member of the judge's personal staff. The court distinguished a DOL opinion letter which states that official court reports do not fall under the personal staff exception, and held that the court reporter was not an eligible "employee" under the FMLA.

Summarized Elsewhere:

Knox v. Town of Southeast, 2014 WL 1285654 (S.D.N.Y. Mar. 31, 2014)

IV. INTEGRATED EMPLOYERS

Maves v. Board of Education of Prince George's County, 2014 WL 3973930 (D. Md. Aug. 12, 2014)

Plaintiff worked as a guidance counselor for defendant when she went out on an extended sick leave of 384 days. Upon the exhaustion of her sick leave bank, defendant and the union sent plaintiff a letter requesting that she either (1) extend an approved leave of absence; (2) submit a letter of resignation; or (3) explain her failure to report back to work. Plaintiff filed suit against defendant, alleging employment discrimination and retaliation. Her complaint was ultimately dismissed by the court.

Proceeding *pro se*, plaintiff filed a second lawsuit against defendant and the union for violation under the FMLA. Upon a motion to dismiss filed by defendant, the court determined that plaintiff's FMLA claim arose from the same operative facts that were considered and dismissed by the court in the first action. Thus, her FMLA claim against defendant was barred by claim preclusion. The court also dismissed plaintiff's FMLA claim against the union, holding that the FMLA only applied to plaintiff's employer. The court also found that her claim was

time-barred by the FMLA's three-year statute of limitation, as it was filed over three years after the last event alleged in her complaint.

Perez v. Staples Contract & Comm., Inc., 2014 WL 4249871 (D.S.C. Aug. 27, 2014)

From July 2008 until January 20, 2012, plaintiff was employed by Staples Contract and Commercial, Inc., which plaintiff alleged was a wholly owned subsidiary of Staples, Inc. In September 2010, plaintiff's wife was diagnosed with breast cancer, and plaintiff notified his supervisors that he needed to take full and partial days of leave for her care. In September 2011, plaintiff's supervisor placed plaintiff on a Performance Improvement Plan (PIP) because plaintiff was not meeting sales goals, and was not providing timely customer service. Eventually, plaintiff was discharged. Plaintiff filed a lawsuit against both companies, alleging they violated the FMLA by failing to notify him of his eligibility and rights under the FMLA in response to his request for leave.

Defendants filed a joint motion to dismiss and motion for summary judgment. Defendants argued that plaintiff failed to allege that defendants collectively employed more than 50 employees in the office where plaintiff worked. The court rejected this argument because the plaintiff alleged that the two companies employed approximately 350 employees where plaintiff worked, and that they were integrated employers and joint employers as defined by the FMLA. Alternatively, defendants submitted affidavits stating that they had no common management, no interrelation in operations, separate and decentralized human resources and labor departments, and separate financial controls. In opposition, plaintiff submitted an affidavit describing commonalities of the co-defendants, including the Staples, Inc. letterhead on letters to plaintiff, plaintiff's enrollment in a Staples, Inc. 401(k) plan, and the fact plaintiff received "Staples" paystubs and corporate mobile phone statements. The court then denied the motion for summary judgment, citing the opposing affidavits. The court stated, however, stated that the defendants could refile the motion after further discovery on the issue.

Demyanovich v. Cadon Plating & Coating, L.L.C., 747 F.3d 419 (6th Cir. 2014)

An employee, who was employed for more than twenty years, was terminated. In the ten years prior to his termination, he took FMLA leave several times for various health conditions. About six months prior to his termination, the employee's health condition deteriorated. He again took continuous FMLA leave and returned to work with restrictions. Upon his return, he also experienced difficulty performing his job duties and requested a transfer to a lighter duty position, which was denied. A couple months later, he again requested FMLA leave, but this time it was denied. Ultimately, plaintiff was terminated for a violation of the attendance policy. Thereafter, the employee sued his former employer and his supervisor for violations of the FMLA. Defendants filed a motion for summary judgment, which the district court granted.

On appeal, the Sixth Circuit reversed the entry of summary judgment, finding that there was a genuine dispute of material fact for trial. First, as to the interference claim, the employer argued that it was not a covered employer under the Act. In particular, it asserted that it did not have 50 employees, which was not disputed. The court found, however, that there was dispute of fact as to whether defendant was an "integrated employer" with an affiliated company that

employed more than 500 employees. The employer also contended that there was no interference because the employee could not have returned to work at the end of the statutory period even if leave had been granted. Although the court recognized that an employee has not been denied any benefit if he is unable to work at the end of the statutory leave period, it found there was a disputed issue of fact as to whether the employee could have returned to work because the employee's physician did not indicate he would be unable to return to work and he had cleared him in the past to return to work from leave. The court found that the employee's receipt of social security disability benefits was not dispositive of this issue. The court found that summary judgment was not proper on the interference claim because there was a disputed issue of fact regarding whether the employer would have terminated him for reasons unrelated to his FMLA leave.

Additionally, the court found a disputed issue of fact on the retaliation claim. In particular, it found that the supervisor's comment that the employee was a "liability," which was made after the supervisor received the employee's request for leave, was direct evidence of FMLA retaliation because it was made by the employee's supervisor who made the decision to terminate the employee on the same day he made this comment. Additionally, it concluded that there was insufficient evidence for the employer to meet its burden to show "that it would have made the same decision absent the impermissible motive." Even absent direct evidence of retaliation, the court concluded that there was sufficient circumstantial evidence to warrant a trial. It noted that the employee was terminated a few minutes after requesting FMLA leave and there was a disputed issue of fact as to whether the employer's reasons for termination are pretext for retaliation. Therefore, the court reversed the district court's order granting summary judgment and remanded the case for trial.

V. JOINT EMPLOYERS

Porter v. Five Start Quality Care-MI, LLC, 2014 WH Cases2d 159197 (E.D. Mich. June 20, 2014)

Plaintiffs filed suit alleging that, pursuant to the sale of the employer's business, they were discharged or, alternatively, not offered reemployment in retaliation for exercising their FMLA rights, and that the buyer and seller (successor), acted in concert to retaliate against them for exercising their FMLA rights. Defendant seller sought dismissal of plaintiffs' claims, or in the alternative, an award of summary judgment. Defendant argued that plaintiffs could not establish a factual basis for their FMLA claims against the seller because it terminated *all* its employees pursuant to the purchase agreement, and accordingly, it could not have possibly singled out these plaintiffs to take adverse action in light of their history of taking FMLA leave.

Construing defendant's claim as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and noting that discovery was ongoing, the court denied defendant's motion on the grounds that plaintiffs' might be able to identify factual support for their theory of FMLA liability. Noting that FMLA retaliation claims are evaluated according to the *McDonnell Douglass* burden-shifting framework, the court found that plaintiffs might be able to establish the causal connection aspect of their *prima facie* case based on the seller's termination of plaintiffs in combination with the buyer's failure to keep employed or rehire plaintiffs after the sale.

Evaluating the claims, the court found that there were two FMLA-based theories which plaintiffs could succeed on. First, pursuant to the “joint employment” theory, plaintiffs’ allegations may indicate that the seller continued to exercise some degree of control over the employees by participating in or somehow influencing the buyer’s decision to terminate or not rehire plaintiffs. Second, pursuant to the FMLA’s definition of an “employee,” plaintiffs’ status as *former* employees would not necessarily preclude them from pursuing FMLA claims against their former employer, the seller, provided they allege and produce evidence that the seller retaliated against their exercise of FMLA rights by somehow discouraging the buyer from rehiring and retaining them. The court concluded that plaintiffs should be provided the opportunity to plead these not-yet-plead theories and flesh them out through discovery.

Summarized Elsewhere:

***Perez v. Staples Contract & Comm., Inc.*, 2014 WL 4249871 (D.S.C. Aug. 27, 2014)**

A. Test

***Murray v. Nationwide Better Health*, 2014 WL 53255 (C.D. Ill. Jan. 7, 2014)**

Plaintiff brought suit *pro se* against a third-party administrator and its employees who handled her FMLA and short-term disability benefits for her former company. In a previous suit, plaintiff alleged that the company had miscalculated her FMLA use and retaliated against her for using FMLA leave. The prior court granted summary judgment for the company. In the instant action, plaintiff alleged FMLA interference and retaliation claims only against the outside benefits administrators.

The district court granted defendants’ motion for summary judgment on the basis of issue preclusion and the lack of a joint-employment relationship. Although plaintiff’s subsequent action claimed that these new defendants failed to abide by record-keeping requirements and to provide her with proper notice of FMLA leave, the court determined that these issues were the same as those litigated in the prior action, were necessarily part of the prior judgment, and that her claims were barred by the doctrine of issue preclusion. The court further reasoned, in the alternative, that defendant – as a third-party benefits administrator – could not be considered plaintiff’s “joint employers.” Defendants provided affidavits showing that they did not exercise control over the working conditions of plaintiff or her colleagues; did not have the ability to hire, fire, assign, or direct their work; and that the administrator was a separate entity that did not benefit from the work performed by them. Citing 29 C.F.R. § 825.106(a), the DOL regulation defining joint employers, the court found that plaintiff did not provide any evidence that the third-party benefits administrator exercised control over the working conditions of any employee of her former company. Plaintiff’s production of a W-2 listing the corporate defendant’s predecessor as her “employer” reflected only the fact that defendants had been contracted for the limited purpose of generating and filing the company’s tax documents, and was insufficient to establish a joint-employment relationship.

***Cuff v. Trans State Holdings, Inc.*, 768 F.3d 605, 23 WH Cases2d 689 (7th Cir. 2014)**

The plaintiff, an airline supplier’s regional manager, filed suit under the FMLA. The district court granted summary judgment to the plaintiff on his FMLA interference claim.

Following a jury trial, the district court entered judgment for the plaintiff and awarded him attorney fees. The defendant appealed. On appeal, the Seventh Circuit affirmed, holding, in part, that the plaintiff was a joint employee, and the district court did not abuse its discretion in awarding the plaintiff attorney's fees despite his low recovery under the Act.

Plaintiff was included on the payroll for Trans States, one of two air carriers under Trans States Holdings, one of United Airlines' suppliers. At the time his employment was terminated, Trans States employed 33 employees while the other Holdings carrier employed 343 employees. Although the two carriers negotiated separate collective bargaining agreements, the court noted that the joint-employment inquiry is person-specific; thus it is possible for a person to be jointly employed by two firms that otherwise have distinct labor forces. The court ruled that plaintiff was an employee of both firms. In doing so, the court noted that the employers shared the employee's services, and was hired to provide services to both employers. Thus, the plaintiff was a joint employee and was covered by the FMLA.

The court also ruled that the district court did not abuse its discretion in finding that the attorneys' fees were reasonable in light of the defense's conduct. Defendant argued that because plaintiff's recovery was only \$50,000, attorney's fees of \$325,000 were not reasonable. The court disagreed, finding that the parties engaged in extensive discovery and a trial. Moreover, the court noted that attorney's fees are available under the FMLA to ensure that justified claims can still be brought despite the high cost of litigation.

The court went on to note that fee-shifting statutes such as the FMLA under § 2617(a)(3) are "designed to prevent the potentially high costs of litigation from stifling justified claims." *Id.*

- B. Consequences
- C. Allocation of Responsibilities

VI. SUCCESSORS IN INTEREST

Summarized Elsewhere:

Porter v. Five Start Quality Care-MI, LLC, 2014 WH Cases2d 159197 (E.D. Mich. June 20, 2014)

- A. Test
- B. Consequences

Osei v. Coastal Int'l Security, Inc., 2014 WL 6608762 (N.D. Va. Nov. 19, 2014)

Plaintiff worked as a security guard for defendant, a government contractor which had recently taken over a General Services Administration contract from Plaintiff's former employer. During her employment, she requested leave to care for her daughter. Two of her leave requests were denied, and her employer treated her absence as unexcused for the instance where she was absent from work anyway. She then had a series of performance issues and disciplinary

meetings, to which she reacted with anger. Because her supervisor found plaintiff's aggressive behavior threatening, Plaintiff was placed on administrative leave. During her leave, plaintiff's attorney sent a letter stating that the suspension was part of defendant's efforts to discourage plaintiff's FMLA leave. Defendant reached out to plaintiff, although the parties disputed whether defendant offered plaintiff return to a full-time or just a part-time position. In either case, plaintiff did not return to work. Plaintiff later sued for FMLA retaliation.

Defendant moved for summary judgment, arguing plaintiff was not an eligible employee under the FMLA, and therefore unable to engage in protected activity. In particular, it argued that, although plaintiff had worked at the same site doing the same job for several years, she had not worked the requisite 12 months for defendant company. Plaintiff, in response, argued that 1) that defendant was a successor in interest to her former employer and 2) that she had a reasonable belief that she was covered by the FMLA. After applying the three-part successor in interest test, using a Department of Labor regulation that set out eight factors to determine whether there is a succession in interest, the court agreed with plaintiff. In particular, it noted that defendant's workforce was almost entirely the same as the successor, the equipment and physical features of the work site were the same, and plaintiff's tasks and supervisory structure was the same. The court found it unnecessary to reach plaintiff's second, "reasonable belief" argument.

In regards to the adverse action part of plaintiff's *prima facie* case, the court found that a reasonable jury could find defendant's tapering off efforts to reinstate plaintiff or attempt to reassign her to a part-time position, constituted an adverse action. Therefore, the court denied summary judgment.

VII. INDIVIDUALS

Page v. Arkansas State University, 2014 WL 584792 (E.D. Ark. Feb. 14, 2014)

Plaintiff sued his former employer and supervisors for, among other things, interference and retaliation under the FMLA. Plaintiff sought an injunction, declaratory relief, and damages. On a Rule 12(b)(6) motion to dismiss by the supervisors, the district court refused to deviate from 8th Circuit precedent, which concluded that individuals acting in a supervisory capacity were subject to liability under the FMLA. Accordingly, the court denied the motion to dismiss.

Crittendon v. Arai Americas, Inc., 2014 WL 354517 (E.D. Va. Jan. 28, 2014)

The employee filed an FMLA claim against her employer and several individual defendants. One of the individual defendants moved to dismiss the FMLA claims against her. Plaintiff's claim against the moving defendant alleged that the individual defendant interfered with her use of FMLA benefits and retaliated and discriminated against her for using FMLA-qualifying leave and/or opposing conduct made unlawful under the FMLA. As a threshold matter, the court held that private sector supervisor liability exists under the FMLA. The court went on to analyze whether plaintiff's complaint adequately alleged that the individual defendant was an employer under the FMLA. The test used by the court was whether the individual defendant carried out the function of an employer with regard to the employee—in this case, to what extent the individual defendant exerted control over the employee's FMLA rights.

The individual defendant was a corporate human resources manager with no independent authority to discipline plaintiff, and no supervisory position over plaintiff. The complaint alleged only that the individual defendant signed the memorandum granting FMLA leave, and that the defendant later prevented plaintiff from obtaining FMLA benefits. The court concluded that those allegations failed to demonstrate that the individual defendant exercised substantial control over plaintiff's FMLA rights. The court therefore granted the motion to dismiss the claim against the individual defendant.

Summarized Elsewhere:

Kiefner v. Sullivan, et al., 2014 WL 2197812 (N.D. Okla. May 27, 2014)

Thomas v. St. Mary Medical Center, 2014 WL 2199408 (E.D. Pa. May 23, 2014)

Arbogast v. Kansas, 2014 WL 1304939 (D. Kan. Mar. 31, 2014)

CHAPTER 3.

ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. OVERVIEW

II. BASIC ELIGIBILITY CRITERIA

Streeter v. Premier Services, Inc., 9 F.Supp.3d 972 (N.D. Iowa 2014)

Plaintiff was employed by defendant staffing agency. After he failed to call in to report his absences for two consecutive days, he was deemed to have voluntarily resigned under the company policy. Plaintiff later presented the employer with a doctor's note stating that he had been seen at a Veteran's Affairs clinic on the two days in question. However, the doctor's note did not indicate that the plaintiff was unable to report or call-in to work on those days, and plaintiff did not notify his employer of his need to be absent on those days. Plaintiff then filed a *pro se* suit against the defendant alleging, in part, an FMLA violation. Defendant filed a motion for summary judgment, to which plaintiff responded, but he did not contest defendant's statement of facts. The district court granted the motion, finding that plaintiff had not worked for defendant for at least 1250 hours during the previous twelve months and thus was not eligible for FMLA leave.

Luke v. Cplac Forest Park, SNF, LLC, 2014 WL 5609537 (M.D. La. Nov. 4, 2014)

Plaintiff, a certified nursing assistant, learned she was six weeks pregnant in December 2011 and shortly thereafter presented a physician's note to her employer certifying that she was unable to lift more than thirty pounds for the remainder of her pregnancy. Plaintiff admitted that she was unable to perform her job duties as a result of her lifting restriction. In January 2012, the employer issued FMLA forms stating that plaintiff would take leave from January 23, 2012 to May 23, 2012. On May 23, the human resources manager informed plaintiff that there was no work available with her lifting restrictions and that her employment would be terminated if she could not return to her regular job, which plaintiff could not do. Thus, the employer terminated plaintiff's employment on May 24, 2012.

Plaintiff subsequently filed suit, claiming, among other things, that her employer interfered with her FMLA leave and retaliated against her for taking FMLA leave. The district court granted the employer's motion for summary judgment, finding that plaintiff was not eligible for FMLA leave because she had not worked for the employer for at least twelve months and thus could not have a viable claim that the employer interfered with her exercise of rights under the FMLA. Nevertheless, plaintiff argued that the employer was equitably estopped from asserting that she was not covered by the FMLA because the employer mistakenly placed plaintiff on FMLA leave. The court rejected this argument, reasoning that the employer's mistake did not cause plaintiff to change her position for the worst because plaintiff admitted that she was physically unable to work because of her lifting restriction and thus was required to take leave at that time.

Saleski-Shingara v. VNA Health Systems, 2014 WL 5702928 (M.D. Pa. Nov. 5, 2014)

Plaintiff, a registered nurse, took maternity leave in March 2012. Shortly thereafter, plaintiff inquired about her remaining sick and vacation time. Plaintiff believed she was entitled to three weeks of vacation based on her seniority, but defendant informed her that she only had 40 hours of remaining vacation. In early May 2012, defendant sent plaintiff a letter informing her that she would abandon her job unless she immediately contacted the defendant because no one at the defendant was able to contact her since she began leave. Within ten minutes of receiving the letter, plaintiff contacted defendant and explained that she was never told to remain in contact with defendant during leave. Several days later, plaintiff was advised that the company's FMLA policy had been revised and that she would not have any FMLA or maternity leave available after May 30. Plaintiff experienced pregnancy complications as a result of her multiple sclerosis and was unable to return to work until June 15. Defendant terminated plaintiff's employment on May 31 when she did not return to work. Because defendant terminated her employment, plaintiff also lost her health insurance. Thereafter, plaintiff was unable to obtain medicine for her multiple sclerosis, ultimately resulting in plaintiff losing her vision. Plaintiff then filed suit, alleging that defendant interfered with her rights under the FMLA, among other things.

The district court granted the defendant's motion to dismiss plaintiff's FMLA claim. The court ruled that plaintiff had not sufficiently pled that she was entitled to FMLA benefits. However, the court dismissed Plaintiff's claim without prejudice and granted plaintiff leave to amend her claim to allege that she was entitled to benefits under the FMLA.

Edwards v. Nat'l Vision Inc., 568 Fed. Appx. 854 (11th Cir. 2014)

Plaintiff sued her former employer, alleging that it opposed her FMLA leave and then retaliated against her for taking leave, among other things. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The court affirmed, finding that plaintiff failed to show she worked the requisite number of hours or an adverse action. The court noted that plaintiff failed to present any evidence supporting her argument that her employer reduced her hours to avoid accommodating her FMLA request. Moreover, the court also held that her FMLA retaliation claim failed because she could not show that there was a causal connection between the reduction of her hours and protected activity.

Alford v. Providence Hosp., 561 Fed.Appx. 13, 2014 WL 3013741 (C.A. D.C., June 20, 2014)

Plaintiff, who worked as a secretary and front-desk attendant and required the use of a wheelchair for mobility, took FMLA leave in late 2009 due to a hand injury. Plaintiff was scheduled to return to work in early April 2010, but injured her head, shoulder and neck when she fell while transferring from her car to her wheelchair. Plaintiff's FMLA was exhausted on April 14, but because she was still unable to return to work, her supervisor granted her an additional sixty days of unpaid leave. Plaintiff returned on May 7. Plaintiff suffered injuries again in December that year and was cleared to return to work a few weeks later, subject to restrictions that prevented her from lifting her wheelchair in and out of her car. Because plaintiff

was unable to transport herself to work, defendant terminated her employment. Plaintiff filed suit, alleging FMLA interference and retaliation.

The district court granted summary judgment to defendant and the Court of Appeals affirmed. The Court found that defendant could not have interfered with her FMLA rights because she exhausted her FMLA leave eight months before her discharge. Plaintiff's retaliation claim also failed for similar reasons, as she last engaged in protected activity eight months before her discharge. And during those eight months, there was no indication of retaliatory activity and, in fact, defendant granted plaintiff additional leave time.

Summarized Elsewhere:

***Woida v. Genesys Regional Med. Ctr.*, 4 F. Supp. 3d 880 (E.D. Mich. 2014)**

***Derus v. California Home Med. Equip.*, 2014 WL 3853898 (N.D. Cal. Aug. 5, 2014)**

***Seeney v. Pennsylvania Department of Corrections*, 22 WH Cases2d 1666 (E.D.Pa. 2014)**

III. MEASURING 12 MONTHS OF EMPLOYMENT

***Wages v. Stuart Management Corp.*, 21 F.Supp.3d 985, 22 WH Cases2d 1313 (D.Minn. 2014)**

Plaintiff, a caretaker at an apartment complex, requested that her employer, a property management company, reduce her hours to 20 hours a week, because of her pregnancy-related medical issues. Her employer denied this request and terminated plaintiff. Plaintiff then brought suit for FMLA interference and retaliation.

Plaintiff brought a motion for summary judgment. In response, defendant argued that that plaintiff was not entitled to protections under the FMLA because she had not worked long enough for the company. The court disagreed and found that plaintiff was protected under the FMLA because she was only one work day away from her FMLA eligibility date at the time she was terminated, and she could reach the eligibility date without needing a reduction in hours for that day. The court noted that the Eighth Circuit has not yet addressed the issue, but it generally agreed with precedent from the Eleventh Circuit in *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Cir. 2012), holding that since pre-eligible employees are required to provide advance notice, they should still be protected under the FMLA for leave that is scheduled to start after the eligibility date. The court also noted that 29 C.F.R § 825.110(d) states that the determination of whether an employee has been employed by the employer for at least 12 months should be based on when the FMLA leave is to start. In this case, the court found that the FMLA leave would have started after the employee reached her eligibility date. The court therefore granted summary judgment as to plaintiff's interference claim.

The court also found that the employee's notice to the employer within one day of being notified by her doctor of the need for a reduction in hours due to pregnancy met the FMLA notice requirements. Furthermore, the court found that plaintiff did not need to follow the company policy for providing notice because company policy does not trump statutory language.

Lastly, the court granted summary judgment in favor of plaintiff in the retaliation claim *sua sponte*, noting that no other reason was given for the termination other than plaintiff's request for a reduced schedule under the FMLA.

Summarized Elsewhere:

***Young v. McCarthy-Bush Corp.*, 2014 WL 1224459 (N.D. Ga. Mar. 24, 2014)**

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

***Castay v. Ochsner Clinic Foundation*, 2014 WL 68806 (E.D. La. Jan. 8, 2014)**

Plaintiff brought an action against her former employer asserting FMLA interference and retaliation. The company initially confirmed plaintiff's eligibility for FMLA leave on the day she had applied for it, but did so in error because she had worked fewer than 1,250 hours over the previous twelve months. After defendant terminated her employment, plaintiff sued for damages and reinstatement. Defendant moved for summary judgment, arguing that plaintiff was not in fact an "eligible employee" under the FMLA and thus failed to assert a prima facie case of FMLA interference.

Although the parties disputed the exact number of hours "of service" plaintiff had worked for defendant (excluding paid vacation, holidays, sick leave, and FMLA leave), plaintiff conceded that she actually worked fewer than 1,250 hours. Plaintiff instead claimed that she was FMLA-eligible because the company had confirmed her eligibility. Her argument relied upon a superseded version of 29 C.F.R. § 825.110(d), which had previously obligated employers that had mistakenly confirmed employees as FMLA-eligible to provide the leave. The district court, however, reprimanded plaintiff's counsel for citing the outdated regulation, noting that after previous courts had deemed the regulation invalid, and the Department of Labor specifically excised the language on which plaintiff relied in the latest version of the regulation. The court granted defendant's motion for summary judgment as to plaintiff's FMLA interference claim, and denied its motion as to the retaliation claim and called for full briefing from the parties.

***Kennedy v. U.S. Postal Service*, 2014 WL 1047820 (N.D. Ind. March 17, 2014)**

Plaintiff was a postal worker. Plaintiff suffered from migraines and had accumulated a series of absences related to her condition, because she was either not yet eligible for FMLA leave or because she failed to provide adequate medical documentation to support the leave. After she became FMLA eligible, by working sufficient hours, she had several absences related to her migraine condition, which eventually prompted defendant to terminate her. She did not receive approved FMLA leave for these absences, either because she did not follow the exact employer-required procedure, or because her employer incorrectly believed she was not eligible for FMLA leave. After her termination, plaintiff filed suit against her employer and individual supervisors for FMLA interference and retaliation.

The court denied summary judgment as to plaintiff's interference claim, finding factual disputes regarding when plaintiff had accumulated sufficient hours to be entitled to FMLA leave

and as to whether she gave defendant sufficient information to put it on inquiry notice that she required FMLA leave. In regards to her retaliation claim, the court found that the questions of whether she took FMLA leave and whether that leave was causally linked to her termination were questions for a jury, because there was sufficient “bits and pieces” of direct evidence suggesting that her supervisors were attempting to terminate her because of her absences.

Saulsberry v. Fed. Express Corp., 552 Fed. Appx. 424, 21 WH Cases2d 1617 (6th Cir. 2014)

Plaintiff sued his employer for, among other things, FMLA discrimination when his employer denied his request for FMLA leave. The employer claimed that plaintiff was not an eligible employee because he had worked less than 1,250 hours during the previous 12-month period. The district court granted the employer’s motion for summary judgment on these grounds and plaintiff appealed. In affirming the district court’s decision, the appellate court noted that an employee’s eligibility for FMLA leave is determined by the number of actual hours worked during the previous 12 months. Thus, even though plaintiff was paid for 1,257 hours during the previous year, some of those hours were paid vacations and holidays. The employer’s records unequivocally showed that plaintiff had actually worked only 1,136 hours during that time period.

Fitzpatrick v. WMATA, 2014 WL 4230929 (D. Md. Aug. 26, 2014)

Plaintiff filed a complaint, alleging that she was discharged while she was caring for her sick premature infant. She was out of work without medical coverage and failed to comply with directions from Human Resources. The Court interpreted her complaint as a demand for FMLA leave for the period between May 3, 2012 and July 25, 2012. She initially claimed the problem was her own sleep apnea and lack of a medical card authorizing her to drive, but subsequently testified that the medical issues concerned her son. The Court dismissed her FMLA claim because she had not worked the necessary 1,250 hours to qualify for FMLA leave in the year immediately preceding the requested leave, and was thus not an eligible employee under the FMLA.

Ennis v. Donahoe, 2014 WL 69877 (N.D. Okla. Jan. 9, 2014)

The employee incurred absences that ultimately led to a last chance agreement, which warned that three more unscheduled absences would result in termination of employment. Following a series of absences, which the employee claimed were eligible for FMLA, the employee was discharged. In the employee’s subsequent lawsuit under the FMLA, the employer filed a motion for summary judgment, arguing that the employee was not eligible for FMLA leave because he did not work 1,250 hours in the preceding 12-month period. The court granted the motion.

First, the employee argued that the 1,250 hour requirement had to be calculated based on the method selected by the employer for determining the leave period. The court rejected this argument, and held that the better approach is to calculate the 1,250 hour requirement based on the twelve months that immediately precede the commencement of leave, regardless of which method of calculating the leave period is selected. The court adopted this reasoning based on the

language of the FMLA, which provided that the hours requirement is calculated based on the 12-month period “immediately preceding” the commencement of leave.

Second, plaintiff argued that the employer was equitably estopped from denying that plaintiff’s entitlement to leave. A supervisor had informed plaintiff that he would be eligible for FMLA leave as of the date listed on his notice of eligibility, and a written notice contained an “estimated” eligibility date. The court noted that a finding of estoppel against the government, the employer in this case, was disfavored. The court concluded that it was unreasonable for plaintiff to rely on the written notice. As to the verbal statement made by the supervisor, the court held that merely erroneous advice is insufficient to constitute affirmative misconduct.

Maya v. Leprino Foods Co., 2014 WL 1091251 (E.D. Cal. Mar. 18, 2014)

The employee sued his employer under the FMLA for failing to provide him leave for baby-bonding. The employee joined the National Guard and went on military leave from October 2010 to August 2011. While he was on military leave, his wife gave birth to their first child. About one year later, the employee asked for baby-bonding leave under the FMLA, but was told that he was not eligible because he had not worked enough hours in the prior year. About three months after the employee’s attorney contacted the employer, the employer offered the employee FMLA leave. Nevertheless, the employee filed a lawsuit, alleging the employer violated the FMLA. The employer moved for summary judgment.

The court denied the employer’s motion, finding that a reasonable jury could conclude that an adverse employment action had occurred. The court noted that the employer wrongfully failed to count the employee’s military leave as regular hours worked, for eligibility purposes. If the employer had done so, it would have granted the employee’s request for leave initially. Instead, the employer only offered leave several months later, and only after the threat of litigation. The court recognized that an employer’s affirmative action to remedy a problem could eliminate what would otherwise be an adverse employment action. However, if the remedy was provided only after significant effort by the employee to correct the issue, the initial wrongful act would still be an adverse employment action. The court concluded that a reasonable jury could find that the employer’s actions constituted an adverse employment action because the employer did not offer a remedy until it was threatened with litigation. Therefore, the court denied the employer’s request for summary judgment.

Davis v. George Washington University, 22 WH Cases2d 547 (D.D.C. Mar. 20, 2014)

The employee filed a lawsuit against his former employer under the FMLA, but the district court granted the employer’s motion for summary judgment. The employer argued that the employee was discharged for multiple absences that were not approved for leave, and for which the employee never provided medical documentation. The employee argued that he either had been granted leave for each absence, or that he should have been granted leave because of his illness. The court noted that the 1,250-hour calculation was triggered on the date that the employee first commenced leave, not the date from which plaintiff was discharged. Accordingly, the court treated the time between the employee’s initial discharge and his subsequent return to work as an unpaid suspension. Thus, the court excluded from calculation all hours during the

employee's "suspension" and concluded that the employee had not worked 1,250 hours. Therefore, the employee was not eligible for FMLA leave.

The employee also argued that he was retaliated against for exercising, and attempting to exercise, his FMLA rights. Because the first two prongs of retaliation were not contested, the court focused on the third prong – whether there was a causal connection between the request for leave and an adverse action. The employee could not establish that the employer's proffered reason for termination was pretext. The employee was unable to raise a dispute of material fact as to whether he was improperly documented as absent without approved leave under the employer's last chance agreement. Thus, the employee could not sustain a claim for retaliation.

Briscoe v. Costco Wholesale Corp., 2014 WH Cases2d 164 (D.D.C. Jul. 29, 2014)

The employee sued his former employer for refusing to grant him requested time off on various occasions to care for court-mandated matters for one of his sons and to care for a daughter after she was sexually assaulted, all under the FMLA, Title VII of the Civil Rights Act of 1964, the D.C. Human Rights Act, the D.C. Wage Payment Act, and various alleged privacy laws.

On the employer's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court dismissed the employee's FMLA claim because he had failed to allege facts showing that he was an eligible employee at the time he requested leave, and the court had no basis for determining his eligibility. The court noted that an employee must be employed for at least 1,250 hours of service during the twelve-month period immediately preceding the commencement of the leave to qualify for FMLA coverage. At most, plaintiff appeared to have worked for the employer for sixteen months in total, with the first six to seven months as part-time employment. However, plaintiff's complaint contained no factual allegations regarding the hours he worked or even when exactly he allegedly requested the qualifying leave. The court declined to address whether plaintiff would have been entitled to the leave had he been eligible.

Alexander v. Boeing Co., 2014 WL 3734291 (W.D. Wash. July 28, 2014)

Plaintiff was employed by defendant from 1996 to 2013. Since at least 2000, plaintiff's managers knew that she suffered from migraines and would occasionally miss work as a result. From 2009 to 2012, plaintiff would sporadically telecommute because of migraines, which became more frequent beginning in 2012. In April or May 2012, defendant advised employees that they could no longer work from home if they were sick, and they could no longer work partial or flexible days. In June 2012, plaintiff was told she could apply for FMLA leave to cover her migraine-related absences. She took intermittent FMLA leave for the remainder of the year, but her performance reviews suffered because she could no longer work partial or flexible days. Plaintiff was also disciplined for "unexcused" absences and ultimately discharged for "job abandonment" when she did not report for work in early May 2013. In response, plaintiff brought claims alleging, *inter alia*, interference with FMLA leave.

Defendant moved for summary judgment, arguing that (1) there was no evidence that plaintiff's use of FMLA leave was a negative factor in the decision to terminate her employment; (2) that plaintiff was ineligible for FMLA leave after January 1, 2013; and (3) that plaintiff did not provide adequate notice of her FMLA leave on June 25, 2012. The court found sufficient

evidence to create a genuine dispute of material fact regarding whether plaintiff's use of FMLA leave was a negative factor in the decision to discharge her, because that decision was made upon consideration of absences which may have been covered by the FMLA. The court also found issues of fact as to plaintiff's eligibility for FMLA leave—notwithstanding that she had recorded less than the requisite 1,250 hours of service in the preceding 12 months—because plaintiff introduced sufficient evidence that she worked hours beyond those that were recorded. Finally, the court found a dispute of material fact as to whether plaintiff provided adequate notice, because the parties had not provided evidence with respect to whether defendant had provided plaintiff with sufficient notice of its FMLA notice policy. The court therefore denied defendant's motion for summary judgment with respect to the plaintiff's FMLA claim.

***Perteet v. Saginaw Transit Authority Reg. Servs.*, 2014 WL 4637232 (E.D. Mich. Sept. 16, 2014)**

Plaintiff, a bus driver for defendant, was injured and never returned to work. Soon after his injury, defendant sent plaintiff a letter alerting plaintiff to the possibility of FMLA leave and requesting that plaintiff fill out the enclosed, necessary paperwork if he wished to request FMLA leave. Plaintiff never completed the paperwork or notified defendant of any reason for his continued absence. Defendant then terminated his employment. Plaintiff brought suit for FMLA interference and retaliation.

Defendant moved for summary judgment on both FMLA claims, arguing that plaintiff was not an eligible employee as defined by the FMLA because he had only logged 901 hours of work in the previous twelve months. In response, plaintiff argued equitable estoppel based on defendant's letter regarding FMLA leave, and also argued that the eligibility requirement applied only to FMLA interference claims – so at a minimum, his retaliation claim should survive. The court rejected both of plaintiff's arguments and granted summary judgment to defendant. Specifically, the court found that defendant's letter to plaintiff only suggested that plaintiff could request FMLA leave, not suggesting that he would qualify for leave, and that no jury could find that plaintiff could reasonably rely on this material representation. As to plaintiff's second argument, the court found that Sixth Circuit precedent suggested that a plaintiff cannot state a claim for relief for FMLA retaliation when that plaintiff did not qualify as an "eligible employee."

Summarized Elsewhere:

***Muhammad v. Seattle Police Department*, 2014 WL 1338089 (W.D. Wa. Apr. 2, 2014)**

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

A. Determining the Number of Employees

Tilley v. Kalamazoo County Road Commission, 22 WH Cases2d 157, 2014 WL 1909256 (W.D. Mich. May 13, 2014)

Plaintiff was an area supervisor of a county road commission who was having performance difficulties. After giving plaintiff several reprimands and then a suspension for failing to prepare satisfactory reports on a timely basis, plaintiff's supervisor gave plaintiff deadlines to provide three assignments that had not yet been satisfactorily submitted. Plaintiff submitted the first two reports by the deadline, but on the day of the last deadline, while preparing the last assignment, plaintiff experienced chest pains and was admitted to the hospital overnight. The physician subsequently excused plaintiff from work for two months. Plaintiff's wife requested FMLA leave for him and was given a form which indicated that plaintiff was eligible for benefits. While he timely filed the form, he was discharged in the interim.

The employer contended that plaintiff was not protected by the FMLA because he was not an eligible employee, as the employer did not have 50 employees total. Plaintiff argued that the eligibility requirement was anomalous with respect to public employers, who are covered notwithstanding the number of their employees, and thus should not be applied. The district court rejected that argument, citing binding Sixth Circuit precedent. Plaintiff also argued that the employer should be estopped because it originally indicated he was eligible for FMLA, but the court noted that there was no evidence that plaintiff would have foregone the medical leave had he known that he was not protected by FMLA. It is noteworthy that plaintiff did not receive the form until eight days after he left work due to the medical issues, and thus missed the deadline for the final assignment well before he requested FMLA leave. Defendant was granted summary judgment on all counts.

Summarized Elsewhere:

Perez v. Staples Contract & Comm., Inc., 2014 WL 4249871 (D.S.C. Aug. 27, 2014)

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

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

Alexander v. Avera St. Luke's Hosp., 768 F.3d 756, 124 FEP Cases 1300, 23 WH Cases2d 855 (8th Cir. 2014)

Plaintiff, a pathologist, entered into a pathology services agreement with defendant which provided that either party may terminate the agreement with or without cause with ninety days written notice. After plaintiff suffered a heart attack, underwent a heart transplant, and was hospitalized for bipolar disorder, defendant terminated the agreement pursuant to the ninety-day notice period. Plaintiff filed suit, alleging the termination violated the FMLA, among other

claims. The district court granted summary judgment in favor of defendant, finding plaintiff was an independent contractor and not an employee. Plaintiff appealed.

The Court of Appeals affirmed the grant of summary judgment on the FMLA claim, referring to the FMLA's cross reference to the Fair Labor Standards Act (FLSA) in its definition of "employee." Plaintiff argued the determination of whether he was an employee under the FMLA should be governed by the six-factor economic realities test that applies to FLSA minimum wage and maximum hour claims as opposed to the common-law agency rule. The Court determined a strict application of the economic realities test was not appropriate here, as plaintiff was exempt from the FLSA's maximum hour standards. Instead, the Court determined a hybrid of the common-law test and economic realities test, was the appropriate test. Under this test, plaintiff was an independent contractor. Therefore, the district court properly granted defendant's motion for summary judgment as to plaintiff's FMLA claim.

Summarized Elsewhere:

McCarroll v. Somerby of Mobile, LLC, 2014 WL 6996300 (11th Cir. Dec. 12, 2014)

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

Summarized Elsewhere:

Lukudu v. JBS USA, LLC, 2014 WL 1048516 (W.D. Ky. March 14, 2014)

B. Adoption or Foster Care Placement of a Child

Plange v. Christ Hosp., 22 WH Cases2d 1170 (D.N.J. May 5, 2014)

Plaintiff, an office coordinator at a hospital, was fired after she returned from FMLA leave that she took to become a kinship guardian. She then brought suit under the FMLA against her employer – a hospital, and two of her supervisors – a Director of Psychiatry and an Assistant Director of Psychiatry, in their individual capacities.

Defendants moved to dismiss the case, arguing that becoming a kinship guardian for a child was not a valid basis for eligibility under the FMLA. The hospital also moved the court to dismiss the case, stating that the terms of its purchase of the hospital prevented plaintiff's FMLA claim, and it further petitioned the court to stay the case pending the outcome of a motion the hospital had in Bankruptcy Court that could affect its liability in this case. The court denied defendants' motion based on the kinship guardian argument, holding that, even though the concept of a kinship guardian was created in New Jersey after the FMLA, it fit well within either the definition of "son or daughter," which includes "legal ward" and "child of a person standing *in loco parentis*." The court granted the hospital's motion to stay the case pending resolution in Bankruptcy Court since that court's ruling would impact the hospital's motion to dismiss in this case.

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

Gienapp v. Harbor Crest, 756 F.3d 527, 22 WH Cases2d 1424 (7th Cir. 2014)

Plaintiff brought suit against defendant to enforce her FMLA rights to care for her sick daughter. The district court granted summary judgment for defendant, ruling that plaintiff had forfeited her rights under the FMLA by not telling defendant exactly how much time she would take. Plaintiff appealed, and the court reversed. The court ruled that plaintiff's daughter's cancer status was changeable and, thus, plaintiff's application for sick leave was categorized as unforeseeable leave. The court explained that employees were not required to advise employers as to how much leave they need when they do not know yet themselves. Thus, the court held that defendant was not entitled to summary judgment.

The court then rejected the defendant's argument that plaintiff did not qualify for any FMLA leave because plaintiff's daughter was married and plaintiff was no longer "standing in

loco parentis,” finding that any biological child is treated as a son or daughter if either the age condition or the disability condition is satisfied. Defendant also argued that plaintiff was not entitled to leave because she was not her daughter’s “primary” caregiver. The court also rejected this argument, noting that the word “primary” is not present in the statute. The court then held that the FMLA does not treat care of grandchildren as disqualifying if the employee also cares for a qualifying relative such as a daughter, explaining that a combination of assistance to an employee’s daughter, plus care of grandchildren that could take a load off the daughter’s mind and feet, constituted “care” under the FMLA.

Summarized Elsewhere:

Weinstein v. AutoZoners LLC, 2014 WL 898081 (D. Nev. Mar. 6, 2014)

Tsun v. WDI Int’l, Inc., 585 F. Appx. 489, 23 WH Cases2d 1025 (9th Cir. 2014)

1. Eligible Family Relationships

a. Spouse

Lukudu v. JBS USA, LLC, 2014 WL 1048516 (W.D. Ky. March 14, 2014)

Plaintiff was a worker at defendant hog-slaughtering factor. He was initially discharged for three no-call/no-shows, under defendant’s attendance policy, but was subsequently reinstated when he showed that he had called before his absences. The day that he was scheduled to return to work, plaintiff called in, stating that he would be unable to come in because his pregnant wife was in the hospital. Defendant terminated plaintiff’s employment the following day. Plaintiff brought claims for FMLA interference and retaliation.

Evaluating plaintiff’s FMLA claims, the court noted that although plaintiff had referred to the woman who was in the hospital as his “wife,” they were not, in fact, married. The court went on to note that common law marriage was not recognized under Kentucky law. The court concluded that the absence of state law recognition of his marriage status was preclusive of his FMLA claim premised on care of his spouse under section 2612(a)(1) (c) of the FMLA. Plaintiff’s argument analogizing to expanding laws of domestic partnership and cohabitation generally raised a question of policy outside the Court’s present jurisdiction. A related claim for care of his son failed on the factual record, in so far as plaintiff was terminated a full week before his son was born, and regardless of a disputed record on potential interference with that FMLA claim, a claim premised on the need to care for a son cannot accrue prior to the birth of the child.

Summarized Elsewhere:

Campbell v. Jefferson University Physicians, 2014 WL 2194519 (E.D. Pa. May 27, 2014)

Young v. McCarthy-Bush Corp., 2014 WL 1224459 (N.D. Ga. Mar. 24, 2014)

b. Son or Daughter

Summarized Elsewhere:

Thomas-Young v. Sutter Cent. Valley Hosps., 2014 WL 1096795 (E.D. Cal. Mar. 19, 2014)

c. Parent

d. Certification of Family Relationship

2. “To Care For”

Michaels v. City of McPherson, 23 WH Cases2d 103 (D. Kan. 2014)

Plaintiff brought suit against his employer, claiming that it interfered with his FMLA rights when it denied his request for FMLA leave. Plaintiff’s step-daughter had a serious health condition and needed to travel out-of-town to Kansas City for a sleep-deprived electroencephalogram (“EEG”), scheduled for May 18 at noon. The exam required the girl to stay awake until midnight the night before the exam and then wake up at 4:00 a.m. Plaintiff requested leave for May 17 and 18, planning to help his wife drive to Kansas City and keep his stepdaughter awake until midnight on May 17, and then attend the exam on May 18. The employer denied the request for May 17, requiring plaintiff to attend mandatory training instead. Plaintiff was not released from the training until 11:00 p.m., after which he drove his family to Kansas City for the appointment.

After the employer later terminated plaintiff’s employment, plaintiff brought suit, claiming that his employer interfered with his FMLA rights when it denied his request for leave on May 17. Both parties moved for summary judgment. The employer argued that leave for May 17 was merely a convenience, and not a medical necessity. The employer also argued that plaintiff did not schedule his stepdaughter’s medical appointment in a way that would not cause undue disruption to the employer’s operations. Plaintiff, however, argued that leave for May 17 was medically necessary in order to both travel to the out-of-town medical appointment and to follow the required sleep protocol for the appointment. He also presented evidence that the May 17 training was not mandatory and that he could have received the training later. The court denied both parties’ motions, holding that disputed issues of fact precluded summary judgment. The court ruled that material questions of fact remained as to whether leave was medically necessary on May 17 for plaintiff to care for his stepdaughter and whether it would have caused undue disruption of operations for plaintiff to miss the May 17 training.

Katoula v. Detroit Entertainment, LLC, 557 Fed.Appx. 496, 22 WH Cases2d 183 (6th Cir. 2014)

Plaintiff requested and was approved for intermittent FMLA leave to care for his mother. Plaintiff needed to take a day off to take his mother to the doctor, but before he could notify the employer, he learned his car had been stolen. Plaintiff then called the employer and said he would not be at work that day because he needed to take his mother to the doctor and deal with his stolen car. Because completing a police report took longer than expected, he was not able to take his mother to the doctor. When he returned to work, plaintiff told his supervisor what happened and the supervisor told him to write down that he had missed the day for intermittent FMLA. Defendant later asked plaintiff why he missed work, at which time he told them what happened. Defendant then discharged plaintiff. Plaintiff filed suit alleging FMLA interference and retaliation over two years later.

The district court granted the employer’s motion to dismiss because plaintiff failed to file suit within the two-year limitations period and plaintiff appealed. The Sixth Circuit affirmed

dismissal, finding that plaintiff did not plausibly allege sufficient facts to show that defendant willfully violated the FMLA. The Court determined defendant could not have knowingly or recklessly disregarded the FMLA's requirements because plaintiff was not entitled to take FMLA leave on the day he was absent. Defendant did not willfully deny plaintiff leave in violation of the FMLA because he did not actually care for his mother that day. He also could not demonstrate willful retaliation because plaintiff's act of missing work that day was not protected activity.

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

Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 22 WH Cases2d 318 (11th Cir., 2014)

Plaintiff, CEO of defendant, sent an email requesting 11 weeks of vacation time over the next two years to the CEO of defendant's parent company, referencing the fact that he was advised by medical professionals to take the time off. The CEO of the parent company denied the request and terminated plaintiff the next day. Plaintiff filed suit for FMLA interference and retaliation against his former employer. Notably, he did not allege his condition rendered him incapacitated or that he needed treatment in order to avoid becoming incapacitated. A jury rejected the retaliation claim, but found the former employee had a right to the leave, and the district court entered judgment for employee, awarding over \$1 million in damages and attorney's fees.

The Court of Appeals reversed, ruling that a claim for interference or retaliation under the FMLA cannot be established based on an employee's serious health condition unless the employee first shows he or she actually qualified the employee for leave as a "right" under 29 U.S.C. § 2615(a)(1). To so qualify, an employee must establish that such leave would be used for a "period of incapacity" or for "treatment for such incapacity" under 29 C.F.R. § 825.115(c) and 29 C.F.R. § 825.113. The court explained that if, instead, it were sufficient for an employee to request leave based on a "potential" future inability to work, then "the FMLA would apply to every leave request." Because former employee asserted only that the requested leave would benefit his condition, he failed to qualify.

Resler v. Koyo Bearings USA LLC, 2014 WL 1272114 (M.D. Ga. Mar. 27, 2014)

The employee, a press operator, claimed that the employer interfered with his rights under the FMLA and retaliated against him in violation of the FMLA. On the employer's motion for summary judgment, the court found that the employee failed to show that he was eligible for FMLA leave. The employee's elbow injury and sickness from medication did not constitute serious health conditions, all of the employee's doctors had released him to return to work, and the employee never experienced a three day period of incapacity. Even assuming that the employee could meet his burden of demonstrating eligibility, he failed to give the employer sufficient notice of his need for FMLA leave, and therefore he failed to demonstrate that he was entitled to a benefit denied. Therefore, the court granted the employer's motion for summary judgment as to both FMLA claims.

Summarized Elsewhere:

Jones v. Con-Way Freight, Inc., 2014 WL 1120062 (W.D.N.C., March 20, 2014)

Vaigasi v. Solow Mgmt. Corp., 2014 WL 1259616 (S.D.N.Y. Mar. 24, 2014)

Knox v. Town of Southeast, 2014 WL 1285654 (S.D.N.Y. Mar. 31, 2014)

Preddie v. Bartholomew Cnty. Consol. Sch. Corp., 2014 WL 4259625 (S.D. Ind. Aug. 27, 2014)

Jackson v. Logistics & Tech. Servs., Inc., 2014 WL 4264839 (N.D. Ala. Aug. 27, 2014)

Holloway v. ITT Ed. Servs., Inc., 2014 WL 4273896 (Aug. 28, 2014)

Washington v. Acorda Therapeutics, Inc., 2014 WL 4467820 (S.D.N.Y. Aug. 28, 2014)

Peda v. New York Univ. Hospitals Ctr., 2014 WL 1013844 (S.D.N.Y. Mar. 17, 2014)

Bement v. Cox, 2014 WL 4699620 (D. Nev. Sept. 22, 2014)

Bowman v. CSX Transp., Inc., 2014 WL 2195857 (N.D.N.Y. May 22, 2014)

E. Qualifying Exigency Due to a Call to Military Service [New Topic]

1. Covered Military Members [New Topic]

Summarized Elsewhere:

Maya v. Leprino Foods Co., 2014 WL 1091251 (E.D. Cal. Mar. 18, 2014)

2. Qualifying Exigency [New Topic]

a. Short Notice Deployment [New Topic]

b. Military Events and Related Activities [New Topic]

Summarized Elsewhere:

Maya v. Leprino Foods Co., 2014 WL 1091251 (E.D. Cal. Mar. 18, 2014)

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]

Ballard v. Chicago Park District, 741 F.3d 838, 21 WH Cases2d 1484 (7th Cir. 2014)

Plaintiff sought leave under the FMLA to care for her terminally ill mother on a trip to Las Vegas arranged by her mother’s hospice as part of her mother’s end-of-life goals. Several months after returning from the trip, defendant discharged plaintiff for unauthorized absences accumulated during the trip. Plaintiff filed suit in the Northern District of Illinois for alleged violations of the FMLA.

Defendant moved for summary judgment arguing, in part, that plaintiff did not “care for” her mother in Las Vegas because plaintiff was already providing her mother with care at home and because the trip was not related to a continuing course of medical treatment. The court denied the motion holding that so long as the employee provides care to the family member, where the care takes place has no bearing on whether the employee receives protections under the FMLA. Defendant moved for an interlocutory appeal. The Court of Appeals held that the FMLA (29 U.S.C. § 2612(a)(1)(C) in particular) speaks in terms of “care” and not “treatment”. As such, the court declined to impose a requirement that an away-from-home trip occur in connection with ongoing medical treatment. The court held that the FMLA’s text does not restrict care to a particular place or geographic location. The court also declined to impose an active treatment requirement as a prerequisite for any care away from home. The court, in reaching its decision, declined to follow cases from the First and Ninth Circuits which tied care on a trip with some level of participation in ongoing treatment of that condition. The court held that so long as the employee attends to a family member’s basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition. Because Plaintiff actually cared for her mother during the trip, Plaintiff was entitled to FMLA leave. As such, the judgment of the district court was affirmed.

- 3. Eligible Family Relationships [New Topic]

Summarized Elsewhere:

Verby v. Paypal, Inc. et al., 2014 WH Cases2d 156 (D. Neb. April 29, 2014)

- 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

Summarized Elsewhere:

Rinaldi v. Quality King Distribs., Inc., 2014 WH Cases2d 160441 (E.D.N.Y. June 26, 2014)

A. Overview

Torres v. Inspire Development Center, 2014 WL 3697816 (E.D. Wash. July 24, 2014)

In early March 2012, plaintiff learned that his mother was ill. As a result, he asked his employer for permission to travel to Mexico from April 27 to May 27, 2012. Plaintiff did not mention that his mother was ill or otherwise indicate that his request was prompted by a need to care for a family member. The employer denied the request because it fell during the company's busiest time of year. On April 10, 2012, plaintiff learned that his mother had died. He travelled to Mexico soon thereafter and stayed until the end of May. During that time, his mother-in-law passed away. And on May 1, plaintiff's wife began chiropractic treatment for a preexisting back injury and was unable to travel home to the United States. Plaintiff contacted his employer to discuss his job situation and his wife's condition and travel restrictions on May 10 or 11, 2012. Plaintiff was discharged on May 21, 2012, for violating the employer's attendance policy.

Plaintiff brought FMLA interference and retaliation claims against his former employer. On the employer's motion for summary judgment, and in a matter of first impression within the Ninth Circuit, the court considered whether plaintiff's entitlement to care for his mother was extinguished upon his mother's death. Noting that many other federal courts have found that a relative cannot require care for a serious health condition following their death, the court held that the employer was not obligated to grant FMLA leave following the death of plaintiff's mother and mother-in-law. The court also granted summary judgment to the employer with respect to the two other events for which plaintiff alleged he was entitled to FMLA leave – his mother's illness prior to her death, and the treatment of his wife's back condition. With regard to the first event, the court held that plaintiff failed to provide adequate notice that his vacation request was actually a request for FMLA leave, and that the employer's obligation to inquire was never triggered. The court also noted that the initial request was for leave beginning on April 27 – not April 10, when plaintiff actually left for Mexico. With regard to the second qualifying event, the court held that plaintiff failed to provide timely notice of his intent to take FMLA leave upon learning of his wife's back injury and travel restrictions. More specifically, the court held that no rational fact finder could find that waiting eight days to give notice constitutes providing notice "as soon as practicable under the facts and circumstances" of the case.

B. Inpatient Care

Bonkoski v. Oberg Industries, 992 F. Supp. 2d 501 (W. D. Pa. 2014)

Plaintiff worked as a wire operator for defendant. On November 6, 2011, a supervisor believed he witnessed plaintiff sleeping on a lunch break. For this reason, defendant suspended plaintiff three days for this conduct. Upon returning from his suspension on November 14, 2011, plaintiff met with defendant twice to discuss his suspension. During the second meeting, plaintiff began experiencing shortness of breath, chest pain, and dizziness. He asked the two

supervisors he was meeting with for – and was granted – permission to leave and continue the meeting the next day. He went home, but because his problems persisted, he then checked himself into a hospital shortly before midnight that day. After hospital doctors performed a battery of tests on him, he was released and given a note excusing him from missing work November 15, 2011. During this time, plaintiff’s wife called defendant about obtaining FMLA paperwork. Plaintiff returned to work the next day. Defendant then advised him that he was being terminated because he walked out of the second meeting on November 14, 2011. Plaintiff sued defendant alleging that it violated the interference and retaliation provisions of the FMLA.

The Court granted defendant’s motion for summary judgment as to both plaintiff’s interference and retaliation claims, explaining that plaintiff did not have a serious health condition when checking himself in for treatment on November 14 and 15. It observed that plaintiff was not relying on the “continuing treatment” portion of the FMLA’s definition of serious health condition; instead, plaintiff contended he met that definition because he stayed overnight in a hospital. The Court concluded that because plaintiff did not check into the hospital until just before midnight on November 14, he did not spend an “overnight” stay in the hospital and his health condition did not, as such, qualify as a serious health condition. For this reason, both of his FMLA claims were dismissed. In doing so, the Court rejected plaintiff’s view that, because the hospital classified him as an inpatient, and that, because “inpatient” is defined by a dictionary to require an overnight stay, he met the definition of serious health condition. The Court explained that, while inpatient care may require an overnight stay, that did not mean that plaintiff *actually* stayed overnight under the definition the Court reached above. Because plaintiff did not actually stay overnight, he did not meet the definition of serious health condition.

C. Continuing Treatment

Michaels v. Norton Healthcare, Inc., 2014 WL 3418925 (W.D. Ky. Sep 14, 2014)

Plaintiff brought her daughter to the hospital on a Wednesday, where a physician diagnosed plaintiff’s daughter strep throat and thereafter gave her a ten-day course of antibiotics. The daughter returned to school the following Monday. After the plaintiff’s request for FMLA leave for Wednesday through Friday was denied, the plaintiff sued for FMLA leave interference. The district court granted the employer’s motion for summary judgment because the daughter’s illness was not a serious health condition even though she had received a continuing treatment of antibiotics. Specifically, because the daughter had not missed more than three days of school and there was no evidence that she would have missed Saturday had school been in session that day, the district court found that the daughter had not been incapacitated for more than three calendar days as required by 29 C.F.R. § 825.114(a).

Tsun v. WDI Int’l, Inc., 585 F. Appx. 489, 23 WH Cases2d 1025 (9th Cir. 2014)

The district court granted the defendant’s motion for summary judgment as to her claims under the Hawaii Family Medical Leave law (HFLL) and the FMLA. The plaintiff appealed, and the court affirmed, finding that she could not raise a material issue of fact that she suffered from a “serious health condition” that qualified her for FMLA leave. The court found that plaintiff was not able to raise a material issue of fact that she was treated by a health care provider because she

failed to submit evidence that the licensed bone specialist that treated her in Hong Kong was a health care provider as defined under the FMLA. The court found that plaintiff's evidence that she was treated with a "special type of ointment" and a simple back massage insufficient to create a material issue of fact as to whether she was treated by a health care provider under the FMLA. The court also affirmed the district court's conclusion that her HFLC claim failed as a matter of law, finding that she could not show a "serious health condition." The court explained that her only claim under the HFLC could be based upon her father-in-law's condition, but she no longer had a qualifying reason to request leave under the HFLC once her father-in-law passed away.

Summarized Elsewhere:

Pivac v. Component Services & Logistics, Inc., 570 Fed.Appx. 899 (11th Cir. 2014)

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

Giddens v. UPS Supply Chain Solutions, 2014 WL 4954597 (D. Del. Sept. 30, 2014)

Plaintiff, a collection associate for defendant, filed claims against his employer for FMLA interference. The Court granted summary judgment to the employer because it found plaintiff did not satisfy the requirements to demonstrate he experienced a "serious medical condition" warranting protections under the FMLA. Plaintiff claims he had flu-like symptoms and was treated by his doctor. Plaintiff was attempting to satisfy the "continuing treatment" prong of the definition of a "serious medical condition," but failed to do so because he did not receive treatment within seven days of the first day of incapacity. Plaintiff also failed to meet the requirement that he was under a regimen of continuing medical treatment, because his doctor advised to continue taking over-the-counter medication and return if he did not feel better. Plaintiff further failed to obtain treatment two or more times during the period of incapacity.

Summarized Elsewhere:

Nicely v. Safeway, Inc., 2014 WH Cases2d 163 (D. Md. July 3, 2014)

Rojas v. Acuity Brands Lighting, Inc., 2014 WL 2926510 (D.N.J. Jun. 27, 2014)

Michaels v. Norton Healthcare, Inc., 2014 WL 3418925 (W.D. Ky. Sep 14, 2014)

- a. Incapacity for More Than Three Calendar Days

Smith v. City of Birmingham, 2014 WL 66485, 22 WH Cases2d 445 (N.D. Ala. Jan. 8, 2014)

Plaintiff was the clerk for the mayor of a city. Plaintiff notified the mayor that she had been diagnosed with multiple sclerosis. After a new mayor took office, and plaintiff missed work, the new mayor stated that plaintiff should retire due to her absences. Plaintiff informed the mayor that she needed time off for foot surgery, and the mayor requested that she delay the surgery. Ultimately, plaintiff delayed the surgery, took leave, retired, and then filed claims for FMLA interference and retaliation. The court granted summary judgment for the employer on the retaliation claim, but denied summary judgment on the interference claim.

Regarding the interference claim, the city argued that plaintiff's foot surgery did not rise to the level of a serious health condition. The court disagreed because the surgery incapacitated plaintiff for at least three days. The employer also challenged the sufficiency of plaintiff's notice. Although plaintiff did not provide thirty days' notice of her foreseeable leave, the employer improperly delayed the FMLA leave for a total of seventy-nine days after receiving notice (not just thirty days as permitted by the law). Further, although plaintiff did not state that she needed FMLA leave, the city was on notice when it learned that she needed time off for surgery. At that point, the city had the burden to ascertain whether the FMLA applied. Finally, there was evidence that plaintiff was directed to delay her surgery, which could be viewed as interfering with her FMLA rights.

As for the retaliation claim, although the mayor made a comment that plaintiff should retire "due to her absences," and he knew that plaintiff was absent "for illnesses," plaintiff acknowledged she never completed FMLA paperwork because she was using sick and vacation time. Moreover, the mayor had no knowledge of any FMLA leave request by plaintiff. Accordingly, there was no causal connection.

Summarized Elsewhere:

***Michaels v. Norton Healthcare, Inc.*, 2014 WL 3418925 (W.D. Ky. Sep 14, 2014)**

- b. Continuing Treatment

Summarized Elsewhere:

***Harris v. CRST Van Expedited, Inc.*, 2014 WL 6686569 (N.D. Iowa Nov. 26, 2014)**

- c. Treatment by Health Care Provider

***Stewart v. White*, F. Supp. 2d, 2014 WL 3747664 (D.D.C. July 31, 2014)**

Plaintiff, a secretary, sued her supervisor, claiming she was improperly denied her right to take leave under the FMLA. Plaintiff suffered from an upper respiratory condition. Her request for an accommodation was approved in September of 2011, allowing her to take unscheduled accrued or unpaid leave. In 2012, plaintiff submitted several updated medical certification forms stating that "flare ups" of her condition had worsened over the course of her employment. Her physician wrote that although plaintiff should be absent from her work environment during these flare ups, she could still telecommute. The updated forms indicated that treatment was necessary, but otherwise did not describe what those treatments were or when they would occur. Plaintiff's request for advanced leave was denied. Plaintiff then brought suit, and the defendant moved to dismiss her claims or, alternatively, for summary judgment.

The court granted the defendant's motion for summary judgment, noting that, to prove that she had a serious health condition, plaintiff "must" be absent from work in order to be unable to perform the essential functions of her job during the absence for treatment. Thus, the court explained that plaintiff was required to demonstrate that the treatment was necessary and that her absence from work was necessary to undergo the treatment. The court held that the forms submitted by plaintiff were insufficient because they did not describe the treatment and,

indeed, even stated that she could still perform her responsibilities by telecommuting. Thus, the court granted defendant's summary judgment motion because no reasonable jury could determine that plaintiff's absences were necessary to undergo medical treatment as required under the FMLA.

Summarized Elsewhere:

Ballard v. Chicago Park District, 741 F.3d 838, 21 WH Cases2d 1484 (7th Cir. 2014)

2. Pregnancy or Prenatal Care

Jarrett v. Nobel Learning Communities, Inc., 2014 WL 1612610 (N.D. Ill. Apr. 21, 2014)

Plaintiff was employed as a cook at defendant preschool. She was also allowed to work as needed as a "teacher helper." After learning that she was pregnant and restricted from performing certain duties, defendant accommodated her. When, however, her physician put her on stricter restrictions that prevented her from performing essential functions of her job, defendant put her on FMLA leave until after her child was born. When her FMLA leave was exhausted, she requested a personal leave, which the administrators granted. Plaintiff returned to work on a part-time basis until she was terminated for poor work performance.

She brought claims for interference and retaliation under the FMLA. Defendant filed a motion for summary judgment, which the court granted. As to both the interference and retaliation claims, the court held that the administrators of the school had provided her with all protections to which she was entitled under the FMLA. The court noted that plaintiff had not objected to being placed on FMLA leave, but only that she was put on it earlier than planned, which was ultimately due to her doctor's medical restrictions. The court found no evidence of interference with her rights under the FMLA, nor retaliation since the placement on FMLA leave did not constitute a material adverse action.

3. Chronic Serious Health Condition

Jones v. Con-Way Freight, Inc., 2014 WL 1120062 (W.D.N.C., March 20, 2014)

A former commercial truck driver was terminated following his employer's determination that she had intentionally refused to submit a urine sample as part of a federally-required random drug test. The former employee filed suit, claiming the employer violated the FMLA because it refused to provide her with leave for what she asserted was a "shy bladder" health condition that had prevented her from providing a urine sample during the drug test.

The court granted the employer's motion for summary judgment on the FMLA claim. Noting that plaintiff had not alleged that that her condition rendered her incapacitated or unable to perform her job, or that it required her to undergo any type of continuing treatment necessitating FMLA leave, the court concluded that plaintiff had not established a serious health condition pursuant to 29 CFR § 825.100, 29 CFR §825.113(a), and 29 CFR §825.115.

Hansler v. Lehigh Valley Health Network, 2014 WL 1281132 (E.D. Pa. Mar. 28, 2014)

Plaintiff filed suit alleging that her employer interfered with her FMLA rights by failing to provide her with an opportunity to cure the deficiencies in her medical certification, and terminated her in retaliation for requesting FMLA leave. During her employment with defendant, plaintiff began experiencing shortness of breath, nausea, and vomiting. Subsequently, plaintiff's physician completed an FMLA written request form that sought intermittent leave two times per week for a probable duration of approximately one month. The employer denied plaintiff's FMLA request because, according to the employer, plaintiff's condition did not qualify as a "serious health condition." After plaintiff missed several days due to her condition, the employer terminated her employment. The employer argued that plaintiff's medical certification was negative on its face because a probable duration of one month did not amount to an extended period of time as required to qualify as a chronic serious health condition.

The Court held that "approximately one month" did not constitute an extended period of time within the meaning of the FMLA regulations. As such, the Court held that plaintiff's certification demonstrated that she did not qualify for FMLA leave and, therefore, the employer did not interfere with plaintiff's FMLA rights. Regarding the employee's retaliation claim, the Court found that an FMLA leave request must be valid in order for the request to form the basis for a retaliation claim. Thus, because plaintiff's FMLA leave request and supporting certification did not entitle her to take FMLA leave, her request could not form the basis for an FMLA retaliation claim. The district court granted defendant's motion to dismiss.

4. Permanent or Long-Term Incapacity

5. Multiple Treatments

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments

2. Treatment for Substance Abuse

Crosby v. F.W. Webb, Co., 2014 WL 1268691, 22 WH Cases2d 725 (D. Maine March 26, 2014)

The employee was a driver for a wholesale distributor of plumbing and heating supplies. The employee suffered from depression and alcohol abuse, and took leave on two separate occasions to treat his illnesses. Three days after the employee returned to work from his second period of leave, the employer terminated his employment, claiming that the employee's driver's license had lapsed. The employer also argued that the employee's condition did not constitute a serious health condition. The court disagreed, denying the employer's motion for summary judgment. The employee's alcoholism and depression were chronic conditions that required continuing treatment by a healthcare professional. There was also a material dispute of fact as to whether the employee was discharged for his use of protected leave, because the employer's asserted justification was called into question by its disparate treatment of other similarly situated employees. Therefore, the court denied the employer's motion for summary judgment.

3. “Minor” Illnesses
4. Mental Illness

CHAPTER 5. LENGTH AND SCHEDULING OF LEAVE

I. OVERVIEW

II. LENGTH OF LEAVE

A. General

Larson v. Rush Fitness Complex, 2014 WL 6090323 (E.D.Tenn. Nov. 13, 2014)

Plaintiff, a physical trainer, brought an FMLA lawsuit against his former employer, asserting he was unlawfully discharged following his leave of absence from work. The employee claimed that, in an FMLA letter addressing the terms of the leave of absence, the employer told him that he could not return to work until released by his physician. Plaintiff interpreted the letter as meaning that he would be afforded a leave of absence until he was cleared to return to work. Plaintiff sought back pay, front pay and the value of stock options. The court dismissed the FMLA claim. On a subsequent motion for summary judgment, the court dismissed the employee's effort to resurrect his leave of absence claim though a misrepresentation cause of action.

The employee's leave of absence was related to recovery time from surgery to repair his right knee. When plaintiff's twelve weeks of FMLA leave expired, he failed to return to work based on his understanding that the employer had advised him to return to work only when cleared by his physician. In an exchange of e-mails between the employee and employer's benefits coordinator, the employee indicated that he would not be cleared to return to work for at least two months after his FMLA leave expired. Two days later, the employer terminated plaintiff's employment.

The court held that there was no evidence that suggested that the employer had guaranteed the employee's job after the expiration of the FMLA leave. It concluded that the employer's representation, that the employee needed a physician's clearance before returning to work, was insufficient as a matter of law to establish a right to leave in excess of the twelve weeks guaranteed by the FMLA. The court noted that, in the context of the letter's other references to the FMLA and that the leave was expected to be 6-12 weeks, there could be no reasonable interpretation allowing for the conclusion that the employer had offered an open-ended leave of absence.

Dixon v. Public Health Trust of Dade Cnty., 567 Fed. Appx. 822, 22 WH Cases2d 1234 (11th Cir. 2014)

The Eleventh Circuit considered an appeal from the trial court's grant of a 12(b)(6) motion for failure to state a claim under the FMLA. Plaintiff sued her former employer, which operated the hospital where plaintiff worked as a patient-care technician. In August of 2011, plaintiff requested FMLA leave to care for her ailing mother. Plaintiff began her FMLA leave on September 25, 2011. Defendant's human resources department also made statements indicating plaintiff could remain on leave until March, 2012. However, on November 1, 2011,

defendant sent plaintiff a letter indicating she needed to return to work by November 23. Although plaintiff later received oral assurances that she could return to work on January 3, 2012, defendant terminated her employment on December 22, 2011.

Plaintiff sued in July of 2012 and the trial court dismissed plaintiff's FMLA claims with prejudice because she had exhausted her twelve weeks of FMLA leave on December 18, 2011. On appeal, the Court of Appeals affirmed the district court. The court reasoned that the FMLA grants only twelve weeks of leave, despite defendant's assurances to the contrary. Because plaintiff alleged that she had received twelve weeks of leave, she could state no claim for relief, so dismissal was appropriate.

Summarized Elsewhere:

Taylor v. Trees, Inc., 2014 WL 5781251 (E.D. Cal. Nov. 5, 2014)

B. Measuring the 12-Month Period

Summarized Elsewhere:

Maya v. Leprino Foods Co., 2014 WL 1091251 (E.D. Cal. Mar. 18, 2014)

Young v. McCarthy-Bush Corp., 2014 WL 1224459 (N.D. Ga. Mar. 24, 2014)

C. Special Circumstances Limiting the Leave Period

1. Birth, Adoption, and Foster Care
2. Spouses Employed by the Same Employer

D. Effect of Offer of Alternative Position

E. Required Use of Leave

Leonard v. Electro-Mech. Corp., 2014 WL 1385356 (W.D. Va. Apr. 9, 2014)

A janitor sued his employer in the federal district court for West Virginia for interference and retaliation under the FMLA. The employer moved for summary judgment. Plaintiff suffered from degenerative disc disease and sometimes experienced "flare-ups" that required him to take FMLA leave. After defendant's general manager expressed concern about plaintiff's ability to safely perform his duties, defendant scheduled an Independent Medical Examination (IME) and told plaintiff he could not return to work until after the examination. Defendant also informed plaintiff that it would designate his absence as FMLA leave, and notified him that he had four weeks' leave remaining. Plaintiff did not respond to messages from defendant, missed the IME appointment, and did not return to work after his FMLA leave expired.

Plaintiff argued that defendant interfered with his FMLA benefits by placing him on involuntary FMLA leave pending the scheduled IME. The court noted that the Fourth Circuit had not addressed the question of whether placing an employee on involuntary FMLA leave constitutes actionable interference. The only circuit to recognize such a claim was the Sixth Circuit, which held that such claims are only ripe when an employee seeks FMLA leave at a later

date, and none is available due to the employer having wrongfully forced the employee to use FMLA leave previously. Since plaintiff never returned to work after his FMLA leave and never requested FMLA leave at a later date, the district court held that he could not establish a claim under the involuntary-leave theory. Although plaintiff also argued that requiring him to undergo an IME constituted interference, the court concluded that the IME was job-related and consistent with business necessity, as required by the ADA. Accordingly, the court granted Defendant's motion for summary judgment on the interference claim. Further, the court found that defendant offered legitimate, nondiscriminatory reasons for terminating plaintiff's employment. The court further found that plaintiff proffered no facts to create a genuine issue of material fact regarding defendant's motivations for terminating his employment, and granted defendant's motion for summary judgment on the retaliation claim as well.

F. Measuring Military Caregiver Leave [New Topic]

III. INTERMITTENT LEAVES AND REDUCED LEAVE SCHEDULES

Summarized Elsewhere:

Mendel v. City of Gibraltar, 23 WH Cases2d 664 (E.D. Mich. 2014)

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

Baier v. Rohr-Mont Motors, Inc., 23 WH Cases2d 1390 (N.D. Ill. Nov. 17, 2014)

Plaintiff, a sales manager at defendant automobile dealership, had heart surgery – for which he requested and was granted FMLA leave. Shortly after his return to work, he was terminated for using profanity during a conversation with another employee. Plaintiff then filed suit for FMLA interference and retaliation.

Defendants brought a motion for summary judgment for both claims. As to the interference claim, defendants claimed that they never denied plaintiff the right to any FMLA benefits. Plaintiff, in response, argued that he was denied intermittent leave to work a reduced schedule 40-hour workweek and that defendants denied him full restoration to his position because he was fired shortly after his reinstatement. The court found that despite plaintiff's nurse's orders to only work 40 hours a week and plaintiff's notification to defendant of that fact, defendant still required him 60-70 hours a week. Additionally, defendants failed to provide plaintiff the required information about the FMLA. In regards to plaintiff's argument that he was not granted reinstatement, defendants argued that plaintiff was terminated for his record of substandard behavior, including his use of profanity. The court, noting that evidence showed that other employees also used profanity, found evidence that this reason was pretextual. Further, the court cited the temporal proximity of the discharge, only thirteen days after his return, and several remarks from plaintiff's supervisor concerning the fact that plaintiff may "die at the desk."

As to plaintiff's retaliation claim, defendants argued that there was no causal connection between plaintiff's FMLA leave and his termination. The court found that there was sufficient circumstantial evidence to survive summary judgment, pointing to evidence that 1) the timing of

his termination was suspicious, 2) his supervisor made statements suggesting retaliatory intent, and 3) defendant's reason for termination was pretextual.

Santiago v. Dept. of Transp., 2014 WL 4823869 (D. Conn. Sept. 25, 2014)

Plaintiff, an employee of the Connecticut Department of Transportation (“DOT”), alleged the DOT and its employees interfered with his rights by denying him leave under the FMLA and retaliated against him for exercising his rights under the FMLA by placing him on unpaid leave. Plaintiff oversaw a storage area for the DOT and, during certain times of the year, his position required a fairly extensive amount of overtime. For years, plaintiff suffered from “cluster headaches” and his doctor eventually determined his excessive work schedule during periods in which he worked overtime was one of the main triggers of his headaches. Plaintiff first notified the DOT of his condition in a May 12, 2011 letter to an HR specialist; plaintiff explained the nature of the headaches and that his doctor had determined working overtime was a main trigger and caused him not to be able to perform his job. The DOT told plaintiff that overtime was an essential function of the job, and if he could not work overtime, it would search for a position with “less arduous duties.” If none was found, he would have to either apply for disability retirement or the DOT would initiate separation proceedings. Plaintiff submitted his FMLA medical certificate on May 17, which stated that he could not work over eight hours per day because doing so precipitated the headaches. However, the doctor did not respond to the employer's request for an estimate of future treatment. The FMLA administrator mailed plaintiff the FMLA request form. Because he never returned it and the medical certificate was incomplete, she denied plaintiff's FMLA request. Although plaintiff claimed he was never told that the medical certificate was incomplete, the FMLA administrator said she sent him notices of the deficiency on May 17 and May 27. On June 2, plaintiff indicated he would apply for disability retirement. On June 27, the FMLA administrator advised him there was no other position and, unless he was approved for disability retirement, the separation process would begin. He was placed on leave on July 1, but was not discharged because he had six months of accrued vacation and sick leave.

The court rejected the employer's assertion that the FMLA did not entitle the plaintiff to be relieved of ever having to work overtime and that he was only entitled to leave during the times he was incapacitated by his headaches. Because the employee's position required overtime only during periods of snow, the FMLA's allowance for intermittent leave in hourly increments (which translates into 480 hours per year based on a 40-hour work week) was sufficient to relieve him from all of the overtime required for his position except perhaps in the most severe of winters. Thus, the FMLA could essentially create a position with no overtime required. And the court found that if the employee could use his FMLA leave to obtain an accommodation that might not be available under the ADA, this result was permitted by the statute. The court also held the HR specialist and the two HR coordinators were covered employers under the FMLA since they were each responsible at least in part for the alleged violations. Although the HR specialist was not the plaintiff's supervisor, she advised supervisors regarding compliance, made the June 2011 determination that plaintiff could not perform his essential functions, and initiated the separation proceedings. The original FMLA coordinator and her successor also bore partial responsibility for denying his leave requests. Finally, the court rejected defendants' assertion that the employee could not advance his FMLA retaliation claim since, because he chose to apply for

disability retirement, he suffered no adverse employment action. While being placed on paid administrative leave may not be an adverse employment action, the court held the employee was placed on unpaid leave and had to use his accrued leave time to maintain an income, resulting in a loss of these benefits. Therefore, he suffered an adverse employment action.

Summarized Elsewhere:

***Bralo v. Spirit Airlines, Inc.*, 2014 WL 1092365 (S.D. Fla. Mar. 19, 2014)**

***Rinaldi v. Quality King Distribs., Inc.*, 2014 WH Cases2d 160441 (E.D.N.Y. June 26, 2014)**

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

***Holder v. Illinois Dept. of Corrections*, 751 F. 3d 486, 22 WH Cases2d 1071 (7th Cir. 2014)**

In *Holder*, plaintiff, a correctional officer, brought suit alleging that defendant had interfered with his FMLA rights by denying him intermittent leave. Plaintiff had been granted leave on day-to-day basis to care for his wife. Defendant had mistakenly allowed plaintiff to take more than sixty days' leave and subsequently sought to recoup its payments for plaintiff's health insurance premiums during that time. Defendant argued that plaintiff had never legitimately been entitled to FMLA leave based on his wife's condition because his wife had herself worked on various days on which plaintiff had taken leave. In a ruling for partial summary judgment, the district court held that defendant was estopped from asserting that plaintiff was not entitled to FMLA leave to begin with—in other words, plaintiff was reasonably entitled to rely on defendant's initial approval of his absences as FMLA leave.

On appeal, the Seventh Circuit held that defendant could not evade the summary judgment ruling to revive its argument that plaintiff was not entitled to FMLA leave. Defendant argued that the district court's holding only applied to so-called "threshold entitlement"—namely, whether a claimant is generally entitled to FMLA based on the health condition of a family member—but not to "date-specific entitlement"—i.e., the right to take leave on a given day because the family member requires the employee's care. Defendant argued that plaintiff may have been entitled to rely on defendant's "threshold" determination that his wife's health problems merited FMLA leave, but that he could not legitimately rely on its approval of his leave requests on dates when he knew that she herself was able to work. The court rejected this distinction because (1) it was not supported by the case law, and because (2) even if it recognized the difference between "threshold leave" and "date-specific leave," reliance would still preclude defendant from arguing that plaintiff had not been entitled to leave on certain dates several months after defendant approved them. The court stated, "Although we need not decide today how long after granting leave an employer has to question the veracity of a claim, we note that there must be some ability for an employee to rely on a grant of leave without risk of retroactive revocation months down the road."

Finally, the court noted that the case highlighted a potentially problematic ambiguity in the FMLA statute: "whether it makes sense . . . to require the same definition of 'serious health condition' for the ailing family member as it does when addressing the [leave-taking] employee itself." The court suggested that while an employee may not be entitled to leave based on his own health if he is well enough to work, he *should* be entitled to FMLA leave to care for a

mentally-ill spouse even if that spouse is physically healthy enough to work from home. The court left the disposition of this issue “for the next case or for Congress’ consideration.”

Ranade v. BT Americas, Inc., 581 Fed. Appx. 182, 23 WH Cases2d 199 (4th Cir. 2014)

The employee was a consultant who was placed on a performance improvement plan and ultimately discharged due to poor performance on a number of client accounts. The discharge decision came six months after the employee took nine days of reduced-schedule FMLA leave. During this period of reduced-schedule leave, the employer allegedly told the employee that she could either return to work full-time or taking a continuous medical leave under the FMLA. The next day, the employee presented medical authorization to return to work without restrictions, and she resumed her full-time duties for the remainder of her employment. In response to the employee’s complaint alleging a “willful violation of the FMLA,” the district court interpreted the employee as asserting a retaliatory discharge claim and a claim for interference with her FMLA leave rights. The district court then granted the employer’s motion for summary judgment, and the employee appealed.

On appeal, the Fourth Circuit Court affirmed the district court’s decision as to both the retaliation and interference claims. The Court held that the nearly six-month gap between the protected leave and the discharge was too large to create any inference of retaliation. Moreover, the Court noted that undisputed evidence supported the employer’s legitimate, non-retaliatory reason, namely that the employee engaged in poor work performance. As to the interference claim, the Court found that the employer fulfilled its burden to work with the employee on a reduced-schedule leave, and that the employee was never denied any FMLA leave (i.e., she voluntarily sought and received medical clearance to return to work on a full-time basis). Accordingly, the Court determined that summary judgment had been properly awarded on both counts.

Summarized Elsewhere:

Hurley v. Kent of Naples, Inc., 746 F.3d 1161, 22 WH Cases2d 318 (11th Cir., 2014)

Michaels v. City of McPherson, 23 WH Cases2d 103 (D. Kan. 2014)

McDaniels v. Group Health Co-op, 23 WH Cases2d 1272 (W.D. Wa. 2014)

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

Summarized Elsewhere:

Oak Harbor Freight Lines, Inc. v. Antti, 998 F. Supp.2d 968, 22 WH Cases2d 17 (D. Or. 2014)

Hansen v. Fincantieri Marine Grp., LLC, 763 F.3d 832, 23 WH Cases2d 372 (7th Cir. 2014)

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

Ferguson v. Williamson County Dept. of Emergency Communications, 18 F.Supp.3d 947 (M.D.Tenn. 2014)

Plaintiff, a county emergency dispatcher, brought action against county employer, alleging FMLA interference. In her employment with defendant, Plaintiff developed pregnancy complications and her doctor restricted her work hours so that she could no longer work 7 or 8 hours of her usual 13-hour shift. At first, plaintiff was placed on intermittent temporary leave status, but later she was permitted to work a different shift that resulted in her working about 176 hours fewer total hours than her normal schedule.

Plaintiff alleged that defendant's requirement that she take intermittent FMLA leave constituted FMLA interference. The court noted that, under the FMLA, an employer may transfer an employee to a part-time position with the same hourly rate of pay and benefits, as long as the employee is not required to take more leave than is "medically necessary." The court found that there were material factual disputes over the amount of intermittent leave that was "medically necessary" for plaintiff to take, and therefore denied defendant's motion for summary judgment.

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

E. Making Pay Adjustments

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

IV. SPECIAL PROVISIONS FOR INSTRUCTIONAL EMPLOYEES OF SCHOOLS

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

CHAPTER 6.

NOTICE AND INFORMATION REQUIREMENTS

I. OVERVIEW

II. EMPLOYER'S POSTING AND OTHER GENERAL INFORMATION REQUIREMENTS

Summarized Elsewhere:

Derus v. California Home Med. Equip., 2014 WL 3853898 (N.D. Cal. Aug. 5, 2014)

- A. Posting Requirements
- B. Other General Written Notice
- C. Consequences of Employer Failure to Comply With General Information Requirements

Clements v. Prudential Protective Services, LLC, 556 Fed.Appx. 392 (6th Cir. 2014)

Plaintiff was employed by defendant as a security guard. Plaintiff notified her supervisor that she was pregnant and the supervisor informed her that after her child was born, she should call him when she was ready to return to work. Neither plaintiff nor her supervisor completed any paperwork regarding her maternity leave, and plaintiff was not paid during her leave. In addition, the employer did not talk with the plaintiff regarding her FMLA rights prior to her leave. Six weeks after the birth of her child, plaintiff contacted her employer to request that she be put back on the schedule. The employer notified plaintiff that due to a cut in staffing, she could not return to work at the same location she had worked previously. The parties disputed whether the employer directed plaintiff to request a new assignment. Plaintiff filed suit, alleging interference with her FMLA rights. Defendant filed a motion for summary judgment, which was granted. Plaintiff appealed, and the Sixth Circuit reversed, finding that genuine issues of material fact existed and precluded summary judgment.

The court noted that plaintiff was allowed to take leave and thus she was not prejudiced relating to her ability to take FMLA leave. However, the court concluded that the record was unclear as to whether the plaintiff suffered prejudice as to her right to return to her previous position or an equivalent position. The court found a factual dispute as to whether the plaintiff was required to request reassignment to a new position upon her return, or whether she was on lay-off status. The court noted that the employer had no written policies and summary judgment was inappropriate due to the employer's failure to give employees notice of how to proceed upon completion of FMLA leave.

Bernard v. EDS Noland Episcopal Day School, 23 WH Cases2d 1040 (W.D.La. 2014)

Plaintiff was employed as a teacher pursuant to an employment contract. At the end of the 2011-2012 academic year, plaintiff met with the school principal to discuss her goals for the upcoming year. One of plaintiff's goals was a health goal that included seeing a doctor about weight loss issues. That summer, plaintiff emailed the vice principal to ask about sick leave so

that she could receive medical attention for an eating disorder. The vice principal responded by advising plaintiff as to the number of sick days she would receive over the next few months, but did not reference the FMLA. After plaintiff was not able to return to work when she was expected to, defendant terminated her employment. Plaintiff filed FMLA interference and failure to notify claims against defendant.

Defendant moved for summary judgment on plaintiff's FMLA claims and the Court denied both motions. The Court determined there was a genuine issue of fact as to whether plaintiff provided defendant with adequate notice that she was planning to take qualifying leave under the FMLA. The Court also found that plaintiff was denied benefits under the FMLA because she did not receive the full 12 weeks of leave provided for under the Act and was not offered her former position when she attempted to return to work. As to her failure to notify claim, plaintiff testified at her deposition that had she known she was entitled to 12 weeks of leave under the FMLA, she would have requested additional leave when she was unable to return to work. Plaintiff also testified she was never informed of her rights under the FMLA either by the vice principal or by posted notices. Because plaintiff never received individualized notice of her time available under the FMLA and there was a genuine dispute as to whether plaintiff was prejudiced by defendant's failure to notify, her claim survived defendant's summary judgment motion.

Summarized Elsewhere:

***Oliver v. Williams Companies, Inc.*, 2014 WL 1344496 (N.D. Okla. Apr. 4, 2014)**

***Boles v. Wal-Mart Stores, Inc.*, 2014 WL 1266216 (D.N.J. Mar. 26, 2014)**

***Spears v. Louisiana Dep't. of Pub. Safety & Corr.*, 2 F. Supp. 3d 873 (M.D. La. 2014)**

***Alexander v. Boeing Co.*, 2014 WL 3734291 (W.D. Wash. July 28, 2014)**

III. NOTICE BY EMPLOYEE OF NEED FOR LEAVE

Summarized Elsewhere:

***Weinstein v. AutoZoners LLC*, 2014 WL 898081 (D. Nev. Mar. 6, 2014)**

- A. Timing of the Notice and Leave
 - 1. Foreseeable Leave
 - a. Need for Leave Foreseeable for 30 or More Days
 - b. Need for Leave Foreseeable for Less Than 30 Days

Summarized Elsewhere:

***Wages v. Stuart Management Corp.*, 21 F.Supp.3d 985, 22 WH Cases2d 1313 (D.Minn. 2014)**

- 2. Unforeseeable Leave

Cantrell v. R.E. W., Inc., 23 WH Cases2d 1159 (M.D. Tenn. July 14, 2014)

Plaintiff, a truck driver, brought FMLA interference and retaliation claims and a state law retaliatory discharge claim against his employer. The driver alleged the defendants acted unlawfully when they terminated his employment because he had abandoned his job, despite the fact that he informed the employer his mother fell gravely ill and he needed to leave his truck in the State of Washington to fly to her bedside in Tennessee. The district court in Tennessee denied both parties' motions for summary judgment because there was a factual dispute as to whether the driver provided adequate notice under the FMLA, including the type of notice practicable under the circumstances. The court granted the defendant's motion to dismiss the state law claim, however, because the common law retaliatory discharge action was preempted by the FMLA.

Nicely v. Safeway, Inc., 2014 WH Cases2d 163 (D. Md. July 3, 2014)

Plaintiff brought suit claiming FMLA interference, and related claims pursuant to Maryland workers' compensation laws. The court denied the defendant's motion for summary judgment on all claims. The defendant generally argued that plaintiff failed to provide sufficient notice that she suffered from a "serious health condition," or that her health condition required FMLA leave, either of which would have triggered the defendant's obligations under the FMLA. In denying the defendant's motion for summary judgment, the court held that the defendant should have known that the plaintiff suffered from a serious health condition, based on information available to the defendant at the time of plaintiff's termination. Additionally, because the plaintiff had previously missed work due to the same medical condition, the defendant could have made a further inquiry regarding the nature of the plaintiff's injury in order to determine whether her requested leave was FMLA eligible, in absence of a direct request from the plaintiff for FMLA leave.

The court further held that, to the extent that the defendant believed that the plaintiff's medical certification relating to her requested leave was insufficient, the plaintiff still had time under the statute to provide additional information prior to her termination. Specifically, when an employee requires FMLA leave that is unforeseeable, the employee has fifteen (15) calendar days to provide medical certification relating to that leave following the employer's request. Defendant fired the plaintiff after within only eight (8) calendar days of its request for a medical certification, and therefore plaintiff's termination was premature. In addition, the court rejected the defendant's arguments that the plaintiff's termination was valid on the independent basis that plaintiff violated the company's attendance policy because too many questions of fact existed regarding the plaintiff's contact with the company during the relevant time period. Finally, the court also rejected the defendant's argument that it validly terminated plaintiff's employment because plaintiff missed an independent medical evaluation ("IME") that had been scheduled during the relevant time period, explaining that requirements under state workers' compensation laws, such as an IME, do not affect an employee's rights under the FMLA.

Gresset v Central Arizona Water Conservation Dist., 2014 WL 4053404 (D. Ariz. Aug. 13, 2015)

Plaintiff was a Safety VPP Specialist for defendant. Since the beginning of her employment, plaintiff had attendance problems. Such issues were discussed between defendant and plaintiff. Defendant had an established attendance and absences notification policy which plaintiff received and reviewed. After two years of employment, plaintiff requested FMLA leave. Plaintiff's doctor notified her that she may need up to three hours of FMLA leave each day for one to three days each week. Defendant changed plaintiff's schedule several times in order to accommodate her. Plaintiff was late and absent on several occasions and did not strictly follow the employer's absence notification policy. After several incidents where plaintiff did not notify defendant of her tardiness and/or absence in accordance to the employer's policy, she was discharged.

An employee requiring FMLA leave that is unforeseeable "must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a). The court held that FMLA requirement is controlling notwithstanding any verbiage in defendant's attendance policy. In denying defendant's motion to dismiss, the court held that plaintiff showed sufficient evidence to establish that she may have complied with the FMLA's notice requirements, thus if defendant terminated her employment based in part on her failure to comply with defendant's attendance policy on FMLA-protected days, then defendant necessarily violated the FMLA.

Achille v. Chestnut Ridge Transp., Inc., 584 Fed. Appx. 20, 23 WH Cases2d 1512 (2d Cir. 2014)

Plaintiff appealed the district court's grant of summary judgment for his claims for FMLA interference and retaliation. The Second Circuit affirmed. While employed by defendant, plaintiff took a leave of absence and failed to return to work until fourteen days after his designated return date. He failed to notify his employer about his late return, and the employer was unable to contact him through their own affirmative efforts. Because of his continued absence, plaintiff's employment was terminated.

In regards to plaintiff's interference claim, the court found that plaintiff could not establish the fourth element of his *prima facie* case, notice, because he failed to alert defendant of his need for leave. Further, plaintiff's argument that unusual circumstances excused his failure to contact the employer, namely that he was in Haiti and an "underground telephone problem" precluded communication outside of the country, was unsupported by the evidence beyond plaintiff's own speculation.

The court also found that dismissal was appropriate for plaintiff's FMLA claim. Assuming that plaintiff could establish a *prima facie* case of retaliation, he failed to provide any evidence of pretext to rebut defendant's legitimate, non-retaliatory reason for his termination.

Harris v. CRST Van Expedited, Inc., 2014 WL 6686569 (N.D. Iowa Nov. 26, 2014)

The employee, a truck driver, went to the doctor and was diagnosed with high blood pressure, asthma, and pneumonia. The employee informed the employer of his diagnosis, and stated that his doctor ordered that he take four days off work until his next appointment. The employer did not notify the employee of his right to take FMLA leave. On the third day of his absence from work, the employee was allegedly discharged over the phone, and he applied for another job the next day.

The employee filed a lawsuit for FMLA entitlement, and the district court denied the employer's motion for summary judgment. There were genuine issues of fact as to each element of the claim. The employee may have had a serious health condition because he visited the doctor twice in four days for the same condition. Moreover, the employee's notice was sufficient because it did more than merely request "sick" leave: it included details about his condition, and stated that he needed to be re-evaluated before returning to work. Therefore, the employer was on notice that the employee may have needed FMLA leave. Finally, the employer contended that the employee was not discharged over the phone, but instead was discharged later for being "missing in action." However, the employee created a genuine issue of material fact because the undisputed evidence showed that he had applied for a job the day after his alleged termination of employment. Accordingly, the Court denied the employer's motion for summary judgment.

Summarized Elsewhere:

Gienapp v. Harbor Crest, 756 F.3d 527, 22 WH Cases2d 1424 (7th Cir. 2014)

Torres v. Inspire Development Center, 2014 WL 3697816 (E.D. Wash. July 24, 2014)

3. Military Family Leave [New Topic]

B. Manner of Providing Notice

Adams v. Scalzo Hospitality, Inc., 2014 WL 1234496 (D. Minn. 2014)

Plaintiff is a former employee of defendant. Defendant had recently and repeatedly warned plaintiff for poor performance and excessive absenteeism. Plaintiff then suffered minor injuries in a non-work related car accident. Plaintiff's physician recommended that she not work for 3 days to recover. Defendant then scheduled plaintiff to return to work, but, before she could return, her physician faxed a note to defendant stating that plaintiff should remain off work a few more days. Over the following month, plaintiff's physician repeatedly faxed cryptic notes to defendant stating that plaintiff should remain off work for additional short periods, typically 5 days. Several times, defendant scheduled plaintiff to work after her most recent physician's note had expired, only to receive another physician's note before the scheduled workdays. Throughout this time, plaintiff did not personally contact defendant. Defendant therefore mailed plaintiff its paperwork for her to obtain FMLA leave. Plaintiff did not receive this material because she had moved without notifying defendant. Defendant's leave and attendance policy required employees in need of FMLA leave to personally contact their manager as soon as practical or they are able to do so. There was no question that plaintiff was fully able to contact her manager throughout the several weeks she was off work, but did not do so. Defendant ultimately discharged plaintiff for excessive absenteeism.

Plaintiff sued defendant for FMLA interference. Plaintiff argued that defendant knew about plaintiff's car accident and her apparent physical inability to work from the several notes faxed to defendant by plaintiff's physician. The court rejected plaintiff's claim because she "did not meet her notification requirements" under the Department of Labor regulations. According to the court, the physician's notes contained little of the information to which an employer is entitled when evaluating the availability of FMLA leave, and that plaintiff failed to provide that information and violated defendant's lawful absence reporting policy without any plausible excuse. The court granted defendant summary judgment.

Perry v. Charleston Area Medical Center, 2014 WL 2168859 (S.D.W.V. May 23, 2014)

Plaintiff, a nurse, brought suit against her former employer, a hospital, under the FMLA. Plaintiff alleged that defendant's termination of her employment interfered with her right to take FMLA leave, and was a retaliatory action in response to her intermittent FMLA leave. Defendant moved for summary judgment on all claims.

As for the FMLA interference claim, defendant asserted that it properly terminated the plaintiff's employment because she failed to comply with ordinary call-in procedures when she could not make it to work. FMLA regulations, 29 C.F.R §825.302(d), allow an employer to take adverse employment action against an employee when the employee does not comply with the employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." The court agreed with plaintiff that the question of whether her failure to comply with the defendant's call-in procedure constituted "unusual circumstances" was a material fact question. But, the court also concluded that, because plaintiff had testified at her deposition that she was aware of and able to comply with the call-in policy but she had failed to comply with it, there was no evidence that any "unusual circumstance" existed. Absent such evidence, the court found no material fact issue subject to determination by a jury.

Rojas v. Acuity Brands Lighting, Inc., 2014 WL 2926510 (D.N.J. Jun. 27, 2014)

The plaintiff took an approved vacation to Ecuador from June 27 to July 12, 2011, but failed to return to work until September 12, 2011. The plaintiff alleged that he could not return to work in July because he was suffering from diverticulitis. During this period, plaintiff failed to contact his employer directly because he could not speak English and did not know the employer's fax number, although he alleged that he faxed his daughter medical records indicating that he could not return home or return to work. The plaintiff alleged that his son, who also worked for the employer, gave the medical records to a union representative, and the representative reassured plaintiff's son that his father would be fine. The parties disputed whether this conversation and exchange of information took place, although the plaintiff presented evidence that the union representative had authority within the employer's plant and often participated in employment decisions. It was undisputed, however, that three days after the plaintiff was scheduled to return to work and failed to do so, the employer mailed a termination letter to his home.

The plaintiff brought suit, alleging claims under state and federal law, including interference and retaliation claims under the FMLA. The district court denied the employer's motion for summary judgment, finding that a material issue of fact existed as to whether plaintiff

had a “serious medical condition” because his physician’s note indicated that the plaintiff was incapacitated for more than three days and required continuing care. The court also found that a material issue of fact existed as to whether plaintiff provided notice to the employer of his need for leave because the plaintiff faxed information to his daughter, and because he had informed the union representative at the employer’s plant, particularly in light of the union representative’s role and participation in the termination process. Accordingly, the court denied the employer’s motion for summary judgment as to plaintiff’s FMLA interference and retaliation claims.

Koszarsky v. A.O. Smith Corp., 2014 WL 108320, 21 WH Cases2d 1367 (D.S.C. Jan. 9, 2014)

Plaintiff filed a claim for FMLA interference, and the employer moved for summary judgment. The court denied the motion for summary judgment. A genuine issue of material fact existed as to whether plaintiff had a serious health condition. While one form indicated that plaintiff’s condition developed on April 7 (the day after plaintiff was discharged), another form stated that the condition started on April 6 (the day plaintiff was absent, which led to his discharge). In addition, there was evidence of e-mails from co-workers, who had asked plaintiff about his behavior on April 6. Accordingly, there was evidence that plaintiff was experience a serious health condition before his discharge.

There was also genuine issue of material fact regarding whether plaintiff provided sufficient notice of his need for leave. Prior to his April 6 email asking for time off, plaintiff had told his supervisor that he was stressed and wanted counseling. Plaintiff also previously told the employer he was bipolar and taking anti-depressant medication. Several emails between plaintiff’s co-workers expressed concern for plaintiff because of his behavior. When plaintiff made his final request to take leave, he stated it was for “stress” and a “need to unwind.” Finally, when plaintiff learned he was discharged, his wife immediately explained to the employer that plaintiff had an anxiety attack on the day he was absent.

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)

The employee alleged that her employer violated the FMLA by terminating her for failing to comply with the employer’s “three day no-show, no-call rule.” The employee used her vacation time to travel to Guatemala, where her father was ill, and she did not request FMLA leave for the time off. The employee failed to return to work when she was scheduled to do so. As a result, she was discharged. After the employee’s motion for summary judgment was denied, the matter proceeded to trial, and the jury entered a verdict for the employer. The employee appealed the denial of its motion for summary judgment, and its motion for judgment as a matter of law.

The Ninth Circuit upheld the decisions below. As for the summary judgment motion, there was no error of law because the employee had affirmatively declined to use her FMLA rights in order to preserve her leave for future use. The employee contended that her leave was FMLA-protected regardless of whether she exercised her rights as soon as they were available. The court rejected this argument, concluding that employees could seek time off without exercising their rights under the FMLA. The court also rejected the plaintiff’s claim that her declining to take FMLA leave constituted an impermissible waiver of rights under the FMLA.

Under the FMLA, “waiver” merely refers to trading off rights for another benefit, and the employee’s actions did not constitute waiver.

The court also held that substantial evidence supported the jury’s verdict that the employee did not intend to take FMLA leave, including the testimony of several witnesses. Furthermore, on fifteen prior occasions, the employee had contacted HR to request FMLA leave. Even though she knew that HR, not her supervisors, would administer FMLA leave, she never contacted HR to request such leave. The court recognized that the employee had a motive to not request FMLA leave, because taking vacation time and FMLA leave separately would allow for additional time off.

Braganza v. Donahoe, 2014 WL 3749694 (E.D. Va. July 29, 2014)

Plaintiff, a former letter carrier for the United States Postal Service, asked a friend to send an email to his union steward to inform him that he was ill and would not return to work until further notice. After being discharged for failing to report to work, plaintiff filed suit against the USPS and his union alleging, *inter alia*, that the USPS interfered with his rights under the FMLA and disciplined him in retaliation for asking for FMLA leave.

On the USPS’s motion for summary judgment, the court concluded that plaintiff could not establish he qualified for FMLA leave. First, plaintiff did not properly notify the USPS of his absence. The email plaintiff sent to his union steward was insufficient because it was written by a third-party, simply stated that the plaintiff was “unable to work,” and failed to include an anticipated date of return. Additionally, plaintiff could not establish that he suffered from a “serious health condition” as defined by the FMLA. Accordingly, the court determined that the plaintiff had no FMLA right on which to base his interference and retaliation claims, and granted summary judgment on the FMLA claims in favor of the USPS.

Osborne v. Suminoe Textile of Am. Corp., 2014 WL 3809652 (D. S.C. July 30, 2014)

Plaintiff, a forklift operator, sustained an on-the-job back injury and was driven by his supervisor to the hospital, where a doctor discharged him and instructed him to take prescribed pain medications and follow up with another doctor in a couple days. Plaintiff alleged that he passed this information on to his supervisor, who instructed him to finish his shift. Plaintiff ignored this instruction and left work. The next morning, a Thursday, plaintiff left his supervisor a message indicating he would not be at work that day due to continued back pain, and that he would see his doctor the following day and return to work Monday. Plaintiff did not call in and did not attend work the following Friday or Saturday. On Saturday, plaintiff’s supervisors decided to discharge him for failing to comply with defendant’s no call no show policy. Plaintiff brought claims alleging interference with his FMLA right to job reinstatement and retaliation for exercising his FMLA rights.

On defendant’s motion for summary judgment, the court found issues of fact as to both of plaintiff’s FMLA claims. As to the interference claim, the court adopted the magistrate’s report finding an issue of fact as to whether plaintiff was incapacitated for more than three consecutive calendar days, so as to entitle him to FMLA leave. The court rejected defendant’s argument that

plaintiff was not incapacitated because his work restrictions could have been accommodated by defendant, because his limitations prevented him from performing his job as a forklift operator. The court also found an issue of fact as to the adequacy of notice, because plaintiff was injured on the job and provided his medical records to his supervisor upon returning from the emergency room. With respect to plaintiff's retaliation claim, the court refused to set aside the magistrate's analysis under the *McDonnell Douglas* framework, which found issues of fact. The court also determined that defendant's positions on the causation and pretext elements of plaintiff's retaliation claim hinged on the issue of whether defendant had adequate notice, and therefore found that a genuine issue of material fact existed regarding those elements. Accordingly, the court denied the defendant's motion for summary judgment.

Fulkerson v. Yaskawa America, Inc., 2014 WL 4638982 (S.D. Oh. Sept. 16, 2014)

Plaintiff worked as an administrator for defendant. Plaintiff left early one day to attend a doctor's appointment. She was being treated for depression and panic attacks. At her appointment, her doctor advised her to refrain from returning to work for two weeks. Later that day, plaintiff sent an email to her supervisor and human resources, stating that she needed medical week for the next two weeks. Human resources and her supervisor claimed to have never received the email. Plaintiff did not call in to report her absences, nor did she respond to a voicemail from her supervisor. Defendant terminated plaintiff's employment for being absent for two days without giving proper notice, considering it a voluntary resignation. Plaintiff filed suit for FMLA interference and retaliation.

Defendant brought a motion for summary judgment as to both FMLA claims. The court refused to grant summary judgment on plaintiff's interference claim, finding that there was an issue of genuine material fact regarding whether plaintiff gave adequate notice of her intent to take leave. In regards to plaintiff's retaliation claim, defendant argued that plaintiff was unable to establish the requisite causal connection because defendant made the decision to terminate her without knowing about her FMLA leave. The court found that the genuine issue of material fact regarding whether defendants received the email precluded summary judgment on this issue as well.

Wesson v. Tyso Foods, Inc., 2014 WL 4388548 (W.D. Ark. Sept. 5, 2014)

Plaintiff, an inventory clerk, was discharged after missing five days of work and failing to call in to report his absences in accordance with the defendant's policy. Sometime in June 2012, plaintiff's father sustained a head injury and was later transferred to a hospital. Around the time his father was transferred, plaintiff requested a replacement for work and, on July 5, informed another supervisor that he may not be at work the following day and that his father was in the hospital. On Friday, July 6, plaintiff called into work and reported "absent-sickness." Plaintiff was also absent for four days the following week, but did not call in to report his absences on those days. Defendant then met with plaintiff to terminate his employment. At that meeting, plaintiff informed defendant that he had advised supervisors that his father was sick. In response, defendant gave plaintiff a certificate of healthcare provider form and then conducted an investigation to determine if plaintiff notified his supervisors that he would require sick leave to attend to his father. Plaintiff's employment was terminated when Defendant's investigation

revealed that plaintiff failed to give sufficient notice of his need for leave. Plaintiff then brought suit, alleging that the defendant interfered with his rights under the FMLA.

The court denied the defendant's motion for summary judgment, finding that plaintiff raised a general issue of material fact as to whether he provided sufficient notice of leave because he had communicated with supervisors regarding his father's condition and that he might need FMLA leave. The court also noted that the day before he took leave, plaintiff had informed the defendant that he required leave, presumably to take care of his father. The court ruled that a reasonable jury could find that his statements put the defendant on notice of his need for absences, even though he did not communicate with the defendant at all during the following week. Moreover, the court noted that plaintiff provided evidence demonstrating that he was not required to continually call in to report absences. Thus, the court found that the sufficiency of plaintiff's communications were best left to a jury and denied the defendant's motion for summary judgment.

Summarized Elsewhere:

Gresset v Central Arizona Water Conservation Dist., 2014 WL 4053404 (D. Ariz. Aug. 13, 2015)

C. Content of Notice

Spurling v. C&M Fine Pack, Inc., 739 F.3d 1055, 21 WH Cases2d 1315 (7th Cir. 2014)

Plaintiff began to exhibit a pattern of decreased consciousness and alertness on the job after having worked for her employer for over five years. These issues spurred her employer to issue several disciplinary warnings, including a final warning/suspension on February 15, 2010, after a coworker found her asleep in the bathroom during her shift. After her suspension, plaintiff met with her supervisors and informed them that her sleep issues were caused by prescription medication. Her sleep problems continued and she was issued a new final warning/suspension for sleeping on the job on April 15, 2010. Following that suspension, plaintiff met with an HR manager and explained that her problems might be due to a medical condition. The HR manager advised plaintiff on the ADA and provided her with some paperwork to complete. On April 16, 2010, plaintiff requested time off to determine the extent of her medical issues, but provided no further information. In an email to the Vice President of HR on April 16, 2010, the HR Manager recounted his conversation with plaintiff but nevertheless recommended her termination. The HR Manager also stated that plaintiff would be placed on a leave of absence until the parties could complete the interactive process required by the ADA. On April 21, 2010, plaintiff delivered paperwork from her doctor indicating that she had a condition covered by the ADA, recommending periods of rest as an accommodation, and that further testing was underway. The paperwork did not state plaintiff's diagnosis. On April 28, 2010, plaintiff's employment was terminated based on the recommendation of the HR Manager. Plaintiff sued, alleging violations of the ADA and FMLA interference.

The district court granted summary judgment on all claims to the employer and plaintiff appealed. In affirming judgment on the FMLA interference claim, the court found that plaintiff had failed to provide her employer with sufficient notice regarding a serious health condition that qualified her for FMLA leave. Although an employee may alert her employer of the need for

FMLA leave in many ways, the notice must be more substantial than plaintiff's request for time off to figure out why she was falling asleep at work. To hold otherwise, the court stated, would be to place an impermissible investigative burden on employers.

Sparks v. Sunshine Mills, Inc., 580 Fed. Appx. 759, 23 WH Cases2d 692 (11th Cir. Sept. 2014)

Plaintiff brought suit under the FMLA, alleging defendant interfered with and retaliated against him for his attempted use of FMLA leave. Although the defendant did not have a formal written disciplinary policy, generally the defendant followed a "three write-up" rule. The plaintiff received three production-related write-ups throughout June and July 2010. In June 2010, plaintiff twisted his ankle at work and subsequently filed for workers' compensation benefits. Following a doctor's appointment at which surgery was discussed, the plaintiff told his direct and plant supervisor that it was possible he was going to need surgery. At no point did the plaintiff specifically request FMLA leave for the possible surgery. The plaintiff received yet another write-up on August 3, 2010. The following day, he took a day off to have an MRI on his ankle. When he returned to work on August 5, 2010, the defendant terminated his employment. On April 27, 2011, the parties executed a settlement agreement regarding his workers' compensation claims. The plaintiff then filed suit on July 25, 2012, alleging the defendant violated the FMLA by interfering with his right to take FMLA leave to have ankle surgery and by retaliating against him after he had stated his potential need for FMLA leave.

The district court granted defendant's motion for summary judgment. The plaintiff appealed. The Eleventh Circuit affirmed the district court's grant of summary judgment. On appeal, the plaintiff argued he gave the defendant sufficient notice of his need to take FMLA leave when he informed his supervisors he may need surgery. He argued the defendant terminated his employment to avoid accommodating his need for FMLA leave and in retaliation for requesting FMLA leave. The court found the plaintiff did not provide sufficient notice because he did not request or provide any information related to the timing or duration of any FMLA-related leave. The plaintiff merely stated it was possible that he could need surgery without indicating he would need any time off. The court held that because the defendant was unaware the plaintiff needed or wanted FMLA leave, the plaintiff's interference claim failed. For the same reason, the court held the plaintiff's retaliation claim failed. Finally, the court held that because the evidence demonstrated the defendant fired the plaintiff for poor performance, not in retaliation for "requesting" leave, the district court did not err in granting summary judgment to the defendant on both claims.

Shelton v. PriceWaterhouseCoopers, LLP, 2014 WL 2581348 (M.D. Fla. May 2, 2014)

Plaintiff sued her former employer, claiming that it interfered with her ability to take intermittent FMLA leave and terminated her employment in retaliation for taking FMLA leave. Defendant moved for summary judgment on all claims. As for the FMLA interference claim, according to plaintiff, defendant interfered with her FMLA rights by failing to treat her unforeseeable absences as intermittent FMLA leave. Plaintiff alleged that she made defendant aware of her serious health condition and, thus, the employer had duty to inquire further about FMLA coverage for absences when she reported off work on sick leave.

The court noted that the FMLA provides for unforeseeable intermittent leave, and requires an employee to notify the employer of the need for such leave as soon as practicable under the circumstances. The court found that because plaintiff had taken FMLA leave previously for her back condition, when seeking more (intermittent) leave based on that same condition, merely calling in “sick” without any reference to that condition would not be sufficient notice to the employer. The court directed the parties to file supplemental briefs with additional record citation before a ruling was issued on the notice issue.

As for the retaliation claim, the Court concluded that the temporal proximity of the employment termination to plaintiff’s FMLA leave (2 months) was sufficiently close to create a material fact issue on whether her termination was causally related to the FMLA leave, and whether the employer’s proffered reason for the termination (excessive absences) was a pretext for retaliation. Accordingly, the Court denied the employer summary judgment on the retaliation claim.

Garcia v. Randall’s Food and Drugs, LP, 2014 WL 2931841 (N.D. Tex. Jun. 30, 2014)

The plaintiff worked as a grocery director for the employer. In this position, he was responsible for inventory, ordering, stocking, and display and sales of groceries. In November 2011, he injured his right hand when he slipped and fell at work, and required three surgeries to recover from the hand injury. The plaintiff did not take any FMLA leave after his first two surgeries, but took two weeks of FMLA leave after the third surgery. When he returned, he told the employer that he may require a fourth surgery, but did not give the employer any further information regarding the surgery or seek leave at that time. The plaintiff was terminated in August 2012 for alleged insubordination and failing to cooperate with the employer’s investigation of a missing customer cell phone. After his termination, the plaintiff brought suit against the employer, alleging, among other things, interference and retaliation claims under the FMLA.

The district court granted the employer’s motion for summary judgment, finding that plaintiff failed to make out a *prima facie* case of FMLA retaliation or discrimination because he failed to put the employer on notice of his need for leave. The district court found that the plaintiff’s general statement that he may require another surgery insufficient to put the employer on notice of a need for FMLA leave, particularly in light of the fact that the plaintiff had previously successfully requested and been granted FMLA leave.

Halker v. Bob Evans Farms, Inc., 2014 WL 4472651 (S.D. Oh. Sept. 11, 2014)

Plaintiff was a server for defendant. During her employment, plaintiff learned she needed to have shoulder surgery, but taking leave for the surgery because of financial and lifestyle reasons. Before she was able to take the leave, allegations of plaintiff’s misconduct arose which resulted in her suspension, an investigation, and ultimately her termination. Plaintiff asserted a claim of FMLA interference and retaliation against defendant. Defendant moved for summary judgment on both claims.

As to plaintiff's *prima facie* interference case, defendant argued that plaintiff failed to request a particular time off, but only informed her supervisor of the need for time off for an unscheduled surgery at some unspecified point in the future. Defendant also argued that there was no evidence of any denial of FMLA rights because plaintiff was not discouraged from taking leave nor denied leave. Further, defendant argued that it had a legitimate reason, unrelated to FMLA rights, for suspending and terminating plaintiff – namely that plaintiff had several episodes of misconduct in violation of defendant policies. The court agreed with all of defendant's arguments and granted summary judgment to defendant for both FMLA claims.

Goss v. Standard Steel, LLC, 2014 WL 6687314 (M.D. Pa. Nov. 26, 2014)

The employee worked for a steel company. One day while at work, the employee appeared glassy eyed, confused, and stumbling around. The employee claimed that he had taken a sleeping pill, but had still not slept well the night before. The employee went home and never returned to work. After the employee had called in sick for about two weeks, the employer's HR manager claimed that he sent plaintiff both employer-provided leave benefits paperwork, and (on the manager's own initiative) FMLA paperwork. However, the employer's records did not indicate that the FMLA paperwork was ever sent. A few weeks later, the employee was discharged. The employee filed a claim for interference under the FMLA.

Both parties moved for summary judgment, and the court granted summary judgment for the employer. The court concluded that there was no genuine issue of fact as to whether the employee had sufficiently notified the employer of his need for FMLA leave. The employee had clearly not appeared well at work, but he himself had attributed his behavior to a sleeping pill. Further, merely calling in sick, but not providing additional information, did not put the employer on notice of a potential need for FMLA leave. Since it was standard procedure for employers to send the employees FMLA paperwork, the employer's *sua sponte* decision to send FMLA documents was based on administrative expedience rather than a reasonable inference that the employee's absence was FMLA-qualifying. Accordingly, the employee had not adequately notified the employer of his need for FMLA leave due to a serious health condition.

Summarized Elsewhere:

Martins v. Rhode Island Hospital, 23 WH Cases2d 793 (D.R.I. Aug. 13, 2014)

Adams v. Scalzo Hospitality, Inc., 2014 WL 1234496 (D. Minn. 2014)

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)

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

Law v. Kinross Gold U.S.A., Inc., 2014 WL 1577301 (D. Nev., Apr. 18, 2014)

Plaintiff worked for defendant as an accounting manager. During the course of his employment, plaintiff made numerous allegations of retaliation and fraud. The allegations were investigated by the employer. The employer took action when warranted but found many to be unsupported and false. Early in the employee's third year of employment, the employer began

making plans to discharge the employee for his inability to communicate with others, his track record of false allegations, and his combative work manner. Around the same time that the employer began looking for plaintiff's replacement, the employee sent an e-mail to various employees containing allegations of fraud and harassment against other employees. Many of these allegations were previously-investigated claims. The employer suspended the employee pending investigation of the allegations. The following day the employer learned that the employee was admitted to the hospital. The employer sent FMLA documentation to the employee the following week. The employee never replied and was discharged a month later.

Plaintiff sued for FMLA interference. The court granted the employer's motion for summary judgment on the employee's FMLA interference claim. The court found that, although the employee provided notice that he had been hospitalized, he did not provide any additional information by which the employer could establish qualification for FMLA leave. Furthermore, the employer maintained procedures for requesting FMLA leave, which the employee failed to follow, even after receiving a request for documentation from the employer. Finally, notwithstanding the employee's failure to show he was entitled to the benefits of the FMLA, the court found the employer's decision to discharge was in motion long before the supposed need for leave arose and that the purported need for FMLA was not a determining factor in either the investigation or resulting discharge of the employee.

Woida v. Genesys Regional Med. Ctr., 4 F. Supp. 3d 880 (E.D. Mich. 2014)

Two part-time emergency room financial administrative associates sued their former employer, a medical center, and their former supervisor. One employee claimed that the employer interfered with her FMLA rights by denying her requests for intermittent FMLA leave, and retaliated against her for taking FMLA leave by disciplining and discharging her, purportedly for various acts of misconduct. The other employee made similar allegations, but stipulated to the dismissal of her interference claims because at the time of her leave requests, she had not worked 1,250 hours in the preceding 12 months. The employees were subject to a collective bargaining agreement, which provided separate disciplinary procedures and progressive discipline policies for absenteeism and tardiness, and another for non-attendance-related conduct.

For the employee who continued to prosecute an interference claim, the court held that the claim was time barred because the employee failed to offer evidence of willfulness in the employer's denial of FMLA leave. Even if the interference claim had been timely, the employer was entitled to summary judgment because one of the absences was not authorized by the employee's FMLA certification, and for the other absences, the employee failed to satisfy the CBA's 7-day rule for submitting leave requests. The court also granted summary judgment to the employer on the employee's retaliation claim, holding that all disciplinary actions were time barred except for plaintiff's termination, for which the employer proffered a legitimate non-discriminatory reason.

The employer was also granted summary judgment on the other employee's retaliation claim. The employee had used all of her eligible FMLA leave, and been granted additional non-FMLA leave prior to her failure to achieve the requisite 1,250 hours of work during the preceding 12 month period, at which point her subsequent requests for FMLA leave were denied.

Therefore, she was not an eligible employee. Moreover, only two of the disciplinary actions about which plaintiff complained were timely, a suspension five months after she became ineligible for FMLA, and her discharge almost 10 months later. Both actions were too remote in time from her FMLA leave to state a *prima facie* case based on temporal proximity alone.

George v. Utility Trailers of Indianapolis, Inc., 23 WH Cases2d 1238 (S.D. Ind. Oct. 31, 2014)

In March 2010, plaintiff fell off a ladder at work and sustained injuries, ultimately aggravating plaintiff's preexisting back injury. Shortly after his injury, plaintiff asked the defendant's human resources director if he needed FMLA leave, but defendant's human resources director responded that "because you're only going to be gone a few weeks, you should be fine." Thereafter, plaintiff was placed on a leave of absence and later asked the human resources director if his job would be held for him until he returned. In late May 2010, the company sent plaintiff a letter informing him that his employment was being terminated due to a shortage of personnel and that he could reapply for any available position within his department if and when he was completely released by his physician. Plaintiff did not reapply to any positions at the defendant or otherwise inquire about any open positions after he was released to return to work. Plaintiff subsequently filed suit claiming, among other things, that the employer had interfered with his FMLA rights.

The district court denied defendant's motion for summary judgment. Defendant argued that plaintiff failed to provide sufficient notice of his intent to take FMLA leave. The court rejected defendant's argument, finding that a genuine issue of material fact existed because the plaintiff testified that he raised the issue of FMLA leave with the defendant's human resources director. In addition, the court held that a question existed regarding whether plaintiff's conversation with the human resources director triggered the defendant's duty to further investigate and determine whether the plaintiff's leave qualified as FMLA leave, even though the plaintiff testified that he never specifically requested FMLA leave. The court reasoned that plaintiff's accident occurred at work, and that the human resources director accompanied plaintiff to the physician at the time of his injury and was aware of the physical therapy prescribed by plaintiff's physician as a result of the injury. Thus, the court held that a material issue of disputed fact exists as to whether plaintiff put defendant on notice of his need for FMLA leave. The court also rejected the defendant's argument that plaintiff suffered no prejudice because he failed to reapply to any position at the company. The court explained that defendant did not offer to reinstate him to his former position but, instead, filled his position while he was on leave, retroactively canceled his health insurance benefits, and only offered him the opportunity to reapply for a job with the company. Thus, the court held that an issue of material fact existed as to whether plaintiff was prejudiced by the loss of his position and insurance benefits as a result of the employer's actions.

Aguirre v. Mayaguez Resort and Casino, Inc., 2014 WH Cases2d 164 (D. P.R. 2014)

The employer instituted a shift rotation program among its supervisors in an attempt to improve performance. Plaintiff worked the night shift, and was her disabled father's caretaker during the day. When she learned of the shift rotation program, the plaintiff notified her employer of her caretaker duties and sought to be exempted from the rotation. The employer

ultimately required the plaintiff to rotate shifts like the other supervisors. The employee resigned and brought suit, claiming that the employer's hostility to her desire to continue her caretaker duties discouraged her from applying for FMLA leave. The court granted summary judgment for the employer, finding that plaintiff was aware of her right to request leave, yet never gave the employer any indication that she actually wanted to take FMLA leave. Instead, plaintiff wanted to maintain a full time work schedule so that she could continue to care for her father. Thus, the court found that plaintiff did not provide adequate notice of her desire for FMLA leave.

Preddie v. Bartholomew Cnty. Consol. Sch. Corp., 2014 WL 4259625 (S.D. Ind. Aug. 27, 2014)

Plaintiff, a fifth grade teacher at an elementary school, filed suit against defendant alleging interference with his rights under the FMLA by failing to provide him with leave. Defendant moved for summary judgment, and the court granted the motion. Plaintiff never provided sufficient notice of his intent to take leave under the FMLA. The court recognized that an employee's reference to being "sick" is generally not sufficient. Moreover, plaintiff admitted in his deposition that he was familiar with the process for requesting FMLA, but never made a request. For the same reason, the court rejected plaintiff's retaliation claim. Plaintiff never took FMLA leave, nor attempted to exercise his FMLA rights, and therefore, plaintiff could not satisfy the first prong under the *McDonnell Douglas* burden-shifting approach – i.e., that he engaged in protected activity.

Summarized Elsewhere:

Cundiff v. Lenawee Stamping Corp., 2014 WL 1389306 (E.D. Mich. Apr. 9, 2014)

Shelton v. PriceWaterhouseCoopers, LLP, 2014 WL 2581348 (M.D. Fla. May 2, 2014)

Sper v. Judson Care Ctr., Inc., 2014 WH Cases2d 163472 (S.D. Ohio July 08, 2014)

Morris v. Pilgrim's Pride Corporation, 2014 WL 3514987 (W.D. Ark. Jul 15, 2014)

Smith v. City of Birmingham, 2014 WL 66485, 22 WH Cases2d 445 (N.D. Ala. Jan. 8, 2014)

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)

IV. EMPLOYER RESPONSE TO EMPLOYEE NOTICE

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

Fuller v. AT&T, 2014 WL 66019, 21 WH Cases2d 1738 (W.D. Pa. Jan. 8, 2014)

Plaintiff took time off work to care for his newborn child, and his leave needed to be extended because the newborn became sick. When plaintiff returned to work, he was discharged. The employer claimed that an anonymous customer survey reported that plaintiff was unfriendly, that two prior warnings were issued to plaintiff, and that plaintiff had low sales figures. Plaintiff filed a lawsuit alleging FMLA interference and retaliation, and the employer moved for summary judgment. The court denied the motion.

With respect to the interference claim, the employer argued that FMLA requests had to be submitted through a specific website, and that plaintiff had failed to submit such a request.

However, plaintiff presented two documents which indicated that he was supposed to inform his supervisor of any need for leave. The court found that the procedures conflicted. Further, while the employer told plaintiff that he could not take intermittent leave, the employer failed to notify plaintiff how he could structure his leave in a way that would be protected. Accordingly, there were genuine issues of material fact regarding the interference claim.

With respect to the retaliation claim, there was sufficient evidence to create a disputed issue of material fact. This included the following: (1) the employer made the decision to terminate plaintiff three days after plaintiff's first day of FMLA leave; (2) a manager stated that plaintiff had attendance issues at work, but this issue was not mentioned in the termination paperwork; (3) plaintiff was terminated at a time when the store was the busiest, but short-staffed; (4) one decision-maker stated, in response to a request for FMLA leave, that "we all have children we want to spend time with, this is a retail job"; and (5) while the employer had investigated prior misconduct before issuing discipline, the employer did not perform any investigation with respect to the last act leading to the employee's termination.

Scorsone v. Wal-Mart Stores, Inc., 2014 WL 2207002 (E.D. Mich. May 28, 2014)

Plaintiff brought suit against her employer, Wal-Mart, for interference under the FMLA. Specifically, plaintiff argued the employer interfered with her FMLA rights by failing to provide notices and failing to reinstate her to an equivalent position after return to work after rehabilitation for a serious leg injury. Plaintiff suffered from a right tibia/fibia fracture and spurring that required surgery. Plaintiff requested leave for just over 26 weeks and indicated the injury would prohibit her from performing all functions of her job upon returning to work. The employer approved the employee's FMLA leave request four months after the initial request was made. The approval contained a FMLA Notice of Designation, which indicated FMLA leave would expire two weeks prior to the date the Notice was sent, meaning the FMLA leave had already expired. Also, the Notice of Designation stated if the employee did not return to work on a date two days after receipt of the letter, her position may be posted and filled. The employee was given fifteen days to seek an extension under the employer's personal leave policy, but the employee did not return the necessary paperwork within the fifteen days. Accordingly, the employer terminated the employee.

The employee argued that if proper FMLA notice had been given prior to four months after the request for leave, the employee would have been able to structure her leave so it would not lapse. The Court found the employer did not provide the employee with the required FMLA notices under 29 C.F.R. §825.300(b)(1), but also found that the employee would have been unable to return to work after the FMLA leave expired. The Court found that while the improper notice requirements were a violation of the FMLA, relief may only be provided if the employee had been prejudiced by the lack of notice. Since the employee was given time to file for extended leave and failed to do so, the employee did not suffer prejudice. The Court dismissed the employee's interference claims under the FMLA, acknowledging the FMLA does not require an employer to maintain a position for an employee who is unable to perform the job upon return, but granted the employee leave to amend the complaint to file FMLA retaliation claims.

Summarized Elsewhere:

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)

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

Kelly v. Horizon Medical Corporation, 2014 WL 1293859 (M.D. Pa. Mar. 31, 2014)

The employee sued her former employer alleging that it had interfered with her right to leave under the FMLA. According to the employee, she requested intermittent FMLA leave on June 2, 2009, and the employer explained that her request was premature because she needed to exhaust her sick leave first. The employee resigned three days later and asserted that the employer’s response to her request for leave was an attempt to discourage her from using leave in violation of the FMLA.

The employer filed a motion for summary judgment on the employee’s claims, which the court granted. The court found that there was no interference with her rights under the FMLA because plaintiff resigned her employment before the time expired for the employer to respond to the request for FMLA leave. The court explained that, after an employee requests leave, the employer has five days to provide the employee with written notice setting forth the expectations and obligations of the employee in requesting leave and explaining any consequences for failure to comply with the procedure. In this notice, the employer also has the right to designate leave as paid or unpaid under the Act. Plaintiff, however, resigned her employment before the employer was required to respond. The court further found that an employer was allowed to require employees to substitute other paid leave, like sick leave, for FMLA leave. As a result, it granted summary judgment in favor of the employer.

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

Ruiz v. Edcouch-Elsa Indep. Sch. Dist., 2014 WL 1385877 (S.D. Tex. Apr. 9, 2014)

Plaintiff brought suit against defendant school district, alleging retaliation for taking FMLA leave to care for her disabled son and seeking reinstatement. After removal to federal court, defendant moved to dismiss for failure to state a claim. Plaintiff’s son suffered from a serious health condition, she took time off to care for him, she was discharged soon after, and her pleadings alleged that her employment was terminated was based on her taking FMLA leave. On these facts, the court found the plaintiff established a *prima facie* case for retaliation under the FMLA.

Defendant argued that plaintiff’s FMLA claim was barred by the statute of limitations, as she was discharged in 2010 and did not mention the FMLA in her pleadings until 2013. The court found, however, that plaintiff’s FMLA claim “related back” to her original state court pleadings, which alleged violations of other acts, including the ADA, stemming from the same occurrence that was the basis of her FMLA claim. Defendant also argued for dismissal based on plaintiff’s failure to show that she ever specifically requested FMLA leave, alleging that plaintiff’s leave did not correspond to any medical treatment of her son. The court noted the

broad notice requirements under the FMLA, stating that this question was more appropriate at the summary judgment stage. Defendant's motion to dismiss was therefore denied.

Davis v. Tri-County Metropolitan Transp. Dist. of Oregon, 2014 WL 4425815 (D. Or. Sept., 8, 2014)

Plaintiff suffered an on-the-job injury while working for defendant. From late 2009 to 2012, plaintiff used her available sick, vacation, and protected leave, and she took unpaid leave time when her paid leave was exhausted. Defendant regularly sent letters to plaintiff documenting her absences, and notifying her that she was in violation of the attendance policy. Plaintiff eventually was issued escalating warnings for absenteeism. Plaintiff's lawsuit against defendant included a violation of her rights under the FMLA, and defendant moved for summary judgment.

In analyzing plaintiff's FMLA claims, the court first noted that a plaintiff's allegation of retaliation under the FMLA is analyzed as an "interference" claim, in the Ninth Circuit. It also determined that the *McDonnell Douglas* burden-shifting framework does not apply to FMLA interference claims, and that plaintiff could prove interference using either direct or circumstantial evidence. Applying this legal standard, the court held that there was an issue of fact as to whether defendant interfered with plaintiff's rights under the FMLA by penalizing her in the promotion process for taking protected leave. Did not sufficiently distinguish between protected and unprotected leave, and therefore, the court concluded that the protected absences may have been considered in defendant's decision to not promote plaintiff. The court also held that there was an issue of fact as to whether defendant's letters regarding how many hours plaintiff had missed constituted retaliation against plaintiff for using FMLA-protected leave. The court reasoned that defendant failed to offer any evidence that the missed hours referenced in the letters did not include protected leave time. Consequently, the court denied defendant's motion for summary judgment motion on plaintiff's FMLA claim.

Ginwright v. Dept. of Revenue for Alabama, 158 WH Cases2d 393 (M.D. Ala. 2014)

Plaintiff, a former Account Clerk for the defendant's Collection Services Division, suffered from permanent disabling conditions of her back and legs, and her daughter suffered from Down's syndrome and epilepsy. Since the mid-1990's, plaintiff had requested and been approved for leave under both the self-care and family-care provisions of the FMLA; however, plaintiff claimed that defendant's human resources officers repeatedly and intentionally denied her requests for leave and requested additional documentation before approving her requests. In October 2010, plaintiff complained to the Revenue Commissioner about these alleged leave denials. On the same day plaintiff complained, her supervisor issued her a written warning due to her excessive usage of unapproved leave. Plaintiff's supervisor was unaware of plaintiff's complaints regarding HR's denial of her leave requests. The supervisor subsequently issued letters of reprimand due to plaintiff's continued excessive use of unapproved leave. In March 2011, when plaintiff's daughter had a seizure, her verbal request for FMLA leave was denied subject to her providing medical documentation to support the request. After she provided the documentation, her leave was retroactively approved as FMLA leave and reclassified as such.

The plaintiff brought suit, alleging defendant Department of Revenue violated multiple provisions of the FMLA. After dismissing all claims against the individual defendants as well as plaintiff's FMLA self-care claims, the only remaining FMLA claim considered by the court was whether defendant had interfered with and retaliated against plaintiff for exercising her rights under the FMLA's family-care provision. The court granted summary judgment for defendant on both claims. First, the court rejected plaintiff's contention that the frequency with which HR required her to provide additional documentation for her leave requests for herself and daughter interfered with her rights under the FMLA. The court found that plaintiff suffered no injury because the defendant ultimately approved the leave she requested. The court likewise found plaintiff's retaliation claim to be without merit because she provided no evidence that her supervisor knew of her complaint regarding HR when issuing the discipline to her.

Summarized Elsewhere:

***Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)**
***Ferguson v. Walmart*, 2014 WL 24139 (C.D. Cal. Jan. 2, 2014)**

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

***Nugen v. Western Reserve Transit Authority*, 2014 WL 5824784 (N.D. Ohio Nov. 10, 2014)**

Plaintiff was a 12-year Director of Transportation for defendant. In March 2013, plaintiff took a leave of absence to care for his wife. While it was disputed whether plaintiff claimed this time-off as FMLA qualifying, it was undisputed that by the time of his employment was terminated, he had received in excess of twelve weeks of leave. Plaintiff was warned that, if he did not return to work by June 3, 2013, he would be terminated. Having failed to return, the employer terminated his employment. In his suit, plaintiff asserted that the employer's failure to properly designate the leave as FMLA precluded his employer from counting paid sick and vacation time taken during the leave of absence against his FMLA entitlement.

On a motion for summary judgment, the court dismissed the FMLA claim. In doing so, it highlighted the U.S. Supreme Court decision in *Ragsdale v. Wolverine Worldwide Inc.*, wherein the court held that a failure to provide certain FMLA notices does not automatically provide an employee with leave in excess of twelve weeks. Rather, the district court noted that a failure to provide required notices must be accompanied by prejudice to the employee in order to state an FMLA interference claim. The court concluded that the plaintiff was unable to demonstrate that, had proper notices been provided, his behavior would have been any different. As such, he was unable to show that he had been prejudiced by any failure to designate the leave as FMLA.

***Wallace v. FEDEX Corp.*, 764 F.3d 571, 23 WH Cases2d 342 (6th Cir. 2014)**

Plaintiff brought suit, alleging that her employer interfered with her exercise of rights under the FMLA following her termination for failure to comply with Defendant's attendance policy. The district court dismissed plaintiff's claims for liquidated damages and front pay. Following a jury verdict in plaintiff's favor, the district court then reduced plaintiff's back pay award from \$173,000 to \$90,788 based on conflicting testimony from plaintiff and plaintiff's expert. The Parties then cross-appealed on multiple grounds, the defendant claiming that plaintiff

did not provide adequate notice that she needed FMLA leave and that 29 C.F.R. § 825.305 (“Employer must . . . advise an employee of the anticipated consequences of an employee’s failure to provide adequate [medical] certification”) is arbitrary, capricious and conflicts with the FMLA, while plaintiff appealed dismissal of her liquidated damage and front pay claims and the order of remittitur.

The Sixth Circuit affirmed the district court’s denial of the defendant’s motion for judgment as a matter of law, finding that even though plaintiff failed to return a medical certification form or otherwise indicate her desire for leave beyond her original leave ended, the defendant’s medical forms were ambiguous and plaintiff’s doctor’s note suggested that “further assessment” was necessary, thus allowing a reasonable jury to infer that she placed the defendant on notice of her need for FMLA leave. Moreover, the court also noted that plaintiff discussed her need for FMLA leave with in-house counsel, who then provided plaintiff with FMLA paperwork. The court thus held that a reasonable jury could conclude that defendant failed to comply with the FMLA when it failed to mention the need for, or consequences of failing to produce, plaintiff’s medical certification. The court also held that 29 C.F.R. § 825.305 was not arbitrary and capricious, explaining that the Secretary’s interoperation of a “timely manner” as at least fifteen days was within the agency’s discretion and reasonable, does not convert 29 U.S.C. § 2615 into a strict liability statute because an employee must still prove that she was harmed before recovering for an employer’s failure to follow the FMLA, and further allows the employer to safely deny or terminate employment if certification is not returned.

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 23 WH Cases2d 174 (3d Cir. 2014)

Plaintiff suffered from depression and was fired after she failed to return from medical leave. Plaintiff brought suit against the defendant, alleging that the defendant interfered with her FMLA rights when it failed to give proper notice and thereafter retaliated against her as a result of her exercise of rights under the FMLA. The district court granted the defendant’s motion for summary judgment, and plaintiff appealed. Plaintiff argued that the defendant failed to inform her that her leave was under the FMLA, and was therefore unaware that she was required to return to work within twelve weeks else the defendant could terminate her employment. The court reversed the district court, particularly in light of plaintiff’s denial of receiving the letter mailed by defendant providing plaintiff with notice of her rights under the FMLA. In doing so, the court explained the “mailbox rule,” which provides that a party is presumed to receive a document once a party proves that the document was mailed. The court noted that the defendant could have easily avoided this issue had it simply verified the receipt of the letter when it mailed it to the plaintiff.

The Court found that Plaintiff’s testimony that she would have returned to work earlier had she actually received notice of her rights, coupled with language in a medical return-to-work release from her doctor, were sufficient, if believed by a jury, to establish that Plaintiff was prejudiced by her lack of notice. The court also reversed the district court’s dismissal of her FMLA retaliation claim in light of the evidence demonstrating the “unusual nature” of plaintiff’s discharge, particularly its proximity to her medical leave and her supervisor’s statement that she could return to work as long as she provided an “unrestricted release.”

Bellone v. Southwick-Tolland Regional School District, 748 F.3d 418 (1st Cir. 2014)

Plaintiff was hired as a fourth-grade teacher in November 2005. On March 4, 2010, plaintiff informed defendant he needed leave for medical reasons for two weeks. He provided a doctor's note stating that he needed leave from March 3, 2010 through March 23, 2010. On March 23, 2010, plaintiff provided another doctor's note stating that he needed additional leave until April 15, 2010. On March 24, 2010, defendant provided what it later characterized as an FMLA eligibility notice and certification. Plaintiff returned the certification on April 10, 2010, which stated that he was unable to perform his job of "teach[ing] children" for an unspecified time. Defendant requested additional information. Plaintiff was out of work through the end of the school year, which ended June 21, 2010. On July 9, 2010, defendant sent plaintiff an FMLA designation notice informing him that he had been approved for FMLA leave, and that his twelve-week entitlement had been exhausted based on a leave period of March 4 – June 4, 2010. Plaintiff was informed that he could request additional unpaid leave up to one year as well. On August 25, 2010, defendant informed plaintiff that his position remained open and that he had seven days to provide evidence of his fitness for duty. On August 30, 2010, plaintiff provided a note from a psychologist stating that there was no psychological reason plaintiff could not return to work. The academic year began on September 1, 2010, but plaintiff did not report to work. On September 9, 2010, defendant sent plaintiff a letter stating that plaintiff was on administrative leave and that he was expected to return to work on September 22, 2010. Plaintiff did not report to work believing that the new position he was given was a demotion. Plaintiff alleged that defendant interfered with his FMLA rights and retaliated against him for exercising his FMLA rights.

The court upheld the lower court's grant of summary judgment in favor of defendant. The court explained that when an employer provides late or inadequate notice of FMLA rights to an employee, it may constitute interference. However, such claims are not actionable unless they harm the employee. The court rejected plaintiff's argument that he could have structured his leave differently had he known his rights. Instead, the court accepted defendant's argument that plaintiff's doctor's notes stating that plaintiff was not able to perform his duties were evidence that he would not have been able to structure his leave differently. Relying on this evidence, the court held that the late and inadequate notice did not harm defendant and once his leave was exhausted he was not entitled to protections under the FMLA.

Summarized Elsewhere:

Schofield v. Maverik Country Store, 2014 WL 2765223 (D. Utah June 18, 2014)

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")]

V. MEDICAL CERTIFICATION AND OTHER VERIFICATION

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

Crane v. Gore Design Completion, Ltd., 21 F. Supp. 3d 769 (W.D. Tex. 2014)Error! Bookmark not defined.

Plaintiff, whose employment had been terminated shortly after she failed to return her completed FMLA certification within the allotted 15 calendar days, sued her former employer for discharging her in violation of the FMLA. Plaintiff claimed under that the period in which she had to return the certification form should have been tolled under 29 C.F.R. §825.305(b), which provides: “[t]he employee must provide the requested certification to the employer within 15 calendar days after the employer’s request, unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts.”

The court, while acknowledging that federal courts in Illinois and Pennsylvania have treated section 825.305(b) as creating a tolling defense for employees, found that the Fifth Circuit had not yet accepted the argument. The court concluded that the Fifth Circuit would allow an employee to obtain additional time through tolling under 825.305(b) if (1) the employee pursued certification within 15 days diligently and in good faith; (2) the employee kept the employer apprised of the employee’s difficulty in obtaining a timely certification; and (3) it had not been practicable for the employee to return the certification within 15 days because of unique circumstances. The court ultimately decided that tolling gave plaintiff a viable FMLA claim regarding her discharge.

White v. County of Los Angeles, 22 WH Cases2d 676 (Cal. Ct. App. April 15, 2014)
Document Number: 80379027

Plaintiff, a district attorney investigator, took leave under the FMLA and then returned to work pursuant to a certification by her doctor that she could perform her essential job functions. However, although plaintiff was restored to employment, defendant ordered her to attend a medical reevaluation based on her conduct *prior* to the FMLA leave. Plaintiff brought a lawsuit against defendant under the FMLA, seeking injunctive relief prohibiting defendant from requiring plaintiff to appear for such medical reevaluation or disciplining her for failure to appear. Plaintiff alleged that the medical reevaluation violated her right under the FMLA to be restored to employment based on her doctor’s certification alone.

The California Court of Appeals reversed the lower court’s decision and held that the FMLA does not prohibit employers from requiring a fitness-for-duty reevaluation related to a serious health condition, even where such an evaluation relates to conduct prior to the leave. According to the court, employers could require such an examination under the ADA despite employees providing return-to-work certifications, as long as the examination was consistent with business necessity and the employer paid for it. The court concluded by noting that allowing medical reevaluations, even after an employee returned from FMLA leave, was particularly important for peace officers who carried weapons, like the plaintiff. Consequently, the court held that defendant’s demand for plaintiff to appear for an examination did not violate the FMLA.

Barker v. Genesys PHO, LLC., 2014 WL 3687335 (E.D. Mich. July 25, 2014)

Plaintiff was bitten by her dog and suffered an infection and severe complications requiring multiple hospitalizations as a result. She notified her employer of the injury and her need for further medical treatment on the first day she was absent from work. The employer discharged plaintiff approximately 15 days after the first day she missed work as a result of the illness. The employer refused to accept a partial medical certification submitted by the employee after her discharge. The employee claimed she had been too ill to pick up the medical certification from her doctor's office. The employer refused to accept an updated certification from her doctor that would have covered the entire period of the employee's absence. The employee then brought suit, claiming FMLA interference and the employer moved for summary judgment.

The court denied summary judgment, finding multiple issues of material fact. The court found the record unclear as to whether the employer ever properly requested that plaintiff submit a medical certification to support her request for FMLA leave. Most crucial to this point, the court found that the employer failed to demonstrate that it made a formal request for a medical certification, particularly whether it was practicable for the employee to respond within fifteen days. In addition, the court found that, for purposes of defeating summary judgment, plaintiff had presented sufficient evidence that she was unable to present the medical certification earlier than she did due to the severity of her illness and its complications.

Thomas-Young v. Sutter Cent. Valley Hosps., 2014 WL 1096795 (E.D. Cal. Mar. 19, 2014)

The employee sued her former employer, a hospital, alleging interference and discrimination under the FMLA. The employee claimed that she was constructively discharged because she was unable to adhere to the change in her schedule (from 4 days per week to 5 days per week) due to her need to take the fifth day off to care for her disabled son. She claimed that her termination led to her forfeiting leave to which she was entitled. The court granted summary judgment in favor of the employer. The employee never requested FMLA leave to care for her son, and did not provide certification issued by her health care provider, as required by 29 U.S.C. § 2613(a). Absent a request and certification, the employer was not required to grant plaintiff leave. The court found that no constructive discharge occurred, and that plaintiff's separation from the employer was the result of her own voluntary resignation.

The employee's discrimination claim alleged that the employer retaliated and discriminated against her for taking protected leave due to her son's medical needs, and for her request for a modified work schedule to care for her son. The court held that no discrimination occurred because the employee voluntarily resigned. Further, the employer articulated a reason why the position that the employee occupied needed to be filled five days per week, and this reason had been conveyed to the employee. The court further reasoned that the decision to require plaintiff to work five days per week was a business decision based on the discretion vested in plaintiff's supervisor. Accordingly, the court granted summary judgment in favor of the employer.

Brown v. Northrop Grunmman Corp., 2014 WL 4175795 (E.D. N.Y. Aug. 19, 2014)

Plaintiff was a former software engineer for defendant. Plaintiff alleged she was discharged for exercising her right to take intermittent leave under the FMLA for her fibromyalgia condition. In its summary judgment motion, the employer argued that plaintiff could not demonstrate that she exercised FMLA rights because she failed to submit proper medical certification to support her request for intermittent leave. The court held that plaintiff's affidavit testimony that she provided this medical certification was sufficient to create a genuine issue of material fact as to whether she was entitled to FMLA leave and whether she actually provided medical documentation in connection to her request. Thus, summary judgment was not appropriate in this regard.

Although the plaintiff presented enough evidence to raise genuine issues of material fact with respect to her *prima facie* case of FMLA retaliation, the court concluded that she did not provide any evidence to support a conclusion that the employer's reason for her termination was a pretext for unlawful retaliatory motive. In concluding such, the court refused to discuss the proper standard for causation, i.e., whether "but-for" standard should apply or if showing that the FMLA leave was a motivating factor is sufficient because it found no genuine issues of material fact as to whether plaintiff's FMLA leave was a motivating factor in the employer's decision to discharge her.

Summarized Elsewhere:

Washington v. Acorda Therapeutics, Inc., 2014 WL 4467820 (S.D.N.Y. Aug. 28, 2014)

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

Crowell v. Denver Health and Hospital Authority, 2014 WL 3608698 (10th Cir. July 23, 2014)

The employee, a paramedic dispatcher, injured her shoulder in a motor vehicle accident. She returned to work two days after the accident, but suffered a torn tendon that required surgery. Despite ongoing pain, the employee did not have surgery. She later sought emergency treatment for chest pain. At the time, the employee twice violated the employer's attendance policy. A third violation was grounds for dismissal. The employee reported to work for her next shift. The employee requested intermittent leave. On the certification form, however, her physician requested continuous leave for surgery. The employer initially granted the employee one month continuous leave, but later determined that continuous leave was not necessary until after surgery. The employee was then terminated for a third violation of the employer's attendance policy.

The employee filed suit, alleging FMLA interference and failure to accommodate under the ADA. The district court found the employee's leave request untimely pursuant to the FMLA and the employer's policy and granted judgment as a matter of law to the employer. On appeal, the court declined to affirm the district court's ruling as to timeliness because, the court noted, the employer did not deny the employee's leave on that basis. Instead, the employer relied upon representations by the employee's treating physician. Instead, the court affirmed the district

court's decision based on the absence of evidence supporting the employee's request for intermittent leave.

Hansen v. Fincantieri Marine Grp., LLC, 763 F.3d 832, 23 WH Cases2d 372 (7th Cir. 2014)

Defendant used an external contractor to manage an “attendance point” system. Employees who accumulated 10 or more points in the preceding year (accumulating one point for each day the employee missed four or more hours of a scheduled work day) were subject to termination. By May 2011, plaintiff had accumulated 9 points when he missed work again and requested FMLA leave for depression. His doctor sent the company a note estimating that plaintiff would have four significant episodes of depression lasting a few days each within six months. The employer approved FMLA leave for several absences over the next two months, but by July, when plaintiff suffered his eighth, ninth, and tenth depressive episodes and again requested FMLA leave, defendant denied FMLA leave and terminated his employment. Plaintiff's doctor sent defendant a note revising his initial assessment of plaintiff's illness, but defendant declined to reconsider the termination.

The district court initially denied summary judgment, but reversed itself on a motion for reconsideration on the ground that plaintiff had failed to provide expert testimony that he was incapable of performing essential functions of his position. The Court of Appeals rejected defendant's arguments that plaintiff needed to put on expert evidence to create a genuine issue as to his incapacity – instead, the Court held that lay testimony supported by medical evidence was sufficient. The Court also rejected defendant's argument that plaintiff's doctor's estimate of plaintiff's expected periods of absence established a binding upper limit on those periods of absence. Instead, defendant should have asked the doctor to recertify his estimate when plaintiff's periods of absence exceeded the initial estimate. Ultimately, the Court remanded the case for trial on the question of whether plaintiff's July absences were medically necessary.

Summarized Elsewhere:

Barker v. Genesys PHO, LLC., 2014 WL 3687335 (E.D. Mich. July 25, 2014)

Mezu v. Morgan State Univ., 2014 WL 2452574 (D. Md. May 30, 2014)

Stewart v. White, F. Supp. 2d, 2014 WL 3747664 (D.D.C. July 31, 2014)

C. Second and Third Opinions

D. Recertification

Oak Harbor Freight Lines, Inc. v. Antti, 998 F. Supp.2d 968, 22 WH Cases2d 17 (D. Or. 2014)

The employer sought a declaration that its policy – which required a note from the doctor's office each time an employee took an instance of intermittent leave – was legal. The district court refused to issue the declaration. The employer claimed that workers were disproportionately using intermittent leave on Fridays, Mondays and before holidays. It instituted a policy requiring an employee to get a note from the doctor's office for each instance of intermittent leave so that it could verify that the leave was, in fact, leave for the qualifying condition. Under the policy, the employee did not have to see the doctor; rather, a note from

someone in the doctor's office would suffice. The court found no support for this policy in the statute or regulations. It relied heavily on regulatory decisions issued by the state employment agency in similar cases. The court determined that the policy was tantamount to requiring a medical certification for each use of intermittent leave, which was not permitted. The court also rejected the employer's argument that it was denied due process because the FMLA was vague and did not clearly prohibit the policy. The court held that the employer's other argument – that, even if the doctor's note policy called for a recertification, such a recertification was permitted where the employer suspected abuse – was not before it on the current pleadings.

Summarized Elsewhere:

Hansen v. Fincantieri Marine Grp., LLC, 763 F.3d 832, 23 WH Cases2d 372 (7th Cir. 2014)

Pearson v. Cuyahoga Cnty., 2014 WL 7384253 (6th Cir. Dec. 30, 2014)

E. Fitness-for-Duty Certification

Bralo v. Spirit Airlines, Inc., 2014 WL 1092365 (S.D. Fla. Mar. 19, 2014)

The employee was a former aircraft maintenance supervisor for an airline. The employee sued his former employer for interference and retaliation in connection with his request for extending his FMLA leave, and his subsequent discharge. The employee was granted FMLA leave. When his leave certification was set to expire, the employee's doctor faxed several notes regarding the employee's continuing need for leave, along with restrictions for his return to work. The employer responded that the employee could not return to work until he was at "100%," and failed to request a fitness for work certification until more than 30 days after learning of his work restrictions. Upon receipt of the request for certification, the employee's attorney attempted to contact the employer to resolve any issues with the employee's return to work, but the employer failed to respond. Days following the expiration of the employer's deadline to provide the return to work certification, the employer discharged the employee. At the time of plaintiff's discharge, he had used only 9.2 weeks of his 12 weeks of FMLA leave, and still had an additional 2.8 weeks available for FMLA leave.

The district court denied summary judgment for employer on both the interference and retaliation claims. The doctor's notes provided sufficient information to put the employer on notice of the employee's need for additional leave. The court also held that the employer's more than 30-day delay in seeking the fitness for work certification ran afoul of the employee's right to be reinstated, and caused the employee to take more FMLA leave than necessary. The employer also failed to communicate with the employee's representative to resolve any return-to-work issues. Additionally, the court held there were disputes of fact regarding the reason for the employee's discharge. The employer's failure to communicate with the employee after he advised them of his ability to return to work, coupled with the HR representative's inaccurate statements concerning the employee's leave and attempts to help replace him, suggested that the proffered reasons for discharge were pretextual.

Doby v. Sisters of St. Mary of Oregon Ministries Corporation, et. al., 2014 WL 3943713
(D.Or. August 11, 2014)

Plaintiff worked as a preschool teacher for the defendants from 2008 until her discharge on May 23, 2012. Plaintiff suffered from OCD and her employer granted her FMLA leave to accommodate those days on which her OCD rituals made her late for work or were so severe she stayed home. In late 2011, plaintiff began reporting that she was being harassed by an anonymous coworker. On May 3, 2012, that coworker told plaintiff that one of plaintiff's students was a Mormon, which triggered plaintiff's OCD anxiety. After finishing her shift, plaintiff sent several emails to defendant's HR Director and identified, for the first time, her harasser. Defendant placed plaintiff on paid administrative leave on May 4, 2012. In a meeting on May 10, 2012, plaintiff was told that she was required to undergo a fitness-for-duty evaluation with a psychologist chosen by the defendants to determine if she could safely perform her job. Plaintiff requested that the evaluation be moved to a location that would not trigger her OCD and a different doctor of her choice. The defendants rescheduled plaintiff's appointments three times and asserted their right to choose the evaluator. Plaintiff refused to attend the third appointment and was fired because of her failure to cooperate with the fitness-for-duty evaluation by attending the scheduled appointment.

The district court ruled that, to the extent plaintiff's FMLA claims were premised on a denial of requested leave on May 3, 2012, they failed for lack of evidence. Plaintiff's communications with the defendant on May 4, 2012 could reasonably be construed as a request to take FMLA leave, to which defendants never responded. Although plaintiff was not granted FMLA leave, she was placed on paid administrative leave and did not lose any pay or benefits. Accordingly, plaintiff suffered no damages as a result of defendant's denial of her FMLA leave.

Further, the undisputed evidence showed that the defendants never denied plaintiff the right to obtain her own FMLA certification and, in fact, advised her of that option. However, plaintiff never attempted to obtain that certification. The court found that the evidence supported a misperception by plaintiff that defendants' requested fitness-for-duty examination under the ADA was the same as an FMLA fitness-for-duty certification. Even if plaintiff had obtained an FMLA certification to return to work, the defendants still had every right to require that she undergo an ADA evaluation before reinstating her. Thus, the district court granted the defendants' motion for summary judgment on plaintiff's interference and retaliation claims.

Alanis v. Metra, 2014 WL 1297440 (N.D. Ill. Mar. 31, 2014)

Plaintiff sued her former employer, alleging it failed to violated her FMLA rights. Employer required employees to submit to a "fitness-for-duty" examination upon returning from FMLA leave. Plaintiff took FMLA leave and alleges that employer violated her FMLA rights by subjecting her to excessive fitness-for-duty examinations upon her return. Employer stated it was concerned for plaintiff's safety following plaintiff's sickness and difficulty breathing. Plaintiff alleged that no reasonable safety concerns existed in her case, and that communications between employer's doctor and plaintiff's doctor went beyond mere clarification of her fitness to return to work, as provided for in the FMLA.

The court dismissed plaintiff's FMLA claims. The court reasoned that the FMLA entitles employers to require employees to obtain medical certification indicating that they are able to resume working. The court held that plaintiff failed to meet her burden of proving that her "fitness-for-duty" examination was excessive or that no reasonable safety concern existed. It noted that the only communication between employer's doctor and plaintiff's doctor concerned a fact already disclosed in plaintiff's FMLA certification. Further, the court noted that plaintiff failed to present evidence that employer's safety concerns were pretextual.

F. Certification of Continuation of Serious Health Condition

Washington v. Acorda Therapeutics, Inc., 2014 WL 4467820 (S.D.N.Y. Aug. 28, 2014)

Plaintiff was a product manager for defendant, a biopharmaceutical company. While plaintiff was on leave for an extended period of time, she informed defendant that she was resigning. After her resignation, plaintiff filed suit under the FMLA alleging interference and retaliation under the FMLA. The court granted the defendant's motion for summary judgment.

As for the interference claim, plaintiff was absent from work from May 18, 2011, until her resignation on August 3, 2011. However, plaintiff's doctor's note only stated that she needed leave until June 6, 2011. Defendant asked plaintiff to provide medical certification for the additional time off, but plaintiff never responded. Without a doctor's note in support of her extended leave, the court held that plaintiff could not demonstrate that she was entitled to leave under the FMLA, or that Defendant denied her benefits to which she was entitled by the FMLA. With respect to the retaliation claim, the court held that plaintiff could not establish that an adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent. Defendant approved all of plaintiff's leave, to the extent it was supported by a doctor's certification. Additionally, even after plaintiff resigned, defendant asked plaintiff to withdraw her resignation and return to work, but plaintiff never responded. No reasonable jury could find that defendant retaliated against plaintiff for exercising her FMLA rights.

Summarized Elsewhere:

Leonard v. Electro-Mech. Corp., 2014 WL 1385356 (W.D. Va. Apr. 9, 2014)

Banks v. Bosch Rexroth Corp., 15 F.Supp.3d 681 (E.D. Ky. 2014)

Stewart v. White, 2014 WL 3747664 (D.D.C. July 31, 2014)

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)]

Thomas v. Doan Const. Co., 2014 WL 1405222 (E.D. Mich. Apr. 11, 2014)

Plaintiff brought an FMLA retaliation claim against the construction company that terminated her employment, alleging she was discharged because she had taken FMLA leave to care for her dying father. Defendant moved for partial summary judgment, arguing that plaintiff's claim failed for three reasons: 1) failure to establish that the man she cared for was her biological father; 2) failure to notify defendant that she was exercising FMLA leave; and 3) failure to establish causation.

While plaintiff could not show that the man she cared for was her biological father under the standards of Michigan's Parenting Act or state paternity law, the court emphasized that this was not a paternity suit and found that the employee's sworn statement, taken together with an affidavit from her mother, was sufficient to establish that he was her "parent" under the FMLA. The court also rejected defendant's second argument, finding that employee's statements to her employer that she needed leave to care for her sick father demonstrated sufficient notice under the FMLA's broad requirements. Finally, the court found that despite "borderline" temporal proximity (roughly-four-months between Plaintiff's leave and her discharge), additional evidence regarding defendant's treatment of plaintiff was sufficient to establish a *prima facie* case under a single or mixed-motive analysis.

Defendant also argued that plaintiff could not claim "unpaid" FMLA leave because it paid her for the time she spend caring for her father. However, the court rejected this argument, noting that the FMLA does not forbid employers from offering employees paid medical-leave benefits alongside FMLA unpaid leave. The court also rejected defendant's argument that the "honest belief" rule applied, finding that because defendant's decision to discharge plaintiff was "made in haste" and subject to factual disputes raised by plaintiff, the "honest belief" defense failed. Accordingly, the district court denied defendant's motion for partial summary judgment.

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")]

Summarized Elsewhere:

Thomas-Young v. Sutter Cent. Valley Hosps., 2014 WL 1096795 (E.D. Cal. Mar. 19, 2014)

1. Employee [Renumbered Heading (Formerly V.H.1)]
2. Employer [Renumbered Heading (Formerly V.H.2)]

Summarized Elsewhere:

Barker v. Genesys PHO, LLC., 2014 WL 3687335 (E.D. Mich. July 25, 2014)

VI. RECORDKEEPING REQUIREMENTS

A. Basic Recordkeeping Requirements

Withers v. Johnson, 763 F.3d 998, 23 WH Cases2d 383 (8th Cir. 2014)

The employee was an assistant probation officer working in a state courthouse under the supervision of a circuit judge. After the employee injured his back while on the job, he went on FMLA leave. The employee's doctor cleared him to return to work, and over the next few days the employee tried calling the judge and HR personnel to arrange for his return to work. However, the court's personnel policy required the employee to immediately provide a copy of the return to work release to his supervisor, and the employee did not immediately do so. Six days after the employee received his clearance to return to work, the judge sent the employee a letter informing him that his employment was being terminated for failing to provide this clearance to the judge immediately after it was issued.

The employee filed a claim alleging that the employer interfered with his right to FMLA leave by requiring him to fax his medical release to the circuit court or otherwise disclose his private medical information to personnel other than the judge in order to return to work. The district court granted summary judgment for the employer, and on appeal, the Eighth Circuit affirmed. Although the court recognized that the FMLA regulations require records to be kept confidential from non-supervisory personnel, the employee's arguments failed as a matter of undisputed fact. The judge did not require the employee to disclose his medical information to any non-supervisory personnel, and the employee was only discharged for failing to deliver the medical clearance to his supervisor. Since this policy complied with the FMLA, the employee failed to make a case for interference.

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

Wisniewski v. Wells Fargo, 2014 WH Cases2d 162 (D. Md. 2014)

The plaintiff worked as a loan support specialist, a customer service position, for the employer from September 2009 up and until the employer terminated her employment in April 2011. Plaintiff suffered from frequent migraines and other ailments because of a prior car accident. She took FMLA leave on several occasions during her employment, exhausted her leave, and was not disciplined for absences related to her medical condition. After the employer terminated her employment, the plaintiff brought suit, alleging several claims under the Americans with Disabilities Act, as well as a FMLA interference claim. Specifically, the plaintiff alleged that the employer interfered with her FMLA leave by improperly calculating the date her leave expired and because it did not pay her for her during her FMLA leave.

Plaintiff and her employer moved for summary judgment, and the district court granted the employer's motion for summary judgment as to plaintiff's FMLA claim. The district court explained that even if the employer improperly calculated plaintiff's FMLA leave, there was no indication that plaintiff's ability to take FMLA leave was prejudiced or hindered in any respect. Moreover, the district court also explained, citing 29 C.F.R. Section 825.100, that employees are not required to be paid during FMLA-related absences

B. When Substitution of Paid Leave Is Permitted

Summarized Elsewhere:

Twillie v. Erie School Dist., 575 Fed.Appx. 28, 2014 WL 3844129 (3d Cir. 2014)

1. Generally

Summarized Elsewhere:

Kelly v. Horizon Medical Corporation, 2014 WL 1293859 (M.D. Pa. Mar. 31, 2014)

2. Types of Leave

- a. Paid Vacation and Personal Leave
- b. Paid Sick or Medical Leave
- c. Paid Family Leave
- d. Workers' Compensation or Temporary Disability Benefits
- e. Compensatory Time

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

III. MAINTENANCE OF BENEFITS DURING LEAVE

A. Maintenance of Group Health Benefits

1. Generally
2. What Is a Group Health Plan
3. What Benefits Must Be Provided
4. Payment of Premiums
 - a. Methods of Payment
 - i. During Paid Leave
 - ii. During Unpaid Leave
 - b. Consequences of Failure to Pay
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

Summarized Elsewhere:

Holder v. Illinois Dept. of Corrections, 751 F. 3d 486, 22 WH Cases2d 1071 (7th Cir. 2014)

1. When an Employer May Do So
2. How an Employer May Do So

C. Continuation of Non-Health Benefits During Leave

Kolodziej v. Board of Educ. Of Southern Regional High School District, Ocean County, 436 N.J Super. 546, 95 A.3d 763 (N.J. Ct. App. 2014)

The employee was a full-time physical education teacher at a New Jersey high school. She worked for three complete academic years (2002-2003, 2003-2004 and 2004-2005) before taking maternity leave from September 1, 2005 through June 30, 2006. She resumed work on September 1, 2006 but was notified in April 2007 that she would be laid off effective September 1, 2007 as part of a reduction-in-force. In August 2007, the employee applied for a different physical education position that had become available. The employee was not awarded this position on the grounds that she had not achieved tenure during her employment; the employee contended that, had she been deemed to have tenure, she would have had greater seniority than the successful applicant, and that the only reason she was denied tenure was due to the School Board's decision to count her FMLA leave as a break in employment.

The employee first challenged the School Board's decision pursuant to the state department of education's appeal process. Although an administrative law judge initially ruled in her favor, the Commissioner of Education rejected that ruling and issued the agency's final decision supporting the School Board's determination. The employee appealed to the New Jersey Superior Court, Appellate Division. Looking first to New Jersey law, the Court determined that the tenure decision hinged on whether the employee's leave under the FMLA constituted "continued employment" during the succeeding academic year. Citing the structure and policy of the FMLA, as well as state law, the Court rejected the contention that such leave was a "break in employment" and found no basis to distinguish an earlier case where an employee was awarded tenure notwithstanding a four-month absence due to a work-related injury. As such, the Court held that the FMLA leave constituted only a "temporary pause in the ongoing working relationship," and thus the employee's tenure rights were maintained. The Court further remanded the case to the Commission to determine the correct amount of relative seniority between the job applicant, and any consequent entitlement to relief for the employee.

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

CHAPTER 8.

RESTORATION RIGHTS

I. OVERVIEW

II. RESTORATION TO THE SAME OR AN EQUIVALENT POSITION

Summarized Elsewhere:

Burcar v. South Washington County School District, 2014 WL 67954 (D. Minn. Jan. 8, 2014)
George v. Utility Trailers of Indianapolis, Inc., 23 WH Cases2d 1238 (S.D. Ind. Oct. 31, 2014)

A. General

Bennett v. Trinity Marine Prods, Inc., 2014 WL 4674764 (E.D. La. Sept. 18, 2014)

Plaintiff worked as a manager for defendant company. He took medical leave after suffering an aortic aneurysm. While plaintiff was on leave, the company underwent a management reorganization, and when he returned, he was placed in a position managing a different department, but with the same salary and general responsibilities. Under a new supervisor, plaintiff was reprimanded for various performance deficiencies, failing to timely file reports, showing a lack of professionalism, and making an inappropriate comment about a subordinate's weight. Finally, when one of his direct reports called in sick and plaintiff entered the incorrect payroll code for the employee – a major infraction – plaintiff was terminated. Plaintiff brought claims of FMLA interference and retaliation.

Defendant brought a motion for summary judgment for both claims. As to plaintiff's interference claim, the major question was whether plaintiff was returned to an equivalent position after his medical leave. The court found that plaintiff was placed in an equivalent position, finding that the small changes in the position were *de minimis*. Therefore, the court granted summary judgment on the interference claim.

In regards to the retaliation claim, plaintiff argued that defendant sabotaged him and exaggerated performance issues, while defendant argued that plaintiff could not prove the causation element of his *prima facie* case. The court found that there was factual controversy that precluded summary judgment. In particular, the court noted that anyone responsible for this department was set up to fail, that plaintiff was reprimanded for performance issues outside of his control, and that plaintiff was fired several months after returning from leave.

Johnson v. Bethesda, 2014 WL 6865484 (D. Minn. Dec. 3, 2014)

Plaintiff worked for a not-for-profit ministry that provided home and health care services for older adults. Plaintiff informed her employer that she would require FMLA leave in order to undergo knee surgery. Before her leave commenced, the employer hired a new director, who began reorganizing many policies and procedures. As part of the reorganization, Plaintiff was warned that her hours were being reduced and her job description modified. She was also allegedly advised that she should look for other jobs, because her eventual discharge was "a planned thing." Subsequently, a Department of Health investigation revealed a number of filing

errors at the facility, which the facility attributed to Plaintiff. Plaintiff was the only employee officially assigned to filing, though other employees also occasionally assisted with filing. When she returned from FMLA leave, the employee was discharged without any progressive discipline – something the employer had never done before.

After her discharge, Plaintiff filed FMLA entitlement and discrimination claims. The court denied the employer's motion for summary judgment as to both theories. For the entitlement claim, the employee was entitled to be restored to the position she occupied before taking FMLA leave, and yet, she was discharged immediately when she came back to work. Because of the comments made to Plaintiff by supervisors before she left, and the reduction in her hours and responsibilities, there was a genuine issue of material fact as to whether she was discharged for the health violations or for her use of FMLA leave. As for the discrimination claim, although there was no temporal proximity between the request for leave and Plaintiff's discharge (three months), the comments by the employer and the failure to follow the progressive discipline policy were sufficient to create a genuine issue of material fact as to whether the employee had been discriminated against for taking FMLA leave. Finally, the Court held that there was also an issue of fact as to the supervisor's individual liability because she made the decision to discharge Plaintiff.

Summarized Elsewhere:

Jackson v. Logistics & Tech. Servs., Inc., 2014 WL 4264839 (N.D. Ala. Aug. 27, 2014)

B. Components of an Equivalent Position

Summarized Elsewhere:

Cribbs v. NFI Network Logistic Solutions, LLC, 2014 WL 4805328 (S.D. Ga. Sept. 26, 2014)

Nigh v. School Dist. of Mellen, 2014 WL 4794521 (W.D. Wisc. Sept. 25, 2014)

1. Equivalent Pay

Summarized Elsewhere:

Fox v. Primary Financial Services LLC, 2014 WL 814969 (D. Ariz. March 3, 2014)

2. Equivalent Benefits

3. Equivalent Terms and Conditions of Employment

Berridge v. Nalco Company, 2014 WL 340596 (D.N.J. 2014)

Plaintiff sought leave under the FMLA to care for a new child and for personal medical reasons. Upon Plaintiff's return from these leaves, he was reinstated to the same title, salary and benefits. Plaintiff was however, removed from being the account manager for a major account at the client's request and placed on a performance improvement plan. A year later, he was discharged. Plaintiff filed suit in the District of New Jersey for interference and retaliation claims under the FMLA.

The district court held that in order to succeed on plaintiff's interference claim, he had to demonstrate that the company's failure to advise plaintiff of his FMLA rights rendered him unable to exercise that right in a meaningful way, thereby causing injury. The court found that plaintiff failed to establish a case for interference with plaintiff's FMLA rights and granted summary judgment to Defendant on this claim. With respect to plaintiff's retaliation claim, the district court, after applying the burden-shifting framework of *McDonnell Douglas*, found that plaintiff could not overcome the company's legitimate reasons for removing the plaintiff from the client's account, by placing him on a performance improvement plan and by ultimately terminating plaintiff's employment a year after returning from leave. The district court subsequently granted summary judgment to Defendant on plaintiff's retaliation claim.

III. CIRCUMSTANCES AFFECTING RESTORATION RIGHTS

A. Events Unrelated to the Leave

Ketchum v. St. Cloud Hospital, 994 F.Supp.2d 1012 (D.Minn. 2014)

Plaintiff sought leave under the FMLA for treatment for breast cancer. Prior to plaintiff's FMLA leave, plaintiff had been placed on probation for work related issues. During plaintiff's FMLA leave, plaintiff visited her employer's premises with her husband when they made statements about maintaining a "kill list" and her biker friends knowing how to hide bodies. Plaintiff indicated her supervisor and coworkers were on such list. Plaintiff was subsequently discharged by defendant effective immediately even though she still had FMLA leave remaining.

Plaintiff brought suit in state court for the Defendant's violation of the FMLA and other state law claims. Defendant subsequently removed this matter to federal court and after discovery moved for summary judgment. The court treated Plaintiff's claims under the FMLA as that of an entitlement claim where an employer is alleged to have denied or interfered with the Plaintiff's substantive FMLA rights. The court held that an employee who takes FMLA leave has no greater protection against termination for reasons unrelated to the FMLA than she did before taking the leave. As such, if an employer can prove it would have terminated an employee even if she had not invoked the FMLA, it will not be liable. For these reasons the court granted summary judgment in favor of the Defendant on Plaintiff's FMLA claims and declined to exercise supplemental jurisdiction over the Plaintiff's remaining state law claims.

Lamonte v. Western & Southern Life Insurance Co., 2014 WL 346079 (E.D.La. 2014)

Plaintiff sought leave under the FMLA to recover from shoulder surgery. Prior to plaintiff's FMLA leave, plaintiff, in his role as a sales representative for defendant with respect to its insurance products, started collecting insurance premiums from clients in cash for insurance policies issued by the company. During plaintiff's leave, the company received a complaint from one of its policy holders that plaintiff failed to remit premium payments received by plaintiff to the company. An investigation revealed that Plaintiff failed to remit numerous payments to the company totaling \$1,403.02. Plaintiff was discharged as a result of its investigation. The district court, in analyzing plaintiff's interference claim under the *McDonnell Douglas* burden-shifting analysis, found that because plaintiff was on medical leave at the time he was discharged, that plaintiff made out a *prima facie* case under the FMLA for interference,

and that a material factual dispute remained regarding whether defendant's proffered reason is pretext. For these reasons the district court denied defendant's motion for summary judgment.

1. Burden of Proof
2. Layoff

Collier-Sumrain v. Trane U.S., Inc., 2014 WL 1584487 (D. Minn. Apr. 21, 2014)

Plaintiff was a supply chain analyst for defendant. She was diagnosed with anemia, which her physician recommended periodic iron infusions to treat. Because the infusions needed to be completed during the workday, plaintiff requested FMLA leave in early February 2012, for dates in February and early March 2012. After another company acquired defendant, management approved a plan which involved eliminating certain positions, including plaintiff's position. Defendant made the initial decision to eliminate her position without knowledge of her FMLA leave and when defendant became aware of her FMLA leave, it decided to delay her terminations until she had returned from leave. Plaintiff brought a lawsuit against defendant for FMLA violations.

The court granted defendant summary judgment on all of plaintiff's FMLA claims. Because plaintiff received all the FMLA leave she requested, the court found that there was no entitlement claim under 29 USC § 2615(a)(1). The court concluded there was no direct evidence to support plaintiff's retaliation claim, finding that defendant's statements that plaintiff's FMLA leave was a factor in delaying her termination were not evidence in the actual decision to terminate. The court further found that there was insufficient evidence of pretext to support the retaliation and discrimination claims, holding that there was nothing unlawful under the FMLA for an employer to delay a previously planned termination until FMLA leave was completed.

Schaaf v. Trane U.S., Inc., 2014 WL 1584485 (D. Minn. Apr. 21, 2014)

Plaintiff worked as senior financial analyst for defendant. In November of 2010, she discovered a lump in her breast and in June of 2011, she learned that she had breast cancer and requested FMLA leave for her July surgery. Defendant's third party administrator initially denied her FMLA request, claiming that plaintiff had not provided medical records and that it had been unable to contact plaintiff or her medical providers. Eventually, however, her FMLA leave was approved. After her surgery, plaintiff had follow-up medical appointments which she believed were covered under approved intermittent FMLA leave.

After another company acquired defendant, management approved a plan which involved eliminating certain positions, including plaintiff's position. Defendant made the initial decision to eliminate her position without knowledge of her FMLA leave and, when defendant became aware of her FMLA leave, it decided to delay her termination until she had returned from leave. Plaintiff brought a lawsuit against defendant for FMLA violations.

The court granted defendant summary judgment on all of plaintiff's FMLA claims. Because plaintiff received all the FMLA leave she requested, the court found that there was no entitlement claim under 29 USC § 2615(a)(1). The court concluded there was no direct evidence

to support plaintiff's retaliation claim, finding that defendant's statements that plaintiff's FMLA leave was a factor in delaying her termination were not evidence in the actual decision to terminate. The court further found that there was insufficient evidence of pretext to support the retaliation and discrimination claims, holding that there was nothing unlawful under the FMLA for an employer to delay a previously planned termination until FMLA leave was completed.

Summarized Elsewhere:

Clements v. Prudential Protective Services, LLC, 556 Fed.Appx. 392 (6th Cir. 2014)

3. Discharge Due to Performance Issues

Thomas v. Dolgencorp, LLC, 2014 WL 3397772 (M.D.Ala. July 11, 2014)

The employee was a store manager at a Dollar General. She first requested FMLA leave for birth of child in 2006. She was thereafter diagnosed with breast cancer, but did not miss work. In 2011, she requested FMLA leave for a second time for the birth of a child. Later that year, she discovered lumps in her breasts and requested FMLA leave for a double mastectomy. Earlier in 2011, the employee's review was downgraded from good to needs improvement and she was placed on a performance improvement plan. While on FMLA leave, the employee's supervisor discovered that the employee had taken a computer based learning class on behalf of her employees and allowed employees to work off the clock. She was suspended upon her return to work and later terminated for the conduct. The employee filed suit, alleging violation of the ADA, Title VII, and the FMLA.

The court granted summary judgment in favor of the employer on the FMLA retaliation and interference claims because the employer was able to show that it would have discharged the employee had she not been on leave and the employee was unable to dispute the employer's proffered reason for her termination.

Holloway v. ITT Ed. Servs., Inc., 2014 WL 4273896 (Aug. 28, 2014)

Plaintiff was an educational recruiting representative for defendant. In October 2012, plaintiff was diagnosed with prostate cancer. He requested FMLA leave and short-term disability, and defendant granted 12 weeks of leave. Prior to requesting leave, plaintiff had received numerous written warnings indicating that his performance fell short of defendant's expectations. Additionally, in plaintiff's overall employment evaluations, plaintiff "Failed to Meet Expectations" on his 2010 and 2011 evaluations, and "Met Expectations" on his 2012 evaluation. Shortly after plaintiff went on leave, defendant began a nationwide reduction in force, including the eliminating three recruiters at plaintiff's location. In determining who would be discharged, defendant used objective scoring criteria based on past work performance. Plaintiff scored the worst, and he was one of the three employees selected for discharge.

Plaintiff filed suit against defendant, alleging it willfully discriminated against him and interfered with his rights under the FMLA by discharging him while he was on leave. Defendant moved for summary judgment, arguing that plaintiff could not show its legitimate, non-discriminatory reason for his discharge was pretext and, alternatively, that plaintiff was not released for work when his FMLA leave period expired and thus could not perform the essential

functions of his job. The district court granted the motion. The court noted that defendant's use of objective criteria was sufficient to establish that plaintiff was not discharged for any improper purpose. Moreover, the court noted that plaintiff had not been cleared to return to work at the time his FMLA leave expired, so plaintiff could not have been reinstated even if defendant had not terminated plaintiff's employment. Accordingly, the court held that no reasonable jury could conclude that plaintiff was denied reinstatement for any reason other than defendant's nationwide reduction in workforce.

Perry v. Bath & Body Works, LLC, 993 F.Supp.2d 883 (N.D.Ind. 2014)

Plaintiff sought leave under the FMLA for surgery and treatment for skin cancer. Plaintiff's position with defendant was as a store manager. Prior to plaintiff's FMLA leave, a new district manager was assigned responsibility over plaintiff's store. The new district manager expressed concerns with plaintiff's job as manager prior to plaintiff requesting FMLA leave. During plaintiff's FMLA leave, policy and procedure violations were discovered at plaintiff's store. Defendant terminated plaintiff and three other members of Plaintiff's sales leadership team for the discovered policy and procedure violations. Plaintiff filed suit against the company and the district manager, alleging FMLA interference and retaliation.

On defendants' motion for summary judgment, the Court found plaintiff could not state a *prima facie* case of retaliation because plaintiff could name no similarly situated employees who were treated more favorably. With respect to plaintiff's interference claim, the district court found that, as with plaintiff's retaliation claim, defendant provided evidence that plaintiff committed policy and procedure violations that led to her discharge. The court found that the possibility that not all of those violations or their extent might have been discovered had plaintiff not taken FMLA leave does not mean that defendant interfered with plaintiff's FMLA rights. For these reasons, the court granted summary judgment to the company and plaintiff's former manager.

Travers v. Cellco Partnership, 579 Fed.Appx. 409, 23 WH Cases2d 556 (6th Cir. 2014)

Plaintiff began working for defendant as a customer service representative in 2008. During her last year of employment, plaintiff suffered from migraine headaches and a heart condition and, as a result, took several weeks of FMLA leave. Before requesting FMLA leave, plaintiff had been disciplined for violating defendant's code of business conduct. Specifically, she received multiple verbal warnings and coachings for waiving a mail-in rebate without supervisor approval. Despite these warnings and coachings, plaintiff continued to waive mail-in rebates without approval, which resulted in her receiving final written warnings. After receiving this final written warning, plaintiff again waived a mail-in rebate and submitted the waiver as a price match request from the customer, which it was not. Plaintiff was discharged two months later, on her first day back from FMLA leave. Plaintiff filed suit, alleging FMLA interference and retaliation. The district court granted summary judgment in favor of defendant and plaintiff appealed.

The Court of Appeals affirmed the district court's decision as to the interference claim, finding defendant had granted all the FMLA leave to which plaintiff was entitled. While plaintiff also claimed she had not been provided notice of her eligibility for FMLA leave or her rights under the FMLA, plaintiff failed to demonstrate she had, in fact, been denied proper notice. Nor did plaintiff demonstrate any prejudice from the alleged notice violation. The Court also affirmed summary judgment as to the retaliation claim, finding plaintiff failed to raise a genuine issue of fact as to pretext. While plaintiff denied providing the final rebate that resulted in her discharge, the Court found that the district court had properly concluded defendant honestly believed plaintiff continued to violate its rebate policy after being disciplined for doing so. In addition, plaintiff's repeated policy violations were strong evidence that it was the actual reason for her discharge. Therefore, plaintiff could not establish defendant's stated reason for its discharge decision was pretextual.

Summarized Elsewhere:

***Law v. Kinross Gold U.S.A., Inc.*, 2014 WL 1577301 (D. Nev. Apr. 18, 2014)**

***Jarrett v. Nobel Learning Communities, Inc.*, 2014 WL 1612610 (N.D. Ill. Apr. 21, 2014)**

***Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 22 WH Cases2d 625 (11th Cir. 2014)**

***Jackson v. Logistics & Tech. Servs., Inc.*, 2014 WL 4264839 (N.D. Ala. Aug. 27, 2014)**

***Peda v. New York Univ. Hospitals Ctr.*, 2014 WL 1013844 (S.D.N.Y. Mar. 17, 2014)**

4. Other

***Allen v. WalMart Stores, Inc.*, 22 F.Supp.3d 722 (E.D. Mich. 2014)**

Plaintiff was a store manager for the employer defendant. After being placed on a performance improvement plan for unsatisfactory performance, plaintiff sent his supervisor an email advising that the challenges of running the store were adding to stress in his family life and requesting reassignment to another position. The email was forwarded to the regional human resources manager for further consideration two days before plaintiff went on FMLA leave. When plaintiff returned from leave twelve weeks later, defendant placed him in an assistant manager position in a different store. Plaintiff contended that defendant's failure to reinstate him as a store manager, rather than as an assistant manager, constituted FMLA interference and retaliation.

The court concluded, based on agreement of the parties, that plaintiff established a *prima facie* case of FMLA interference. The court applied the *McDonnell Douglas* burden-shifting analysis, however, and concluded that defendant's explanation for the action was strongly supported by plaintiff's own request prior to taking FMLA leave. Plaintiff contended that he rescinded his request for reassignment when he returned from leave, but the evidence demonstrated that the employer had already reassigned him to the new position. Under these facts, the court concluded that plaintiff had failed to establish interference as a matter of law. With respect to plaintiff's retaliation claim, the court ruled that plaintiff failed to establish a *prima facie* case, because his request for reassignment precluded any inference of a causal

connection between the reassignment and his request for leave. Therefore, the court granted summary judgment to defendant on both of plaintiff's FMLA claims.

Janczak v. Tulsa Winch, Inc., 2014 WL 2197794 (N.D. Okla. May 27, 2014)

Plaintiff brought suit against his employer for FMLA retaliation and interference. Plaintiff-employee brought a partial motion for summary judgment and defendant-employer brought a motion for summary judgment. Plaintiff was an employee who utilized FMLA leave for personal health issues. The employer initiated a corporate restructuring that ultimately led to the employer's termination upon his return from FMLA leave, despite his positive performance reviews.

The court found the employer sufficiently proved that the employee would have been terminated regardless of the protected activity of FMLA leave, noting that the discussions began prior to the employee's leave. However, the employee also argued he was entitled to be placed in the same or equivalent position upon return from FMLA leave. The court noted that an employee taking FMLA leave is not entitled to any right, benefit, or position of employment that he would not have been entitled to if the leave was never taken. Since the employer had discussed eliminating the employee's position for reasons unrelated to the FMLA leave, the employee was not entitled to an equivalent position because he would have been terminated regardless. The employee also argued his employer retaliated against him by failing to promptly pay him an agreed-upon three months' salary. The court found paying the three months' salary was not an adverse reaction that met the burden in proving a retaliation claim under the FMLA. Accordingly, the court granted the employer's motion for summary judgment and denied the employee's partial summary judgment.

Jarvela v. Crate Carrier Corp., 754 F.3d 1283, 22 WH Cases2d 1217 (11th Cir. 2014)

Plaintiff, a commercial truck driver, alleged that the defendant violated the FMLA when it terminated his employment pursuant to a policy in which it refused to employ anyone with a diagnosis of alcoholism within the previous five years. Plaintiff took FMLA leave for treatment for his alcoholism, and upon his return, defendant determined that he no longer met the qualifications to be a commercial truck driver and thus terminated his employment. Plaintiff alleged that defendant interfered with his FMLA rights and retaliated against him for failing to return him to his job or an equivalent position following his FMLA leave. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed.

The court affirmed, reasoning that an employer can deny reinstatement following FMLA leave if it can demonstrate that it would have discharged the employee even if he had not been on FMLA leave. The court held that the defendant demonstrated it would have discharged plaintiff regardless of his FMLA leave, and plaintiff failed to present any evidence disputing the defendant's position. Thus, the court agreed with the district court and ruled that plaintiff's FMLA interference claim failed as a matter of law. The court also found that summary judgment was appropriate on plaintiff's FMLA retaliation claim, finding that plaintiff failed to show a causal connection between his FMLA leave and the decision to terminate his employment. The

vice president who discharged plaintiff was unaware that he had taken FMLA leave and plaintiff presented absolutely no evidence to the contrary.

Thereafter, plaintiff petitioned for a panel rehearing, which was granted. The court affirmed, vacating and superseding its prior judgment. *Jarvela v. Crete Carrier Corp.*, ___ F.3d ___, 2015 WL 348602 (11th Cir. Jan. 28, 2015).

B. No-Fault Attendance Policies

Summarized Elsewhere:

***Greineder v. Masonic Homes of the R.W. Grand Lodge*, 2014 WL 1632143 (E.D. Pa. Apr. 23, 2014)**

***Hayes v. Tennessee*, 2014 WL 3408344 (Tenn. Ct. App. July 10, 2014)**

C. Employee Actions Related to the Leave

1. Other Employment

***Shryer v. University of Texas Southwestern Medical Center at Dallas*, 587 Fed.Appx. 151, 23 WH Cases2d 1026 (5th Cir. 2014)**

Plaintiff, who had been diagnosed with Multiple Sclerosis, began experiencing performance difficulties which were reflected by low performance evaluation scores. In 2009, her score dropped from a 3.6 out of 5 to a 2.0, at which time plaintiff's supervisor asked her if she had a serious medical condition. After telling him she had MS, plaintiff claimed that her supervisor began openly expressing his frustrations with her and plaintiff also learned her department may be closing. Plaintiff then began seeking a transfer to another department within the University, including Southwestern Temps, the University's pool for temporary employment. The University's policy was to remove temporary employees from the payroll if they could not find work within two pay periods. Plaintiff's supervisor agreed to the transfer to Southwestern Temps and, shortly thereafter, plaintiff requested and was approved for six weeks of FMLA leave. Plaintiff's transfer was then delayed until one month after she returned from leave. While in Southwestern Temps, plaintiff bid on full-time jobs, but was not successful due to her low performance evaluation score. Because she did not find work within two pay periods, her employment was terminated. Plaintiff then filed suit, alleging FMLA interference and retaliation, among other claims. The district court granted summary judgment in favor of defendant on the FMLA claims and plaintiff appealed.

Plaintiff claimed defendant interfered with her FMLA rights and retaliated against her by transferring her to a temporary role a month after she returned from leave and terminating her employment. The Court of Appeals affirmed the grant of summary judgment, finding her claims to be meritless. First, plaintiff requested a transfer before seeking FMLA leave. Second, plaintiff requested to enter Southwestern Temps, knowing her employment would be terminated if she did not find work within two pay periods. Further, plaintiff did not demonstrate she was unable to find full-time work because of her FMLA leave or that other employees were treated more favorably.

2. Other Activities During the Leave
3. Reports by Employee
4. Compliance With Employer Requests for Fitness-for-Duty Certifications

Budhun v. Reading Hospital and Medical Center, 765 F.3d 245, 23 WH Cases2d 312 (3d Cir. Aug. 27, 2014)

Plaintiff's job duties required her to type sixty percent of the time, and plaintiff took FMLA leave following a hand injury which rendered her unable to type at full capacity. Plaintiff's treating physician cleared her to return to work with "no restrictions in splint" and, after informing her supervisor, plaintiff was informed she could not return to work unless she had full use of all of her fingers. Plaintiff received a subsequent note from her physician that she be excused from work until further evaluation, and defendant extended plaintiff's FMLA leave but replaced Plaintiff at the end of her leave period and informed her she was not eligible for a transfer to another position. Defendant then informed plaintiff that if her doctor released her to work before she found another position at the company (for which she would have to apply as a new hire), her employment would be terminated. In addition, the defendant asked plaintiff to pick up her belongings and return her badge and keys. Plaintiff then brought suit, alleging that defendant interfered and retaliated against her as a result of her exercise of rights under the FMLA.

The district court granted the defendant's motion for summary judgment, and plaintiff appealed. The Third Circuit reversed and remanded, finding a genuine dispute of material fact as to whether plaintiff invoked her right to return to work. In doing so, the court addressed for the first time what constitutes "invocation of one's right to return to work," particularly in light of the fact that her fitness for duty certification stated that she could return to work with "no restrictions" and the failure on the defendant's part to provide a list of essential function for her to present to her physician in accordance with 29 C.F.R. § 825.312(b). Moreover, the court found that a reasonable jury could conclude that she was able to perform the essential functions of her job even though she could not use all ten fingers, particularly in light of another employee who only used one finger on each hand to type. The court also reversed dismissal of plaintiff's FMLA retaliation claim, holding that defendant's decision to replace the plaintiff constitutes an "adverse employment action" particularly in light of the defendant's request that she return her badge and key and collect her belongings, and its decision to replace plaintiff with another employee, thereby precluding plaintiff from being able to return to her previous job.

Summarized Elsewhere:

White v. County of Los Angeles, 225 Cal. App. 4th 690, 22 WH Cases2d 676 (Cal. Ct. App. 2014)

Alanis v. Metra, 2014 WL 1297440 (N.D. Ill. Mar. 31, 2014)

Rodriguez v. School Board of Hillsborough County, Florida, 23 WH Cases2d 1065 (M.D. Fla. 2014)

5. Fraud

D. Timing of Restoration

IV. INABILITY TO RETURN TO WORK WITHIN 12 WEEKS

Downs v. Mr. Burch Formal Wear, Inc., 2014 WL 4264849 (N.D. Ala. Aug. 27, 2014)

Plaintiff, manager of downtown dry cleaning operations, filed FMLA interference and retaliation claims against the employer. Some of his functions included occasional lifting of a 200 gallon drum onto a dolly, and regularly lifting 20 or more pounds. He generally worked 45 hours a week, but that increased to 65 hours a week during prom season. One day, he fell approximately 20 feet in the “hot room” and sustained head and back injuries. He filed a report with OSHA about unsafe working conditions. He was placed on FMLA leave and COBRA coverage while he was recuperating, and his employer reimbursed him for the difference between the COBRA cost and his regular premium share.

The employer hired a temporary employee to cover for him until his return to work. Thereafter, the employer hired a full-time plant manager. He was released to work four hour days for two weeks with full schedule thereafter, but could not work on elevations. He was told no light duty was available, and requested two weeks of FMLA leave until he could return to full duty. He received no answer from his employer, and retained an attorney, who contacted his employer. He filed a claim with social security and indicated in the application that he was unable to bend and could not lift any amount over a few pounds.

The employer then moved for summary judgment as to plaintiff’s FMLA interference and retaliation claims. The court ruled that plaintiff failed to establish an FMLA interference claim because he was unable to return to work during the twelve week FMLA period, which expired on May 19, 2011. He was not released to return to work until May 31 and only for a light duty position. The court also affirmed the employer’s right to run accrued paid leave contemporaneously with FMLA leave. The court also dismissed plaintiff’s FMLA retaliation claim because he could not establish that the employer terminated his employment because he took FMLA leave. To the contrary, the employer kept the position open for him to resume work during the entire 12 weeks of his required FMLA leave.

Silva v. City of Hidalgo, Texas, 23 WH Cases2d 574 (5th Cir. 2014)

The employee, a member of the employer’s SWAT team, broke her leg jogging and underwent surgery. She requested and received leave under the FMLA. Prior to the expiration of her leave, the employee requested light duty. She was advised that she would be deemed to have resigned if she did not return to work in her former capacity at the expiration of her leave. Thereafter, her physician advised her employer that she would require one-to-two more months of physical therapy and would not be able to work in a full duty capacity. The employer responded that there were no available positions that met the employee’s physical limitations and terminated the employee when she failed to return to work. The employee then filed suit, alleging a violation of the ADA, interference with and retaliation for taking FMLA, and reporting sexual harassment. The district court granted the employer summary judgment on all counts.

On appeal, the court affirmed the district court finding that the employee was unable to perform the essential functions of the position and had no right to restoration. The court noted that the employee claimed no right to light duty before her leave and had no right to be placed in a new, non-equivalent position.

Crisell v. T-Mobile USA, Inc., 23 WH Cases2d 801 (D. Idaho July 28, 2014)

Plaintiff suffered from a medical condition that required two surgeries within a year for which she took FMLA leaves of absence which exhausted her 12 weeks of leave. After the second surgery, plaintiff was still unable to resume her normal duties and despite her representations to the company that she would try to get her doctor to release her to full duty at an upcoming appointment, the company discharged her. Plaintiff filed suit, claiming the company terminated her employment in retaliation for her use of FMLA leave.

The court granted summary judgment to the employer, finding that plaintiff had fully exhausted her FMLA entitlement, plus an additional 42 hours, and that, when offered to return to her full-time position, plaintiff was not yet released to perform those duties. The court determined the employer had fulfilled its obligations under the FMLA, and her discharge was permissible.

Wanamaker v. Town of Westport Board of Education, 11 F. Supp. 3d 51 (D. Conn. Mar. 27, 2014)

The employee was an elementary school teacher who filed a lawsuit against her employer for interference and retaliation under the FMLA. The employee requested and was granted FMLA leave after she was ordered to go on bed rest during the final months of her pregnancy. After the birth of her daughter, both the employee and her child developed numerous complications that required the employee to take additional non-FMLA leave. The employer informed her that upon her return it was likely that she would be reassigned to a different position. The employee refused to accept the reassignment, and the employer terminated her employment.

On the employer's motion for summary judgment, the court found that because the employee was granted twelve weeks of leave, the employer did not interfere with the employee's FMLA rights. The employee was unable to prove interference with her right to reinstatement because she was medically unable to perform an essential function of the position at the end of her FMLA leave, and the employer was therefore not obligated to return her to her former job or an equivalent position. As to her retaliation claim, the court applied the *McDonnell Douglas* burden-shifting framework and concluded that the employer had a legitimate, non-retaliatory reason for terminating her employment because she was medically unable to return to work for more than a year. The employee was unable to offer evidence that retaliation was a motivating factor, or that the reason was pretextual, because she was not discharged until fifteen months after her FMLA leave expired. Significantly, the court declined the employer's request to apply a more arduous "but-for" standard in analyzing the employee's retaliation claim, holding that it did not need to address this issue of first impression.

Bryant v. Pavilion Foundation, 22 WH Cases2d 760 (C.D.Ill. 2014)

Plaintiff, a mental health technician, saw a doctor after injuring her ankle at home on May 28, 2010. The doctor told plaintiff she would be off work until June 2, 2010. Plaintiff was later referred to a specialist, who filled out paperwork on June 3, 2010 stating she could not perform several functions of her job. Plaintiff was not released to work until August 30, 2010. Upon her return to work, plaintiff was relieved of her position as Lead technician and, as a result, her pay was reduced. Plaintiff filed suit, alleging FMLA interference and retaliation.

Defendant moved for summary judgment, arguing plaintiff's leave expired on August 20, 2010 – ten days before she returned – because her leave began on May 28. Plaintiff countered by arguing her leave did not begin until June 3, when the specialist completed the FMLA paperwork. The Court disagreed and determined plaintiff's FMLA leave expired on August 20, 2010. Therefore, plaintiff's interference claim failed because plaintiff could not show defendant denied her FMLA benefits to which she was entitled. In addition, her retaliation claim failed because defendant was no longer obligated to hold her position open for her after August 20, 2010.

Mendel v. City of Gibraltar, 23 WH Cases2d 664 (E.D. Mich. 2014)

Plaintiff, a police dispatcher for the City of Gibraltar, brought claims alleging defendant, the City of Gibraltar, interfered with his medical leave and terminated his employment in violation of the FMLA. Plaintiff suffered from severe abdominal pain, which prevented him from working several consecutive shifts in December 2008, and he was unable to work his January and February 2009 shifts. Plaintiff's supervisor removed him from the schedule and told him to provide a doctor's note by February 16, 2009 or voluntary resignation would be presumed. Plaintiff did not timely provide the requested documentation and defendant terminated his employment. Plaintiff eventually had surgery for his condition in May 2009, and was cleared to return to work on June 1, 2009.

The court granted defendant's motion for summary judgment, accepting defendant's argument that even if it improperly denied plaintiff's leave, it was entitled to summary judgment as a matter of law because plaintiff was unable to return to work within the 12-week time period allowed under the FMLA. The court rejected plaintiff's argument that his termination tolled his FMLA leave because he was fired during his 12-week leave period. The court cited Sixth Circuit precedent which states that a plaintiff cannot recover under the FMLA even if he is terminated before the remaining leave period expires if he could not return to work prior to the twelfth week. The court also rejected plaintiff's argument that because he was a part time employee, worked a flex shift, and was fired, the time between his termination and recovery should not count toward his FMLA leave. The court reasoned that, under the plain reading of the statute, if a part-time employee misses his entire scheduled work week, that employee uses a whole week of FMLA leave without any proportional adjustment.

Finally, the court turned to the issue of how to calculate FMLA-leave weeks following termination for an employee who worked a flex schedule. Following 29 C.F.R. § 825.205(3), the court looked at the average weekly hours plaintiff worked in 2008, determining that he worked an average of 35 hours per week during 2008. Because he worked a full time schedule, all 15

weeks counted for purposes of determining post-termination FMLA leave. Thus, the court found that plaintiff's leave entitlement would have expired three weeks before he was released to return to work and, therefore, his FMLA claim failed as a matter of law.

Summarized Elsewhere:

Vaigasi v. Solow Mgmt. Corp., 2014 WL 1259616 (S.D.N.Y. Mar. 24, 2014)

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 23 WH Cases2d 174 (3d Cir. 2014)

Holloway v. ITT Ed. Servs., Inc., 2014 WL 4273896 (Aug. 28, 2014)

Scorsone v. Wal-Mart Stores, Inc., 2014 WL 2207002 (E.D. Mich. 2014)

Dean v. Safeway, Inc., 2014 WL 6473543 (D. Or. Nov. 18, 2014)

Turner v. Eastconn Reg'l Educ. Serv. Ctr., 588 F. Appx. 41, 23 WH Cases2d 1778 (2d Cir. 2014)

V. SPECIAL CATEGORIES OF EMPLOYEES

A. Employees of Schools

Summarized Elsewhere:

Davies v. N.Y. City Dep't of Educ., 563 Fed. Appx. 818, 22 WH Cases2d 926 (2d Cir. 2014)

B. Key Employees

1. Qualifications to Be Classified as a Key Employee
2. Standard for Denying Restoration
3. Required Notices to Key Employees
 - a. Notice of Qualification
 - b. Notice of Intent to Deny Restoration
 - c. Employee Opportunity to Request Restoration

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

I. OVERVIEW

II. INTERRELATIONSHIP WITH LAWS

A. General Principles

B. Federal Laws

1. Americans with Disabilities Act

Summarized Elsewhere:

Flamberg v. Israel, 2014 WL 1600313 (S.D. Fla. Apr. 21, 2014)

Sper v. Judson Care Ctr., Inc., 2014 WH Cases2d 163472 (S.D. Ohio July 08, 2014)

Knox v. Town of Southeast, 2014 WL 1285654 (S.D.N.Y. Mar. 31, 2014)

Word v. AT&T, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)

- a. General Principles
- b. Covered Employers and Eligible Employees
- c. Qualifying Events
 - i. Serious Health Conditions and Disabilities
 - ii. Triggering Events for Leave of Absence Rights
- d. Nature of Leave and Restoration Rights
 - i. Health Benefits
 - ii. Restoration

Summarized Elsewhere:

White v. County of Los Angeles, 225 Cal. App. 4th 690, 22 WH Cases2d 676 (Cal. Ct. App. 2014)

- iii. Light Duty

Hansen v. Robinson Nevada Mining Co., 158 WH Cases2d 534 (D. Nev. 2014)

Plaintiff alleged his employer, a mining company, interfered with his FMLA rights by failing to inform him of his rights under the FMLA and ultimately terminating his employment. There was no dispute that plaintiff was a disabled person within the meaning of the ADA. After an absence from work, the plaintiff's doctor released him to return to work but stated that he

would not be able to perform the functions of the position he held before going on leave. The plaintiff believed he could have held one of four open positions upon his return to work; however, the defendant determined that plaintiff was not qualified for any of the positions either because of his disability or because the position would have been a promotion. The defendant terminated his employment because he was not able to perform the essential functions of his position or any open position for which he was qualified.

The district court granted summary judgment for defendant, holding that plaintiff failed to establish a *prima facie* case of FMLA interference. First, the court found plaintiff was not eligible for FMLA leave because he only worked 1,131 hours in the 12 months prior to his leave of absence and, therefore, did not meet the FMLA's 1,250 hour threshold. The court held that this fact alone was sufficient to grant summary judgment in favor of the employer. Second, the court found plaintiff failed to show his termination was motivated by his use or request of FMLA leave; indeed, defendant had approved twenty-six weeks of short-term disability leave and, at the time he was attempting to exercise his leave rights, plaintiff was also attempting to return to work under light duty. Thus, the court found that plaintiff failed to show a causal connection between his attempted use of FMLA leave and his termination.

e. Medical Inquiries and Records

Summarized Elsewhere:

White v. County of Los Angeles, 225 Cal. App. 4th 690, 22 WH Cases2d 676 (Cal. Ct. App. 2014)

Doby v. Sisters of St. Mary of Oregon Ministries Corporation, et. al. 2014 WL 3943713 (D. Or. August 11, 2014)

f. Attendance Policies

2. COBRA

Summarized Elsewhere:

Gresset v Central Arizona Water Conservation Dist., 2014 WL 4053404 (D. Ariz. Aug. 13, 2014)

3. Fair Labor Standards Act

4. 42 U.S.C. § 1983

Summarized Elsewhere:

Gresset v Central Arizona Water Conservation Dist., 2014 WL 4053404 (D. Ariz. Aug. 13, 2014)

5. Title VII of the Civil Rights Act

Summarized Elsewhere:

Word v. AT&T, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)

Muldrow v. Blank, 2014 WL 938475 (D. Md. 2014)

Mezu v. Morgan State Univ., 2014 WL 2452574 (D. Md. May 30, 2014)

6. Uniformed Services Employment and Reemployment Rights Act

Summarized Elsewhere:

Maya v. Leprino Foods Co., 2014 WL 1091251 (E.D. Cal. Mar. 18, 2014)

7. IRS Rules on Cafeteria Plans
8. ERISA [New Topic]
9. Government Contract Prevailing Wage Statutes [New Topic]
10. Railway Labor Act [New Topic]
11. NLRA and LMRA [New Topic]
12. Genetic Information Nondiscrimination Act of 2008 [New Topic]
13. Social Security Disability Insurance [New Topic]

C. State Laws

Hettler v. Entergy Enterprises, Inc., 2014 WL 1508699 (S.D.N.Y. Mar. 28, 2014)

Plaintiff worked as a security lieutenant and alarm station operator. He alleged retaliation and interference claims against his employer and several co-employees under the FMLA. He claimed that defendants harassed and intimidated him and also wrongfully denied certain of his requests to leave because he had taken intermittent leave under the FMLA in 2009, 2012, and 2013 to care for his wife.

Defendants moved to dismiss plaintiff's FMLA claims, arguing that he waived them by also bring a claim under the New York Whistleblower Act because of its provision stating that employees waive other claims when bringing an action under the Act. The court concluded that plaintiff's claims under the FMLA would not warrant dismissal. It reasoned that plaintiff's claims of interference and retaliation did not stem from whistleblowing; rather, they stemmed from defendants violating the FMLA by denying his requests for leave and retaliating against him for taking leave under the FMLA. The court further found that if they read the Whistleblower Act as displacing federal claims, it would create serious constitutional concerns and therefore, the Act was to be construed to avoid such conflicts. Therefore, plaintiff's action under the Whistleblower Act did not waive his FMLA claim. The court denied the defendants' motion to dismiss plaintiff's FMLA claims.

Summarized Elsewhere:

Kolodziej v. Board of Educ. Of Southern Regional High School District, Ocean County, 436 N.J Super. 546, 95 A.3d 763 (N.J. Ct. App. 2014)

1. State Leave Laws

Summarized Elsewhere:

Sper v. Judson Care Ctr., Inc., 2014 WH Cases2d 163472 (S.D. Ohio July 08, 2014)

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)

- 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

Freelain v. Village of Oak Park, 2014 WL 148739 (N. D. Ill. 2014)

Plaintiff was a detective employed by defendant police department. Defendant granted plaintiff two FMLA leaves, the first on September 24, 2012 and the second in early January 2013. These leaves were meant to care for himself and his ill wife. Four days after taking the first FMLA leave, defendant expressed its unhappiness with sick leave plaintiff took prior to taking the first FMLA leave and advised him that those absences put at issue whether he was fit-for-duty. He was therefore asked to submit to a fitness-for-duty evaluation on October 2, 2012. Until the evaluation was completed, defendant advised plaintiff that his absence would not be classified as a work-related injury, which would entitle plaintiff to receive full pay during his time off. Instead, his absence was deemed a non-work-related injury, which would be counted against his sick and vacation leave balance. A doctor eventually cleared plaintiff to return to work on November 15, 2012. However, because the evaluation took so long, plaintiff had no remaining sick and vacation leave balance. In fact, because that balance was exhausted during his leave, he then was also docked pay during his leave. Plaintiff's second FMLA leave began in January 2013 and ran out on March 8, 2013. Plaintiff then sought to extend this leave, but had to return to work and forego time caring for his wife when defendant did not immediately respond to his request. He was finally granted the extension in April 2013.

Plaintiff asserted an FMLA retaliation claim against defendant regarding his first leave and an interference claim regarding his second leave. Defendant filed a motion to dismiss, which the court denied.. The Court rejected defendant’s argument that, because plaintiff was receiving benefits under Illinois’ worker compensation law, that law’s exclusive remedy provision precluded relief under the FMLA. The Court also held that plaintiff sufficiently pled the elements of material adverse action and causation to support his retaliation claim. Plaintiff did so by alleging he lost his sick and vacation leave balance after advising defendant that he had a work-related injury. Plaintiff’s complaint also adequately alleged causation by asserting that defendant was dissatisfied with plaintiff taking FMLA leave and based on the temporal proximity between his request and the adverse action. The Court further held that plaintiff pled adverse action by alleging defendant docked his pay, deprived him from caring for his wife, and delayed the evaluation which caused a loss of pay. Plaintiff also stated an FMLA interference claim by alleging that defendant partially approved – and thereby delayed approval of – his second FMLA leave. Plaintiff’s allegations showed that, by requiring him to return to work prematurely, he was denied “leave that he was entitled to take [to care for his wife] – at least for a period of time.”

Summarized Elsewhere:

Nicely v. Safeway, Inc., 2014 WH Cases2d. 163 (D. Md. July 3, 2014)

- b. Job Restructuring and Light Duty
 - c. Requesting Medical Information
 - d. Recovery of Group Health Benefit Costs
- 3. Fair Employment Practices Laws
 - 4. Disability Benefit Laws
 - 5. Other State Law Claims [New Topic]

Summarized Elsewhere:

James v. Diamond Products Ltd., 2014 WL 4285665 (N.D. Ohio Aug. 27, 2014)

- D. City Ordinances [New Topic]

III. INTERRELATIONSHIP WITH EMPLOYER PRACTICES

- A. Providing Greater Benefits Than Required by the FMLA

Summarized Elsewhere:

Thomas v. Doan Const. Co., 2014 WL 1405222 (E.D. Mich. Apr. 11, 2014)

Alexander v. Carolina Fire Control Inc., 23 WH Cases2d 978 (M.D.N.C. July 25, 2014)

- B. Employer Policy Choices

Summarized Elsewhere:

Oak Harbor Freight Lines, Inc. v. Antti, 998 F. Supp.2d 968, 22 WH Cases2d 17 (D. Or. 2014)

1. Method for Determining the “12-Month Period”

Casas v. School Dist. of Hillsborough County, 22 WH Cases2d 1689 (M.D. Fla. July 2, 2014)

Plaintiff filed suit alleging FMLA interference and retaliation, and additional claims under state disability discrimination laws. The defendant argued that plaintiff had exhausted all of her FMLA leave for the allotted 12-month period. The plaintiff argued that the leave she took that led to her termination occurred in a different 12-month period than her initial period of leave, and thus, she had not exhausted her leave entitlement when she was terminated.

The court denied the defendant’s motion for summary judgment on the plaintiff’s FMLA interference claim. The court cited to the 9th Circuit case *Bachelder v. American West Airlines, Inc.*, 259 F.3d 1112, 1128 (9th Cir. 2001) for its discussion on employers’ calculation methods, and its requirement that an employer’s calculation methods be clear and open. Following *Bachelder*, the *Casas* court held that, since the defendant’s leave policy referenced both calendar and fiscal year computation periods, the policy was ambiguous and contrary to *Bachelder*. As such, a question of fact remained as to whether the plaintiff had exhausted her FMLA leave entitlement at the time of her termination.

On the other hand, the court granted the defendant’s motion for summary judgment as to plaintiff’s FMLA retaliation claim because plaintiff failed to put forth any evidence showing that the defendant had a retaliatory intent in terminating plaintiff’s employment. In so holding, the court noted that an employer may terminate an employee based on a mistaken belief without violating federal law. Since the plaintiff’s evidence only established that the defendant may have mistakenly believed that the plaintiff’s FMLA leave entitlement had expired, without more, summary judgment was appropriate.

2. Employee Notice of Need for Leave

Summarized Elsewhere:

Kennedy v. U.S. Postal Service, 2014 WL 1047820 (N.D. Ind. March 17, 2014)

3. Substitution of Paid Leave

Howard v. U.S. Steel Corp., 2014 WL 1042968 (N.D. Ala. March 14, 2014)

Plaintiff worked in a shipping facility for defendant. Throughout her employment, she accumulated a series of disciplinary actions for performance-related problems. Plaintiff also took several periods of paid medical leave relating to her breast cancer diagnosis, although these were not termed FMLA leave. Plaintiff was eventually terminated for her performance problems. She brought suit for FMLA leave and retaliation.

The court held that Plaintiff was not damaged by Defendant's failure to label her twelve month paid sick leave as FMLA leave, and noted that she actually received much more than the FMLA required. Plaintiff also was not able establish a claim for retaliation because she could not establish monetary losses based on termination. The court noted that plaintiff claimed to have been totally disabled several days prior to her discharge and therefore was unable to establish entitlement to reinstatement.

4. Reporting Requirements

Bradley v. Army Fleet Support, LLC, 2014 WL 5307470 (M.D. Ala. Oct. 16, 2014)

On March 4, 2013, plaintiff informed the employer he would need to use FMLA leave on March 18 to take his son to the doctor. On March 10, plaintiff injured his finger, which required surgery. Plaintiff was required to be off four to six weeks after the surgery and notified human resources of his need for leave. Human resources instructed him to inform his supervisor, which he did. Thereafter, plaintiff kept in touch with his supervisor to update him on the status of his return to work. Nevertheless, on March 25, defendant terminated plaintiff's employment for violating a work rule prohibiting unauthorized absences for three consecutive days and a CBA provision that stated seniority is broken after three consecutive days without reporting an absence. Plaintiff filed an FMLA interference claim, arguing defendant interfered with his rights by not appropriately designating his leave and by terminating his employment. Plaintiff also argued defendant retaliated against him.

Defendant moved for summary judgment, arguing plaintiff's time off did not qualify for FMLA leave because he was able to perform some functions of his job. While plaintiff was released to sedentary duty, the Court determined plaintiff's leave qualified under the FMLA because he was not able to perform any of the essential functions of his position as an aircraft technical inspector. Defendant also argued it was not liable for FMLA violations because plaintiff did not notify it of its absences pursuant to the CBA. The Court also rejected this argument, finding that plaintiff's call to his supervisor, notifying him that he would be out for four to six weeks meant he did not have to call in every day. Therefore, the Court denied summary judgment as to the interference claim. The Court also denied summary judgment on the retaliation claim, finding there was a genuine issue of fact as to whether defendant's stated reason for discharging plaintiff – violation of the CBA's call in procedure – was pretextual.

5. Fitness-for-Duty Certification

Summarized Elsewhere:

Alanis v. Metra, 2014 WL 1297440 (N.D. Ill. Mar. 31, 2014)

6. Substance Abuse

Summarized Elsewhere:

***Bailey v. City of Daytona Beach Shores*, 560 Fed.Appx. 867, 22 WH Cases2d 358 (11th Cir., 2014)**

***Jones v. Con-Way Freight, Inc.*, 2014 WL 1120062 (W.D.N.C. March 20, 2014)**

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

Summarized Elsewhere:

***Holder v. Illinois Dept. of Corrections*, 751 F. 3d 486, 22 WH Cases2d 1071 (7th Cir. 2014)**

10. Restoration to an Equivalent Position for Employees of Schools

IV. INTERRELATIONSHIP WITH COLLECTIVE BARGAINING AGREEMENTS

A. General Principles

***Donald v. Se. Pa. Transp. Auth. (SEPTA)*, 2014 WL 3746520 (E.D. Pa. July 29, 2014)**

Plaintiff was employed as a general helper at defendant's bus depot. Under plaintiff's collective bargaining agreement, he would be dropped from service if he exhausted his allotted amount of sick leave. Plaintiff requested FMLA leave for the installation of a pacemaker. When plaintiff attempted to report to work with medical restrictions, he was sent home and told that he could not come back until he could work without restrictions. Before plaintiff could return to work without medical restrictions, he exhausted his allotted sick leave and was automatically discharged.

Plaintiff asserted, *inter alia*, FMLA claims for interference and retaliation. On defendant's motion for summary judgment, the court determined defendant did not interfere with plaintiff's rights under the FMLA because plaintiff would not have been able to perform an essential function of his position at the end of his FMLA leave. While plaintiff argued that he was still able to perform the majority of his duties at the time of his discharge, he could not fuel and move vehicles—one of his primary responsibilities. Turning to the plaintiff's retaliation claim, the court employed the burden-shifting framework established in *McDonnell Douglas*. The court found that plaintiff met his burden of establishing a *prima facie* case of retaliation determining the short passage of time between plaintiff's invocation of his rights and the adverse employment action suggested a causal connection between the two. The court agreed with defendant, however, that it had proffered a legitimate reason for terminating plaintiff, as the collective bargaining agreement provided that an employee who exhausts his allotted sick leave would be terminated. The court also found that plaintiff failed to prove by a preponderance of the evidence that defendant's proffered reason was pretextual. The court therefore granted summary judgment for defendant on the FMLA retaliation claim.

Dean v. Safeway, Inc., 32014 WL 6473543 (D. Or. Nov. 18, 2014)

Plaintiff worked as a truck driver for defendant. During his employment, he was covered by a collective bargaining agreement (“CBA”). Under the terms of the CBA, employees were required to fill out an authorized Leave of Absence form before taking any leaves of absence, as well as call in to the appropriate supervisor. In addition to the CBA, defendant sent all employees a memo requiring verbal notice for FMLA leave. While on the job, plaintiff injured his knee and was told to report to a light-duty position. Plaintiff expressed that he was unable to get to the location for this position because he was on pain medication, making driving impossible, and that he did not need the money anyway. Defendant did not provide plaintiff with any forms to fill out, and plaintiff did not fill out any forms for his leave. He also did not call in for his absences. Believing that plaintiff did not comply with the CBA-required call-in policy, defendant treated plaintiff as having voluntarily quit his position. Plaintiff sued for FMLA interference and retaliation.

Defendant moved for summary judgment on both FMLA claims. Defendant argued that for purposes of plaintiff’s interference claim, plaintiff did not give adequate notice under the CBA of his intent to take leave, that he was not denied FMLA benefits because he voluntarily quit, and even if he was able to prove interference, he could not show prejudice because he was not released to return to work within twelve weeks of the date of his discharge. The court found that the CBA’s requirements were not clear, and that a reasonable jury could determine that plaintiff’s verbal rejection of the light-duty program constituted appropriate notice, meaning that it was defendant’s responsibility to provide plaintiff with the appropriate form. Further, the court found that there was a genuine issue of material fact as to whether plaintiff complied with the ambiguous requirements of the CBA’s leave notice requirements, and therefore it was not clear that plaintiff had voluntarily quit his employment. In response to defendant’s argument that plaintiff was not medically released to return to work within twelve weeks, the court found that the legal argument was persuasive, but that there was no evidence indicating that plaintiff was incapable of returning to work prior to the twelve weeks, rather only that his doctor’s appointment, where he was released to return to work, happened to fall more than twelve weeks after his discharge. The court denied summary judgment on plaintiff’s FMLA interference claims.

In regards to plaintiff’s FMLA retaliation claim, defendant argued that plaintiff was not terminated for poor attendance but because he voluntarily quit when he failed to comply with the CBA’s call-in requirement. The court found that a reasonable jury could find that plaintiff did comply with the CBA and, because of that date of his discharge just a week later, there was adequate evidence of the requisite causal connection. Therefore, the court denied summary judgment on the FMLA retaliation claim as well.

B. Fitness-for-Duty Certification

CHAPTER 10. INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. OVERVIEW

Summarized Elsewhere:

Ruark v. Arkansas Democrat-Gazette, Inc., 2014 WL 1809606 (E.D.Ark. 2014)

II. TYPES OF CLAIMS

Robinson v. Cardinal Constr., Inc., 2014 WL 1389308 (N.D. Iowa Apr. 9, 2014)

Plaintiff was injured in an off-the-job accident, for which he took FMLA leave. After he was released to return to work with no restrictions on May 4, 2010, he was terminated on June 14, 2010. Approximately a week later, he filed claims of disability discrimination and eventually initiated a civil action. The day before discovery was due to close, plaintiff sought to amend his complaint to add an FMLA discrimination claim, asserting that newly-discovered evidence lead him to conclude that he also had an FMLA claim. Because the time to amend the pleadings had already passed pursuant to a scheduling order, the district court reviewed whether plaintiff had shown good cause to amend his complaint.

The employer asserted that plaintiff knew all of the operative facts at the time the complaint was filed for an interference claim, but plaintiff asserted that he was bringing a discrimination claim. The district court noted that for an interference claim, the plaintiff merely had to show that he was entitled to a benefit that was denied. For a discrimination claim, which the court distinguished from a retaliation claim that would arise for objecting to an unlawful act, the plaintiff would have to show that the adverse action was because of the exercise of FMLA rights. The district court held that because plaintiff alleged that he had not been restored to his former position following leave, that he was bringing a claim for interference. Therefore, because there was no showing that he did not learn until the discovery period of facts sufficient to state a claim, the motion to amend was denied.

Summarized Elsewhere:

Maycole v. Philadelphia Corporation for Aging, 2014 WL 1281121 (E.D. Pa. Mar. 31, 2013)

A. Interference With Exercise of Rights

Musoke v. KeyBank Nat. Ass'n, 2014 WL 969896, (W.D. Wash. Mar. 11, 2014)

Plaintiff sued her former employer, alleging FMLA interference and retaliation. Plaintiff was terminated after she had received several warnings for her work behavior, including for absences from required meetings. Plaintiff alleged that she took FMLA leave and that while on leave she was called to the worksite. She also alleged that upon her return from leave, she received a written warning for not performing her work duties while on leave. Plaintiff pointed out that other employees who missed meetings were not disciplined.

The court held that plaintiff had produced enough evidence to present genuine issues of material fact as to whether her employer interfered with exercise of her FMLA rights, and whether her use of FMLA leave was improperly used as a factor in her termination. It denied employer's motion for summary judgment on these grounds.

Queen v. Haywood Regional Medical Center Medical Care Plan, 2014 WL 4311030 (W.D.N.C. Aug. 29, 2014)

Plaintiff brought an action against her former employer for her dismissal under the FMLA for interference and retaliation. Defendants had terminated her employment while plaintiff was on approved FMLA leave to care for her sick son, and maintained that a merger of two hospitals resulted in duplication of employee positions and duties, requiring a reduction in force.

The district court held that plaintiff failed to adduce any evidence from which a reasonable jury could conclude that she would not have been terminated from her employment if she had not taken FMLA leave. Plaintiff's primary evidence – the timing between her taking FMLA leave and her dismissal – was relevant but did not transform this case into the “rare” case in which timing is independently sufficient to create a triable issue of fact. The court noted that defendants countered with evidence that would help show that they would have dismissed plaintiff as part of a reduction in force for performance reasons unrelated to her FMLA leave.

The court also dismissed plaintiff's FMLA claim because she could not establish a causal connection between her protected activity and the dismissal. The court reasoned that the decision to fire plaintiff was made long before she requested and took FMLA leave. Even if she had established prima facie claim of retaliation, the court further noted that: (1) defendants provided documentation of plaintiff's performance issues, including a performance improvement plan for problems with decision-making, confidential information, and timeliness that also predated her protected activity and led to the decision to terminate her employment; and (2) plaintiff's “disagreement” with her supervisors' negative evaluations was not adequate to prove pretext.

Young v. Sungard Financial Systems, LLC., 29 A.D. Cases 1815, 2014 WL 1576903 (N.D. Ala., Apr. 17, 2014)

Plaintiff, a data entry employee, had a history of performance and attendance issues during the last 18 months of her four years of employment for defendant. Over the course of employment, the employee applied for FMLA leave 31 times through the employer's third-party FMLA administrator. Leave was denied on two occasions due to plaintiff's admitted failure to submit proper documentation. The employee was ultimately terminated for violating the strict policies in place regarding use of the employer's computer systems, in addition to her history of discipline for performance issues and attendance violations.

Plaintiff filed FMLA interference and retaliation claims. Defendant filed a motion for summary judgment, which the court granted. The court dismissed the employee's interference claim, ruling she provided no evidence that the employer ever denied or otherwise interfered with her rights under the Act, noting the two times that her request for leave was denied were due to her

failure to submit proper documentation. As to the retaliation claim, the court found that plaintiff provided insufficient evidence of a causal connection between her termination and her requests for FMLA. The court went on to state that even if she had made a *prima facie* case for retaliation the employee submitted no evidence the employer's reasons for discharging the employee were pretext for unlawful retaliation.

Shetty v. Hampton University, 2014 WL 280448 (E.D. Va. Jan. 24, 2014)

Plaintiff, a tenured professor in defendant's Physical Therapy Department, requested FMLA leave to travel to India for medical treatment. His request was initially approved. However, when defendant received the certification form from plaintiff's health care provider and the certification did not support the type of leave requested, defendant's Director of Human Resources sent a letter to plaintiff informing him that he was not eligible for FMLA. By that time, plaintiff had already left for India. Accordingly, his leave was deemed unauthorized. However, when plaintiff returned the following month, defendant did not take action against him, nor did defendant deny him benefits.

Months later, plaintiff resigned and brought various claims against defendant, including an FMLA interference claim. The FMLA regulations, which the Magistrate Judge relied upon, provide that an employer who interferes with an employee's FMLA rights, but has not denied the employee any benefits, are only liable for any actual monetary losses sustained by the employee as a direct result of the violation. The Court, adopting the findings and recommendations of the Magistrate Judge, granted the defendant's motion for summary judgment because there was no evidence before the court as to the alleged actual monetary loss.

Silver v. Corinthian Colleges, Inc., 571 Fed. Appx. 577, 22 WH Cases2d 925 (9th Cir. 2014)

Plaintiff alleged that defendant had interfered with her FMLA rights by not giving her notice of such rights. In this unpublished memorandum order, the Ninth Circuit affirmed the trial court's grant of summary judgment to defendant. The court held that failing to inform plaintiff-employee of her FMLA rights did not constitute a violation of the law because plaintiff presented no evidence that she lost compensation or benefits. The court declined to consider alternative FMLA-theories that plaintiff did not raise in the district court.

Jones v. Children's Hospital, 2014 WL 5824902 (E.D.La. Nov. 10, 2014)

Plaintiff, a former switchboard operator for a hospital, filed suit against her former employer, alleging FMLA claims of interference and retaliation. The employee asserted that her supervisor had interfered with her FMLA rights by dissuading her from taking FMLA leave to which she was entitled and that, as a result, she was entitled to her actual money damages from the interference, i.e., taxi fares that were incurred because the employee did not provide care to her husband. The employee also claimed that she was terminated from her employment in retaliation for asserting her FMLA rights. On a motion for summary judgment, the court dismissed the retaliation claim but allowed the interference claim to proceed to trial.

On the interference claim, the employee testified that her supervisor told her that she could not take her leave of absence because the hospital was short-staffed at her position. The employer argued that, even if such a statement was made, the employee could not state a claim because the hospital had, despite the comment, approved the leave request. The court noted, however, that an interference claim is not limited to instances where leave is denied. Rather, interference claims may also arise when an employee is discouraged from taking a leave. The court held that the supervisor's alleged effort to dissuade the employee from taking leave, together with the prejudice suffered by the employee in the extra taxi fares incurred in order to care for the employee's husband because leave was not taken, warranted a denial of summary judgment.

In contrast, the court dismissed the employee's retaliation claim. The employee asserted that she had not engaged in the misconduct relied upon by the hospital in making the termination decision. However, the court found that there was no dispute that the employer had relied, in good faith, on reports of the plaintiff's misconduct submitted by other employees. The court highlighted that, in cases where the employer's decision is based, in good faith, on the complaints of other employees, a dispute over whether the underlying conduct occurred is insufficient to withstand a motion for summary judgment.

***O'Donnell v. Passport Health Commc'ns, Inc.*, 561 F. Appx. 212, 22 WH Cases2d 514 (3d Cir. 2014)**

Plaintiff brought suit under the FMLA against her former employer, alleging interference and retaliation. Before plaintiff took planned FMLA leave, her employer informed her that, because of a company reorganization, her job would be eliminated. Her employer encouraged her to apply for another position, and, subsequently, the employer offered her a new position. Upon offering plaintiff the new position, the employer informed her that she was required to sign several employment documents for the new position, including a non-compete agreement. After receiving the new job offer, plaintiff took FMLA leave. While on leave, plaintiff failed to sign the documents by a designated due date and, therefore, the employer terminated her employment. Plaintiff argued that the employer interfered with her FMLA leave by requiring her to sign the documents while she was on leave.

The district court granted the employer's motion for summary judgment, and plaintiff appealed. The Third Circuit rejected plaintiff's argument, finding that plaintiff knew she had to sign the documents before she invoked her FMLA rights. The Court also found that the employer's contacts with plaintiff did not hamper or discourage plaintiff's exercise of her right to medical leave. The Court noted that "there is no right in the FMLA to be left alone, and be completely absolved of responding to the employer's discrete inquiries." Analyzing the retaliation claim, the Court found that, even if the employer's decision to require plaintiff to sign the documents while she was on leave satisfied the causation element, plaintiff's failure to sign the document was a legitimate, nondiscriminatory reason for terminating her.

Museau v. Heart Share Human Servs. of New York, 2014 WL 1277006, 2014 WH Cases2d 154 (E.D.N.Y. Mar. 27, 2014)

The employee filed a lawsuit against her former employer for FMLA interference and retaliation. The employee claimed that she was forced to work from home during her FMLA leave, that she was not reinstated when she returned from leave, and that she was retaliated against for taking FMLA leave. The court granted summary judgment for the employer on all counts.

Regarding the interference claim, the employee had volunteered to work from home by telling coworkers that she would periodically check her email, and that they should feel free to email her. The employee admitted she did not complain to anyone about being contacted while on leave, and did not ask coworkers to stop contacting her. The court found that the employee was permitted to return to work, and then was laid off the next day due to budget cuts. There was ample evidence showing the budgetary constraints, and seven other employees were also laid off. As to the retaliation claim, although there was close temporal proximity, the budgetary restraints were a legitimate reason for her discharge, and there was no evidence of pretext. Temporal proximity, and the mere assertions that her supervisor was angry at her for taking FMLA leave, was not sufficient to overcome the employer's nondiscriminatory reasons for the termination. Accordingly, the court granted summary judgment for the employer.

Peda v. New York Univ. Hospitals Ctr., 2014 WL 1013844 (S.D.N.Y. Mar. 17, 2014)

The employee was a nurse who filed a lawsuit against her former employer for interference and retaliation under the FMLA. The employee had a lengthy disciplinary record, which included numerous complaints about her performance and professionalism. In October 2011, the employee yelled at another nurse about operating room assignments in front of a patient who was prepared to undergo surgery. Because of that incident, the employer decided to discharge the employee. After the employer made the decision, but before notice was given to the employee, the employee had a conversation with her supervisor about taking FMLA leave in the future.

The court held that no causal connection could be found where the employee would have been terminated regardless of whether she took FMLA leave. The decision to discharge the employee was established before the employee requested leave, and therefore, the court granted summary judgment to the employer on both of the employee's FMLA claims.

Hodges v. Greenspun Media Grp., LLC, 2014 WL 814231 (D. Nev. Feb. 28, 2014)

The employee, a former traffic manager, filed an FMLA interference claim against her employer after she was discharged while on intermittent FMLA leave. Plaintiff requested and was granted both continuous and intermittent FMLA leave, due to her medical conditions. While still on intermittent leave, the employee told one of her subordinates that the employer would retaliate against her if she used FMLA leave, and falsely stated that the subordinate was ineligible for leave. The employee's statement violated the employer's policies, and her managerial training. Accordingly, the employee was discharged.

The court granted summary judgment in favor of the employer. It concluded that the employee failed to provide any evidence to show that her discharge was motivated by her use of FMLA leave. Moreover, the evidence on the record demonstrated that the employer consistently granted the employee's leave requests.

Bement v. Cox, 2014 WL 4699620 (D. Nev. Sept. 22, 2014)

The employee filed a lawsuit against his employer alleging denial of FMLA leave and discouragement of FMLA leave. In addition to claiming that his request for leave had been denied, the employer also asserted that he was improperly required to return FMLA paperwork for leave approval without being told what the consequences would be if he failed to do so. The employer moved for summary judgment, which the court granted in part and denied in part.

The court denied summary judgment for the employer on the leave claim because it found a genuine issue of material fact as to whether the employer had informed the employee of the consequences of his failure to return the certification packet. The employee alleged that he was not told he had fifteen days to return the packet, and was surprised to find that his leave request was denied after the fifteen day period had elapsed. As for the allegation that, on a separate occasion, the employer had discouraged the employee from taking FMLA leave, the court granted summary judgment for the employer. The court found that the employee did not take or request FMLA leave during the relevant time period. Therefore, the employee could not prove that he took protected leave, or causation. Although the employee had taken sick leave during the relevant period, the court found that there was no evidence to suggest that this was protected FMLA leave. Moreover, the employee claimed that his later suspension was caused by a separate, approved FMLA leave he had taken six months prior to his suspension. The court held that a six months period between the employee's suspension and his FMLA leave was too far removed to support causation.

Ferguson v. Walmart, 2014 WL 24139 (C.D. Cal. Jan. 2, 2014)

On March 8, 2011, defendant decided to terminate plaintiff for "gross misconduct," effective March 9. After the meeting with his supervisors on March 8, plaintiff "felt ill" and was diagnosed with anxiety on March 9. Plaintiff then asserted his FMLA rights to leave. After initially refusing plaintiff's request because they had already terminated him, defendant reinstated plaintiff and granted his request for leave. Plaintiff's leave was subsequently extended until September 2011. When plaintiff attempted to return to work at that time, defendant indicated it needed a medical release prior to allowing plaintiff to resume working. Plaintiff obtained the medical release in late November, but did not return to work. Ultimately, defendant concluded plaintiff had abandoned his job in January 2012.

The district court granted summary judgment as to plaintiff's FMLA claims. Plaintiff could provide no evidence that his request for FMLA leave was a factor in either of defendant's March 2011 or January 2012 termination decisions.

Imeson v. Eagle View Technologies, Inc., 2014 WL 1047165, 22 WH Cases2d 406 (W.D. Wash. Mar. 14, 2014)

The employee was a former sales manager who sued the employer for interference and retaliation under the FMLA. When the employee returned to work after FMLA leave, the employer took her largest account away from her. The employer also allegedly “gave her a hard time” for taking leave. In an email, one supervisor asked another whether the employee should be placed on probation for absenteeism. Another supervisor stated that the employee was the “sickest person [he] has ever known.” The employee was also issued a Performance Improvement Plan (“PIP”), which was stamped “Proprietary and Confidential.” The employee discussed the PIP with a coworker. The employer subsequently discharged the employee for insubordination and for her discussion with her co-worker regarding the PIP.

The court denied the employer’s motion for summary judgment. The employer argued that the employee’s breach of the PIP confidentiality provision was a legitimate, non-discriminatory reason for her discharge. Plaintiff claimed that this reason was pretext, arguing that she did not reveal anything told to her in confidence at the PIP meeting. Moreover, the employer and employee gave conflicting accounts of the employee’s work performance. The court held that triable issues of material fact existed, and that summary judgment was not proper.

Similarly, issues of material fact precluded summary judgment on the employee’s interference claim. To state a claim for interference based on termination, a plaintiff must show that taking FMLA-protected leave constituted a negative factor in the decision to terminate her. The parties disputed whether the employee’s leave was a negative factor in her termination or the decision to take away her largest account. Defendant argued that (1) her termination letter did not mention her FMLA leave; (2) she was terminated more than four months after her return from leave; and (3) the decision to take away her account was made before she went on leave, and not as a result of her leave. Plaintiff pointed to the email between her supervisors asking whether to put her on probation for absenteeism, and the comments that her supervisor made regarding her sickness. Thus, the court held that triable issues of fact existed and that summary judgment was not proper.

Mezu v. Morgan State Univ., 2014 WL 2452574 (D. Md. May 30, 2014)

Plaintiff, a professor, sued her employer, a state university, for FMLA interference and retaliation claims. Plaintiff’s FMLA interference claim related to defendants’ handling of her request for leave to care for her daughter. Plaintiff also alleged that defendants retaliated against her by failing to timely pay her salary once she returned from leave. Plaintiff brought additional FMLA interference and retaliation claims based upon her attempts to obtain half-time leave to recover from stress related to her alleged course overload. The court dismissed these additional claims on the basis that states were immune from suit under the FMLA “self-care” provisions.

The court initially denied plaintiff’s motion for partial summary judgment on the issue of liability for her FMLA interference claim, in part, because the record did not clearly establish that plaintiff suffered prejudice as a result of defendants’ actions. In that initial proceeding, the court noted that the FMLA provides no relief unless an employee has been prejudiced by the

FMLA violation. Although the court believed that plaintiff was likely to prevail on her FMLA interference claim, it also denied her renewed motion for partial summary judgment regarding FMLA liability because there were disputes of material fact. Specifically, the court found that it was not clear for how long plaintiff's daughter would continue to need care, nor was it clear at what point plaintiff's notice to defendants was sufficient. Furthermore, the court decided that a factfinder could conclude that defendants' requests for additional information for certification were justified under the circumstances.

Langenbach v. Wal-Mart Stores, Inc., 761 F.3d 792, 23 WH Cases2d 182 (7th Cir. 2014)

Plaintiff brought a retaliation claim against the defendant after she was discharged five months after she returned from FMLA leave. Plaintiff received written discipline for not following management routines and frequently failing to complete her duties on time. She then went on an extended FMLA leave for surgery. After she returned, she was reassigned to the night shift. She also received an evaluation that reflected poor leadership skills and insufficient organization, planning, and time management. Defendant placed her on a performance improvement plan and noted that plaintiff needed a "complete turnaround." Plaintiff was discharged after a subsequent follow-up revealed that plaintiff's performance had not improved.

The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The court affirmed, ruling that plaintiff could not survive summary judgment under the direct method of proof. The court noted that issuing plaintiff a poor performance rating, putting her on a performance improvement plan, and reassigning her to the night shift did not constitute adverse employment actions. The court explained that a schedule change is not a materially adverse action where defendant did not alter plaintiff's work schedule to exploit a known vulnerability after she returned from FMLA leave. The court then found that plaintiff's discharge was an adverse action, but held that plaintiff could not establish a causal nexus between her FMLA leave and Defendant's decision to terminate her. The court reasoned that plaintiff's assertions that the timing of her termination was suspicious only amounted to "unbridled speculation," particularly in light of plaintiff's performance issues.

Similarly, the court rejected Plaintiff's attempts to provide indirect evidence of retaliation in light of her failure to prove she was meeting the defendant's legitimate expectations. The court noted that the appropriate issue to consider in this context is whether plaintiff performed well at the time of her discharge, not in relation to her past performance. The court agreed with the district court that plaintiff could not maintain a claim under the indirect method of proof, noting that her poor performance evaluations and other evidence clearly demonstrated that she was not meeting the defendant's expectations.

Evans v. Books-A-Million, 762 F.3d 1288, 23 WH Cases2d 158 (11th Cir. 2014)

Plaintiff brought suit against defendant, alleging that the defendant interfered with her rights under the FMLA, among other things. The district court granted the employer's motion for summary judgment, and the plaintiff appealed. The district court dismissed plaintiff's FMLA claim because it found that plaintiff could not establish that she suffered any loss of income. The court reversed the district court, explaining that the FMLA provides for two categories of relief:

monetary damages and “such equitable relief as may be appropriate, including employment, reinstatement, and promotion.” Thus, the court noted that a plaintiff only needs to demonstrate harm remediable by damages or equitable relief to establish prejudice. Because the district court failed to consider whether equitable relief was available. Moreover, the court also explained that there was an issue of material fact as to whether equitable relief was available, particularly in light of the fact that the defendant emphasized that her job performance suffered while she was home on FMLA leave when deciding to reassign her to an inferior position. Accordingly, the court reversed and remanded the district court’s decision on the FMLA interference claim.

Gutter v. Guideline Mutual Ins. Co. 2014 WL 1614169 (N.D. Ga. March 28, 2014)

Plaintiff brought suit against defendant for FMLA interference and retaliation claims. Plaintiff alleged that she was terminated one day after seeking leave under the FMLA. Defendant sought summary judgment based on evidence that its termination of plaintiff was unrelated to her request for such leave.

The district court denied defendant’s motion for summary judgment for the interference claim because it found that the record gave rise to multiple inferences regarding both when defendant actually decided to fire plaintiff and when that decision was actually communicated to her. The circumstantial nature of the record required a factfinder to make credibility determinations, which the court found to be beyond its function on a motion for summary judgment. In addition, the court found that plaintiff established a *prima facie* claim of retaliation. The temporal proximity between her FMLA request and termination, combined with the factual dispute concerning whether defendant had knowledge of plaintiff’s FMLA request, created a genuine issue of material fact as to causal connection. The court stated that plaintiff did not need to challenge defendant’s proffered reasons as pretextual because they were not the factors defendant relied upon when deciding to terminate her. Based on the record, a reasonable jury could infer from the evidence challenging defendant’s testimony that plaintiff’s termination was precipitated by her request for FMLA leave. Thus, the court denied defendant’s motion for summary judgment on the retaliation claim.

Freeburg v. Deere & Co., 2014 WL 1258029 (C.D. Ill. March 27, 2014)

Plaintiff filed suit against defendant after the termination of his employment. Plaintiff claimed that defendant interfered with his FMLA leave when it impermissibly required verifying notes from his doctor. Second, plaintiff claimed that defendant terminated him in retaliation for exercising his FMLA rights.

Defendant moved for summary judgment on the ground that plaintiff was not actually entitled to additional FMLA leave after he used up his hours. Defendant argued that even if plaintiff was entitled to additional leave under the FMLA, his termination was the consequence of his unexcused absences. Despite the fact that plaintiff used up all of his FMLA leave, the court concluded that there was a genuine issue whether plaintiff was entitled to FMLA leave based on a theory of equitable estoppel, given that defendant had misrepresented the number of FMLA hours remaining. Defendant argued that it was justified in denying plaintiff’s FMLA leave because plaintiff failed to follow defendant’s policy of providing usual and customary

notice and procedural requirements for requesting leave. The court rejected defendant's argument because presenting a doctor's note after returning from a leave of absence did not logically qualify as a notice or procedural requirement for requesting leave. Rather, the court stated that the goal of a doctor's note policy is to verify that a particular absence is FMLA-related. Thus, the court denied defendant's motion for summary judgment in its entirety.

Plaintiff also claimed that his reliance on defendant's statement that he was entitled to FMLA leave gives rise to a promissory estoppel claim. Because plaintiff had previously supplied a doctor's note to cover some FMLA absences, the court found a genuine issue for trial as to whether his reliance upon defendant's promise concerning the number of FMLA hours remaining was expected and foreseeable, as well as whether he relied upon that misrepresentation to his detriment. The court reasoned that if plaintiff was fired because of his failure to supply a doctor's note, then a trier of fact could reasonably find that the detriment suffered by plaintiff was not caused by his reliance on defendant's statement. Therefore, the court denied plaintiff's motion for summary judgment as to his promissory estoppel claim.

Bowman v. CSX Transp., Inc., 2014 WL 2195857 (N.D.N.Y May 22, 2014)

Plaintiff brought this action against defendant for interference and retaliation in violation of the FMLA. Plaintiff claimed interference because he allegedly was unable to use his last two weeks of qualified FMLA leave as a result of his termination. The court found that there was an issue of material fact as to whether plaintiff gave adequate notice that he needed FMLA leave – although calling in sick, without more, was insufficient to put the employer on notice, a doctor's note that the employee needed an entire month of leave due to medical reason created an issue of fact as to whether the employer was on notice of the need for leave. Regardless of whether notice was adequate, the court granted summary judgment for the employer because, given the overwhelming evidence that he was terminated for poor performance and insubordinate behavior, the employee could not establish that he was discharged for taking FMLA leave.

The court also granted summary judgment on Plaintiff's retaliation claim. Applying the *McDonnell Douglas* framework for retaliation, the court found that the close temporal proximity between his taking leave and his termination—plaintiff was on leave when he was terminated – was sufficient to make a *prima facie* case. The court also found that the employer demonstrated that it terminated the employee for a legitimate business reason – his unacceptable performance coupled with his insubordinate behavior. Finally, the court found that the employee was unable to raise an inference of discrimination animus given that (1) with respect to temporal proximity, no FMLA violation occurs where the employer already has decided to terminate the employee; (2) comments by the employer that it believed the employee was being disingenuous by calling in leave after corrective action has nothing to do with whether the employer viewed the employee's FMLA leave as a negative factor; and (3) the fact that an employee received satisfactory performance reviews prior to his leave is not sufficient to create a triable issue of fact.

Seguin v Marion County Health Dpt., 2014 WL 3955162 (M.D. Fla. Aug. 13, 2014)

Plaintiff applied for intermittent FMLA leave to provide care for her two autistic children and her application was approved a short time later, a supervisory position opened and plaintiff applied for it, but she was not offered the position. Several months later, plaintiff was transferred to a clinic farther away from her home, which required her to use more FMLA leave since it took her longer to get to work. Shortly after the transfer, the clinic was closed. Plaintiff and the other employees were not laid off, however, but had to split their work between two clinics. Plaintiff filed suit, claiming FMLA interference and retaliation.

In deciding defendant's motion for summary judgment, the court discussed that, in order to bring a successful FMLA interference claim, plaintiff must show that she suffered some sort of prejudice as a result of the interference. Here, plaintiff did not testify or argue that situations she endured ever coerced her into refraining from submitting a leave request or that she was denied leave on the basis of such conduct. It was undisputed that she received all of the FMLA leave that she has requested. Consequently, the court concluded that plaintiff could not show that she suffered any prejudice as a result of defendant's alleged interference with her FMLA rights. The court found that there was sufficient evidence to permit a reasonable factfinder to conclude that the reasons provided by defendant for plaintiff's transfer and promotion denial were a pretext, given the timing of the adverse employment action and protected activity. Therefore, defendant's summary judgment motion as to the retaliation claim was denied.

Ross v. Gilhuly, et. al. 755 F.3d 185 (3d Cir. 2014)

Plaintiff worked for defendant, a tire manufacturing company, in different managerial positions, beginning in 2008. In 2010, defendant began to receive negative comments regarding plaintiff's work performance from a large customer. The customer subsequently requested that plaintiff be removed as the manager on the account. In 2011, plaintiff's manager reported plaintiff's ongoing work faults to the Human Resources Department. Human Resources, in turn, told plaintiff that he was "not meeting expectations". Several months later, plaintiff received a "does not meet expectations" performance evaluation, as well as a performance improvement plan (PIP). Shortly after receiving the PIP, plaintiff provided his manager with a medical note stating that he had prostate cancer and would undergo treatment. Plaintiff indicated that he wished to continue with the PIP and its timetable was adjusted due to his health and treatment schedule. Following his return to work, defendant provided plaintiff with a memorandum which addressed his performance issues. In particular, the memorandum stated that plaintiff would be responsible for being versed in defendant's new 2012 programs that were implemented while he was out on leave. In response, plaintiff sued, asserting an FMLA interference claim against his manager, individually, as well as an FMLA retaliation claim against both his manager (individually) and the corporate employer. Approximately two months after filing his lawsuit, defendant issued plaintiff a final memorandum noting that his performance continued to fall short of expectations and his employment was being terminated.

The District Court found in favor of both defendant and plaintiff's manager regarding the FMLA claims. Plaintiff subsequently appealed the District Court's decision. With respect to the FMLA interference claim, the Third Circuit examined whether plaintiff's manager was an

“employer” pursuant to the FMLA and whether plaintiff had been denied any benefits under the FMLA. The Third Circuit upheld the dismissal of plaintiff’s FMLA interference claim, finding that plaintiff failed to establish the necessary *prima facie* case. Specifically, the Court found that plaintiff failed to demonstrate that he had been denied any entitled benefits pursuant to the FMLA. With respect to the retaliation claim, the Third Circuit stated that retaliation claims based upon circumstantial evidence are evaluated using the *McDonnell Douglas* burden-shifting framework. The court found that even if plaintiff articulated a *prima facie* case of retaliation, plaintiff failed to rebut the legitimate, non-discriminatory reason proffered by defendant and plaintiff’s manager – namely his ongoing poor job performance issues. In an effort to demonstrate pretext, plaintiff pointed to the timing between his request for FMLA leave and defendants’ decision to extend his PIP. Here, defendant and plaintiff’s manager placed plaintiff on the PIP before having any knowledge of plaintiff’s medical issues. Upholding the summary judgment decision, the Third Circuit concluded that plaintiff did not establish a causal connection between plaintiff’s request and use of FMLA and any alleged retaliation.

Summarized Elsewhere:

***Terry v. Promise Hospital of Ascension, Inc.*, 2014 WL 4161581 (M.D. La. Aug. 19, 2014)**

***Huffman v. Speedway LLC*, 2014 WL 5817321(E.D.Mich. Nov. 10, 2014)**

***Wallner v. J.J.B. Hilliard*, 23 WH Cases2d 1203 (6th Cir. Oct. 31, 2014)**

***Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 23 WH Cases2d 174 (3d Cir. 2014)**

***Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 23 WH Cases2d 312 (3d Cir. Aug. 27, 2014)**

***Edwards v. Nat’l Vision Inc.*, 568 Fed. Appx. 854 (11th Cir. 2014)**

***Davis v. George Washington University*, 22 WH Cases2d 547 (D.D.C. Mar. 20, 2014)**

***Hettler v. Entergy Enterprises, Inc.*, 2014 WL 1508699 (S.D.N.Y. Mar. 28, 2014)**

***Hansen v. Robinson Nevada Mining Co.*, 158 WH Cases2d 534 (D. Nev. 2014)**

1. *Prima Facie* Case

***Martins v. Rhode Island Hospital*, 23 WH Cases2d 793 (D.R.I. Aug. 13, 2014)**

Plaintiff worked as a Unit Assistant at defendant’s hospital until his termination on September 24, 2010. Defendant scheduled plaintiff to work eight consecutive days, including September 11, 2010. On September 11, plaintiff reported to work, but clocked out through the hospital’s badge system approximately four hours later. The charge nurse notified plaintiff’s supervisor of his disappearance, and an investigation was opened. A review of the badge swipe reports, parking lot entry/exit swipes, and security camera images of plaintiff entering and exiting the hospital on September 11 led defendant to believe that plaintiff had left the hospital for almost four hours during his work shift on that day. Plaintiff failed to return to work, and was placed on sick leave status because he was hospitalized and diagnosed with bipolar disorder. He was then terminated on September 24, 2010 for theft of company time related to the September 11 disappearance. At the termination meeting, plaintiff initially claimed that he was “around the hospital” during the period in question. When pressed by the union steward, however, plaintiff ultimately apologized, saying that his bipolar disorder was the reason for his behavior that day.

Plaintiff filed suit against defendant, alleging that defendant interfered with his FMLA rights. Plaintiff initially alleged that his hospitalization from September 13 through September 15

should have placed defendant on constructive notice of his need for medical leave. However, he later abandoned that argument, instead arguing that he provided defendant with actual notice of his need for medical leave when he informed defendant of his bipolar disorder diagnosis at the termination meeting. The district court granted summary judgment in favor of defendant. The court reasoned that plaintiff's speculative reference to his bipolar disorder only after his initial story of being "around the hospital" was challenged was inadequate to have placed defendant on notice of a need for FMLA leave. Absent notice of the need for leave, plaintiff could not establish that he was entitled to benefits for which he was denied, and his FMLA interference claim was dismissed.

Lehtinen v. Town of Greenport, 2014 WH Cases2d 163, 682 (N.D.N.Y. July 11, 2014)

Plaintiff, a court clerk, alleged her employer violated the FMLA when it terminated her employment midway through her leave for knee replacement surgery. At the outset, the district court in New York noted the Second Circuit has not articulated the standard in analyzing interference claims. Nevertheless, the court noted other courts in the Second District have repeatedly used the same standard, which "requires the plaintiff to prove that: "(1) she is an eligible employee under the FMLA; (2) defendants constitute an employer under the FMLA; (3) she was entitled to leave under the FMLA; (4) that she gave notice to defendants of her intention to take leave; and (5) defendants denied her benefits to which she was entitled by the FMLA." In this case, the defendant argued the plaintiff would have been fired due to deficient performance regardless of whether she was on leave. The court agreed with the defendant and held that there was no evidence to suggest her leave impacted the employment decision. Accordingly, she was not entitled to reinstatement or additional leave under the FMLA and her interference claim failed. The court also granted summary judgment on the retaliation claim, explaining that temporal proximity alone is insufficient to create an issue of fact as to pretext.

Didier v. Abbott Laboratories, 21 F.Supp.3d 1152, 122 FEP Cases 1778 (D. Kan. 2014)

Plaintiff was a district manager in the employer's pharmaceutical products division who was discharged for submitting numerous expense reimbursements that the employer deemed inappropriate, as well as improperly representing that her supervisor had approved a travel purchase. Plaintiff contended her termination constituted interference with, and retaliation for, her intermittent FMLA leave.

The district court applied the Tenth Circuit standard for a *prima facie* case for interference, which required proof that the employer's adverse action was related to the exercise of FMLA rights. In concluding that plaintiff failed to meet that requirement, the court noted the unusual posture of a case involving ongoing intermittent leave. Unlike a situation where an employee takes time off for a specific period of full-time leave, intermittent leave typically recurs for an extended or ongoing period. Thus, the court concluded that in terms of temporal proximity, the appropriate measure in this case was from plaintiff's first request for or usage of intermittent leave, four months before her discharge, rather than from the most recent occurrence. Additionally, the court noted that plaintiff had received intermittent leave every time she requested it. Finally, the evidence reflected that plaintiff's supervisor was supportive of

her intermittent leave, even encouraging her to take it. On these facts, the court found no inference of causal connection could be established.

The court concluded that her retaliation claim was largely duplicative of the interference claim. The only additional evidence offered was an email sent six weeks before her termination advising her supervisor of a pregnancy. The court concluded the email could not be deemed a request for leave, and was not sufficient to provide an inference of retaliatory intent where plaintiff had miscarried before her termination.

Pallatto v. Westmorland County Children's Bureau, 2014 WL 836123 (W.D. Pa. March 4, 2014)

The plaintiff claimed that the defendant had taken numerous adverse employment actions against her as a result of her application for and use of FMLA leave. The defendant subsequently moved for summary judgment on all claims.

The court considered the FMLA retaliation claim using the *McDonnell Douglas* burden-shifting framework and determined that the plaintiff had produced sufficient evidence to survive the defendant's motion for summary judgment. The court first noted that the parties had agreed that the plaintiff had engaged in protected activity under the FMLA. The court then concluded that the evidence reflected that the plaintiff had suffered a materially adverse employment action when 1) the defendant altered her schedule to require her to meet with clients when she was not available; 2) she was given case update deadlines when her colleagues were not; 3) she was denied assistance with her workload where others were given such assistance; 4) she was harassed about missing work and told to quit and find another job; and 5) when her longtime schedule was changed in a way that negatively impacted her. Finally, the court determined that sufficient evidence of causation existed because the plaintiff alleged that one of her supervisors had described her application for FMLA leave as convenient, that he had raised the possibility of disciplinary action for her use of sick leave at the time of her application, and that plaintiff had never been made aware of the FMLA by the defendant prior to her application therefor despite her earlier use of sick leave.

Having found that the plaintiff had proven her prima facie case by a preponderance of the evidence, the court noted that the defendant had articulated a legitimate, nondiscriminatory reason for the adverse employment actions taken against the plaintiff, but held that the plaintiff had proffered sufficient evidence of pretext to survive summary judgment.

Fox v. Primary Financial Services LLC, 2014 WL 814969 (D. Ariz. March 3, 2014)

The plaintiff, a collections agent, claimed that she had taken leave under the FMLA and, upon her return to work, the defendant assigned her the same position but in a different department and with different clients, resulting in a significant drop in her earned commissions and her income. She alleged that such action constituted a failure to properly reinstate her, thereby interfering with her rights under the FMLA. The defendant subsequently moved for summary judgment.

The court noted that, in a claim of FMLA interference, the employer's intent is irrelevant to the determination of liability, and a plaintiff's showing that she had not been reinstated to her previous position would be sufficient to shift the burden to the defendant to demonstrate a legitimate reason to have denied the plaintiff reinstatement. The court further determined that a genuine dispute of fact existed as to whether plaintiff was reinstated to the same position with similar opportunities to earn commissions and income or whether the plaintiff's position was sufficiently different so as not to constitute reinstatement. Accordingly, the court denied the defendant's motion for summary judgment.

Oliver v. Williams Companies, Inc., 2014 WL 1344496 (N.D. Okla. Apr. 4, 2014)

Plaintiff, a former senior records analyst in defendant's records group, brought an action against her former employer under the FMLA. Specifically, plaintiff alleged that defendant discriminated against her because she sought to take leave under the FMLA. As plaintiff did not expressly state whether she alleged an FMLA claim under an interference theory or a retaliation theory, the court examined plaintiff's claims under both theories. In denying defendant's motion for summary judgment as to the FMLA claims, the district court found that there was sufficient evidence from which a reasonable jury could find that defendant engaged in the discriminatory conduct alleged by plaintiff.

In response to plaintiff's FMLA interference claim, defendant argued that plaintiff was not eligible for FMLA leave in January 2011, and, therefore, could not prevail on a claim for interference with her rights under the FMLA. Plaintiff argued that because defendant kept inaccurate records of the hours she worked, the burden shifted to defendant to establish that plaintiff failed to work the minimum number of hours required to become eligible for FMLA leave. In reviewing the record, the court found an inconsistency in defendant's recordkeeping that created a genuine dispute as to whether defendant kept accurate records of plaintiff's time or supplied accurate records to its third-party administrator for FMLA leave. The court noted that although the Tenth Circuit had not expressly adopted equitable estoppel in FMLA cases, it could be appropriate in the present case to prevent defendant from challenging plaintiff's eligibility for FMLA leave, because a reasonable jury could find that defendant discouraged plaintiff from returning to work to become eligible for FMLA leave. The court reasoned that even though plaintiff had not conclusively established that she was eligible for FMLA leave in January 2011, she raised a genuine dispute as to a material fact showing that equitable estoppel could prevent defendant from raising a defense as to plaintiff's eligibility for FMLA leave. Accordingly, the court denied defendant's motion for summary judgment as to plaintiff's FMLA interference claim.

As to plaintiff's retaliation claim, the court found that plaintiff produced evidence showing a causal connection between her taking of FMLA leave and her termination so as to establish a *prima facie* case of FMLA retaliation. Specifically, the court found that emails exchanged between defendant's employees could support a finding that defendant was looking for a way to terminate plaintiff's employment because she requested FMLA leave. In addition, the court found that plaintiff produced evidence raising a genuine dispute of material fact as to whether defendant's stated reason for terminating her employment was pretextual. In particular, emails exchanged between defendant's employees suggested dissatisfaction with the amount of

leave plaintiff was taking. The court also considered evidence showing that plaintiff needed only two more hours of work to become eligible for FMLA leave, and that defendant failed to give plaintiff all the information she needed to determine whether to proceed with her surgery as planned. As such, the court denied defendant's motion for summary judgment as to plaintiff's FMLA retaliation claim.

Thomas v. Dana Commercial Vehicle Products, LLC, WL 1329948 (W.D. Ky. Mar. 31, 2014)

Plaintiff, a former material handler/fork lift operator, brought an action against his former employer alleging FMLA interference and retaliation. Defendant argued that plaintiff's FMLA claims should be dismissed because he failed to sufficiently plead his *prima facie* case. The court found that the Sixth Circuit does not require that an FMLA plaintiff plead each element of the *prima facie* case but, instead, must plead factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. As such, the court found that the complaint easily satisfied the pleading standards for plaintiff's FMLA claims.

With respect to plaintiff's interference claim, the court found that plaintiff sufficiently alleged that he invoked the protections of the FMLA and engaged in protected activity when he took medical leave in July 2012 and October 2012. As to the retaliation claim, the court also found that plaintiff sufficiently alleged that defendant retaliated against him by terminating his employment while on FMLA leave in October 2012, and harassed him even after he was reinstated by an arbitrator. The court rejected defendant's argument that plaintiff failed to state a claim for interference and retaliation under the FMLA, finding that the pleadings were sufficient to allege that defendant took an adverse employment action against plaintiff, which if true, would dissuade a reasonable employee from making a claim for FMLA benefits. As such, the court denied defendant's motion to dismiss the FMLA claims.

Perk v. Nyrstar Clarksville, Inc., 2014 WL 1379170 (M.D. Tenn. Apr. 8, 2014)

Following her termination, Plaintiff brought an FMLA interference claim, alleging that the absences resulting in her discharge should have been treated as FMLA leave. On summary judgment, the district court noted that in order to establish her FMLA claim, plaintiff needed to establish that she was entitled to FMLA benefits. That is, although it was a legal question as to whether an illness qualified as a serious health condition, plaintiff needed to present evidence that she was suffering from a serious health condition that made her unable to perform the essential functions of her job. While the plaintiff argued that she was not required to provide evidence at the time she gave notice to her employer of the need for FMLA benefits, the district court noted that even if she did not have that burden at the time the leave was taken, such evidence had to be presented in response to a motion for summary judgment. Because the court found that there was no evidence in the record establishing an issue of material fact, the court held for the employer.

Kaitschuck v. Doc's Drugs, Ltd., 2014 WL 1478017 (N.D. Ill. Apr. 15, 2014)

Plaintiff worked as a pharmacy technician with defendant business for many years. In 2010, defendant instituted a requirement that all pharmacy technicians acquire a particular

certification by January 1, 2012. In May, 2011, plaintiff requested medical leave to undergo foot surgery, and defendant granted her leave from May 17 through September 26. Plaintiff then returned to work after this period, but she again requested leave on November 30. She had not returned to work or made any attempt to acquire the certification when, on January 10, 2012, defendant terminated her.

Plaintiff brought suit for FMLA retaliation. The court granted defendant's motion to dismiss with prejudice. The court granted the defendant's motion to dismiss because plaintiff could dispute none of the facts to indicate that she was retaliated against, as needed for a *prima facie* claim. Defendant showed that a similarly-situated worker who had not taken the required exam also faced termination, and that defendant had warned plaintiff of termination because of the problem well before she took her medical leaves.

Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 22 WH Cases2d 1436 (1st Cir. 2014)

Plaintiff filed suit bringing claims for FMLA interference and retaliation. The district court granted defendant's motion to dismiss for failure to state a claim and plaintiff appealed. Plaintiff argued that, after she blew the whistle on wrongdoing in her office, the employer retaliated against her for exercising her rights under the FMLA terminating her employment and prior to that, taking other adverse actions. Additionally, Plaintiff argued that the employer interfered with her FMLA rights by terminating her employment while she was out on leave to care for her sick mother.

Affirming the district court's dismissal on both counts, the Sixth Circuit found plaintiff "offered too little" connecting her FMLA leave and her termination "to push her claim across the plausibility threshold." The court noted that although plaintiff argued she was terminated during her FMLA leave, an employee may be discharged during FMLA leave and temporal proximity alone is not enough to establish causation, especially if the surrounding circumstances undermine that inference. Moreover, plaintiff proffered no facts beyond the timing of the discharge that would relate the termination to the FMLA requests or FMLA leave status. Rather, the record was clear that plaintiff was terminated for her misconduct. Finally, in response to plaintiff's arguments that the employer took other adverse actions that constituted FMLA retaliation, the court again concluded that she failed to put forth sufficient facts to demonstrate a causal connection between her FMLA leave and a plausible claim for relief. The court noted that an employer can take adverse action against an employee while she is on leave for reasons other than leave status. In addition, the court also ruled that plaintiff failed to state an FMLA interference claim because she was no longer entitled to FMLA leave benefits because she was discharged.

Clark v. Northland Group, Inc., 2014 WL 3828218 (D. Minn. Aug. 4, 2014)

Plaintiff worked as a call center associate for the employer, a debt collection agency. Plaintiff suffered from symptoms associated with numerous medical conditions, including irritable bowel syndrome, attention deficit disorder, leg cramping, diabetes, neuropathy, and depression. On Friday, September 28, 2012, plaintiff informed the employer that her doctor

recommended that she take medical leave. At that time, she also met with the human resources department to determine what paperwork she would need to fill out in order to take leave. The following Monday, the employer terminated her employment for deficient work performance. In response, the plaintiff filed suit alleging that the defendant employer unlawfully interfered with her rights and unlawfully retaliated against her in violation of the FMLA. Plaintiff's complaint failed to allege that any of her medical conditions made her unable to perform her job functions. As a result, the employer moved to dismiss, contending that plaintiff had to allege that she suffered from a serious health condition that made her unable to perform her job in order to state viable claims under the FMLA.

The district court granted the defendant employer's motion to dismiss in part, upholding her claim for retaliation and dismissing her interference claim without prejudice. In doing so, the Court held that the FMLA prohibits an employer from retaliating against an employee who merely asks for FMLA leave and does not require that an employee plead that she is actually eligible for such leave. Finding that plaintiff had specifically alleged that she asked the employer for FMLA leave and was subsequently fired, the Court found that she had alleged a sufficient claim for retaliation under the FMLA. In contrast, the Court found that the plaintiff failed to plead a viable claim for FMLA interference because such a claim required the plaintiff to plead and prove that her employer denied her a benefit "to which she was entitled under the FMLA." The Court held that her interference claim had to be dismissed due to her failure to allege that she was entitled to FMLA leave, *i.e.*, she suffered from a serious health condition that rendered her unable to perform her job functions.

Clink v. Oregon Health and Science Univ., 2014 WL 3850013 (D. Or. Aug. 5, 2014)

Plaintiff suffered from several physical injuries, including: bulging discs in his lower back and severe low back pain radiating down his thigh. Between January and July, 2011, plaintiff used a significant amount of his FMLA leave intermittently to address these health issues. During that same time period, management observed that the plaintiff was in severe pain while working and became concerned that he was unable to perform the essential functions of his job. The employer eventually placed plaintiff on paid administrative leave between July and August, 2011, pending an independent fit-for-duty evaluation. Following the independent evaluation, the employer determined that plaintiff was unable to perform the essential functions of his position and placed him on FMLA leave on August 25, 2011. On September 9, 2011, university representatives met with plaintiff and notified him that he would remain on continuous FMLA leave, but that his employment would be terminated after his leave was exhausted unless he provided a fit-for-duty certification or could perform his essential job functions. Plaintiff never provided a fit-for-duty certification. Plaintiff's FMLA leave was then exhausted, and the university terminated his employment. Plaintiff subsequently filed suit for interference and retaliation under the FMLA, and the university moved for summary judgment.

The Court granted defendant's motion for summary judgment and held as an initial matter that plaintiff's retaliation claims were actually interference claims because he did not offer any evidence that he was subjected to an adverse employment action as the result of opposing practices made unlawful by the FMLA. Rather, he claimed that the university took

adverse employment actions against him because he used or requested use of protected FMLA leave. The Court also stated that in order to prove a *prima facie* case of interference under the FMLA, plaintiff had to show, among other things, that he was entitled to leave under the FMLA. The Court explained that in order to be entitled to FMLA benefits, individuals must be able to perform the essential functions of their position. Because it was undisputed plaintiff was unable to perform the essential functions of his position, he failed to satisfy his burden of proving a *prima facie* case of FMLA interference.

Young v. United Parcel Service, 992 F. Supp. 2d 817 (M. D. Tenn. 2014)

Plaintiff worked as a warehouse supervisor for employer. In March 2010 and on July 6, 2010, the employer granted his requests for FMLA leave. Three days later, on July 9, 2010, the employer counseled plaintiff regarding his failure to competently perform his duties as a supervisor. He was placed on a management performance improvement plan (“MPIP”) and warned that failure to complete his MPIP may disqualify him for a raise in 2011 and subject him to further discipline. In October 2010, plaintiff submitted a third request for FMLA leave, but then withdrew it. On October 25, 2010, the employer concluded that plaintiff had failed to meet its expectations under the MPIP. It considered terminating plaintiff but instead extended his MPIP until December 2010. On December 9, 2010, plaintiff sustained a work-related injury and submitted a worker’s compensation claim. The employer met with plaintiff five days later and on February 7, 2011 to discuss further issues with plaintiff’s MPIP. It then terminated him on March 23, 2011. Plaintiff then sued employer, claiming that it violated the interference and retaliation provisions of the FMLA.

The Court granted the employer’s motion for summary judgment. Plaintiff alleged that he was discouraged from taking his October 2010 FMLA leave (which he ultimately withdrew) due to the employer’s failure to provide him a raise after his March 2010 FMLA request and placing him on MPIP after his July 2010 request for FMLA leave. The Court found no evidence to support that argument. The Court also rejected the employee’s retaliation claim, reasoning that the employee could not establish that employer’s explanation that he was terminated for poor performance was a pretext for exercising his rights under the FMLA. In particular, it ruled that a supposed conflict in testimony between two employer supervisors as to what time periods formed the basis for plaintiff’s termination was irrelevant. It also concluded that a supervisor statement that the plaintiff should be “committed to his job” and the three-day temporal proximity between his FMLA leave and MPIP did not establish causal link between the two. Noting that temporal proximity alone could not show pretext, it then went on to state that the only support for the supervisor’s statement was plaintiff’s own self-serving testimony. In addition, that statement did not create an issue for trial since it did not “overwhelm the great weight of evidence concerning [plaintiff’s] declining performance.” Plaintiff also could not prove that other allegedly similarly situated employees were treated more favorably than him. This was because he did not provide any evidence as to why some of those employees were similar, and that the remaining were dissimilar since they had either improved after being counseled or were never placed on MPIP.

Rice v. Kellermeyer Co., 23 WH Cases2d 242 (N.D. Ohio 2014)

In January 2012, days after announcing that his wife was pregnant, plaintiff was assigned additional job duties, including all of the job duties of a former employee. In June 2012, plaintiff requested five days' vacation time because of an unexpected doctor's appointment for his wife. After two of the five vacation days were denied, he requested FMLA leave for the two denied days. Three days after his request for FMLA leave, the employer terminated plaintiff's employment. Plaintiff then brought suit, alleging that his employer interfered with his exercise of rights under the FMLA and retaliated against him for requesting FMLA leave.

The district court denied the employer's motion for summary judgment, finding that plaintiff presented sufficient evidence for a reasonable jury to conclude that the employer intentionally discriminated against the plaintiff as a result of his exercise of rights under the FMLA. Two managers (one of whom was married to the decision-maker) of the employer testified that the individual who had made the decision to terminate plaintiff's employment did not know of plaintiff's request for FMLA leave. The district court, however, discounted the testimony because the two witnesses were not "disinterested." The district court then found that it was unlikely that neither manager had mentioned the request to the decision-maker. Moreover, the district court noted that there was no evidence that the employer made the decision to terminate plaintiff's employment prior to his request for FMLA leave and thus found that the temporal proximity of the employee's termination to his FMLA request established sufficient causal connection. Finally, the district court ruled that plaintiff presented enough evidence to show that the employer's reason for terminating plaintiff's employment – poor performance – was pretextual, explaining that plaintiff's performance reviews expressly stated that plaintiff was a valued employee and is a benefit to the employer.

Morris v. Pilgrim's Pride Corporation, 2014 WL 3514987 (W.D. Ark. Jul 15, 2014)

In June 2012, plaintiff informed his employer of back pain and requested light duty. His request was granted, his pain diminished, and he returned to his regular duties. In August, plaintiff requested vacation for Friday, August 10 and August 13-14. On August 9, plaintiff met with his supervisor and requested FMLA leave because of his back pain and a possible surgery. Plaintiff was informed that he would have to use all of his vacation leave first and needed to meet with the employer to fill out the requisite paperwork for the FMLA leave. The employer informed plaintiff that it would complete plaintiff's FMLA paperwork when he knew the date of his surgery and how long he was scheduled to be out for FMLA leave. After the plaintiff's scheduled vacation time was over, he did not return to work for three days and failed to notify the employer of his absences. Plaintiff brought suit against the employer under the FMLA after the employer terminated plaintiff's employment for his failure to notify the employer of his absences.

The district court granted the employer's motion for summary judgment. The district court found that plaintiff failed to state an FMLA entitlement claim because he failed to give adequate notice of his need to take leave for his surgery because he failed to request leave for the surgery or otherwise state that he was even going to have surgery. Instead, plaintiff only provided an indication that he would be absent at some point in the future. Further, plaintiff did

not suffer from a serious health condition because he did not undergo surgery on the days that he was absent. Likewise, the district court also ruled that plaintiff failed to establish a *prima facie* case of FMLA discrimination because he failed to give notice of his need for leave and was able to perform his job, thus plaintiff did not engage in protected activity. Finally, the district court ruled that plaintiff could not establish an FMLA retaliation claim because he had never opposed any practice unlawful under FMLA.

Skotnicki v. Board of Trustees of the University of Alabama, 23 WH Cases2d 432 (N.D. Ala., August 8, 2014)

Plaintiff, a registered nurse for a university, sued her former employer and two individual defendants for interference and retaliation under the FMLA. The employer moved for summary judgment, and the motion was granted. Plaintiff was not entitled to FMLA leave, and she did not experience discrimination because of any protected FMLA activity. Plaintiff worked in a temporary position, and she acknowledged in February 2009 that her employment was set to expire. Plaintiff was scheduled to go on FMLA leave on April 2, 2010. However, on February 18, 2010, plaintiff was informed that her employment with the company would end as of March 26, and that her FMLA leave would therefore not be available. Accordingly, plaintiff was not an eligible employee under the FMLA because she was not employed by defendant on the date her leave was supposed to commence.

As for Plaintiff's retaliation claim, the district court found that the undisputed evidence did not support an assertion that her employer intentionally discriminated against plaintiff. Any alleged adverse employment decision had been announced before plaintiff engaged in protected activity and plaintiff therefore could not, in good faith, argue that the employer sought to intentionally discriminate against her.

Verby v. Paypal, Inc. et al., 2014 WH Cases2d 156 (D. Neb. April 29, 2014)

Plaintiff, a fraud investigator for Paypal, brought suit under the FMLA. During her employment, plaintiff took intermittent FMLA leave to care for her ailing grandmother. At one point, while discussing plaintiff's performance via internal emails, defendant noted that it was concerned because when plaintiff had been given corrective counseling in the past, she claimed FMLA and left for the rest of the day. Defendant later fired plaintiff for poor performance.

Regarding the FMLA interference claim, the court found that plaintiff could not prove she was entitled to an FMLA benefit in the first place because FMLA does not authorize leave to care for grandparents unless they stand *in loco parentis* to plaintiff, of which there was no evidence in this case. In addition, there was no FMLA interference because defendant never denied plaintiff any FMLA benefits that she requested. In regards to FMLA retaliation, the court found there was no causal connection between her leave and her termination. In particular, defendant's email only suggested concern for misuse of FMLA leave and did not suggest that she would be terminated for her use of leave. In addition, the court found that plaintiff was terminated because of her deficient job performance. The court granted defendant's motion for summary judgment as to the FMLA claims.

Dial v. Noland Health Services, 2014 WH Cases2d 156 (N.D. Ala. Apr. 30, 2014)

Plaintiff, a registered nurse who was terminated after five years with her employer, brought suit against the employer alleging FMLA interference arising from her FMLA leave to recover from surgery and a car accident. Defendant had a written policy that all employees were required to work one of three major holidays each year (Christmas, Thanksgiving or New Year's Day). The policy also required that employees who decided not to work on a scheduled holiday notify a Nurse Manager and that employees who called off due to illness provide a doctor's note. Plaintiff, who was scheduled to work on Christmas after returning from her leave, called in sick due to gastrointestinal pain but did not provide a doctor's note. Defendant terminated plaintiff's employment based on her failure to provide a doctor's note.

Plaintiff alleged that defendant improperly listed a number of absences that should have been covered by FMLA time when assessing her for termination. The court found that there was no interference under the FMLA because she was not denied the exercise of any FMLA rights. The court further noted that there was no legal support for plaintiff's claim that inaccuracies in reporting her absences constituted FMLA interference, especially when her final discharge decision was not premised upon any of the disputed days. The court granted summary judgment for defendant on all claims.

Anderson v. McIntosh Construction, LLC, 2014 WL 2207924 (M.D. Tenn. May 28, 2014)

Plaintiff brought suit under the FMLA without specifying the exact basis for the claims. During her employment, plaintiff had numerous confrontations with a subordinate employee, of which defendant was aware but did not consider to be a problem. Plaintiff began taking days off from work but never informed the employer of the reason for her requested absences and never filled out the required forms to request FMLA leave under the employer's guidelines. Plaintiff eventually resigned after accepting alternative employment, and at that point she informed her employer that she resigned due to stress from the relationship with her subordinate.

The court found the employee did not prove interference with her FMLA rights because she failed to identify any serious health condition that existed during the employment period or was classified as such under the FMLA. Also, plaintiff failed to show that she was denied benefits under the FMLA, because she failed to address the issue in her brief. Plaintiff's retaliation claim failed because she did not prove that she exercised her rights for leave under the FMLA, her employer was never aware of any ailment that may require FMLA leave, and the employee did not suffer adverse employment action since she voluntarily resigned. Accordingly, the employer's motion for summary judgment was granted.

Campbell v. Jefferson University Physicians, 2014 WL 2194519 (E.D. Pa. May 27, 2014)

Plaintiff filed suit against her former employer under the FMLA when the employer's third party agency, which was in charge of the employer's personnel matters, allegedly fired the employee. The employee's husband had suffered chronic grand mal seizures, requiring the employee to take time off to care for her husband. The employee received FMLA approval for her time off, but took off more days than had been approved. The employee then indicated to her

employer that she had ceased attending work because the third party administrator informed her she had been terminated. Phone recordings between the administrator and the employee indicated the employee's employment had never been discussed during the alleged timeframe and the employee had not been terminated. The employer also permitted plaintiff to obtain a recertification of entitlement to FMLA leave, which was communicated to the employee. Plaintiff was ultimately terminated by the employer for her unauthorized absences.

The court noted the employee did not make clear whether relief was sought for retaliation or interference under the FMLA. However, the court did not consider the employee's retaliation claim because she failed to brief the argument in response to defendant's motion for summary judgment. In order to prove interference, the court noted an employee needs to only show entitlement to FMLA benefits and denial of those benefits. The employee argued she was prejudiced by not receiving notice of her rights to recertify for FMLA leave, which she argued qualified as a denial of FMLA rights and interference with those rights. The court found the employee was not prejudiced by any failure to notify of recertification rights because she was not terminated for failing to obtain recertification, but rather because she failed to attend work or report absences. The court also found the employer's argument that being fired during the period for recertification was without merit, stating an employee may be terminated during recertification. Under this analysis, the court granted the employer's motion for summary judgment.

Owens v. City of Barnsdall, 2014 WL 2197798 (N.D. Okla. May 27, 2014)

The employee was a city worker who allegedly became disabled as a result of depression and anxiety. The employee alleged that the city which employer her interfered with her FMLA rights by preventing her from exercising FMLA benefits and denying the exercise of her FMLA rights. The employee also brought suit against the mayor of the city for FMLA violations.

The court found these assertions satisfied the pleading requirement to show interference with FMLA rights. The court also found the employee's statement that she was eligible for FMLA rights in her petition satisfied the pleading requirement to state she was an eligible employee under the FMLA. In regards to her claim against the mayor, the court noted a split exists as to whether an individual qualifies as an employer under the FMLA, but determined an individual may be an employer under the FMLA if the person "acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." Accordingly, the court determined that the employee's allegations that the mayor was the final policymaker, with final decision-making authority over the alleged incidents, satisfied the pleading requirement in order to state a claim against the mayor individually. The court denied the employer's motion to dismiss the employee's FMLA claims.

Muldrow v. Blank, 2014 WL 938475 (D. Md. 2014)

Plaintiff, a program management specialist for a federal agency, filed a lawsuit against his supervisors which the Court interpreted as alleging interference and retaliation under the FMLA. Plaintiff claimed that in late May or early June 2011, he learned that one of his supervisors was illegally using funds. Although Plaintiff's supervisors allegedly demanded that

he keep the fraud secret, Plaintiff reported the illegal use of funds. On June 13, 2011, Plaintiff requested leave six months before of his pregnant wife's due date. The employer requested that he provide a proposal regarding how his duties would be covered during his absence. Plaintiff's employment ended on August 23, 2011, months before his children were born. Plaintiff further alleged that he repeatedly sought, and was denied, FMLA leave to be home with his wife, who suffered from severe morning sickness, as documented in plaintiff's medical certification. Plaintiff alleged he was denied his FMLA leave in August 2011 because he reported the misuse of funds.

Defendant moved to dismiss Plaintiff's complaint in its entirety, and the court granted the motion. Plaintiff argued that Defendant discouraged him from taking FMLA leave by asking him to propose how his duties would be covered. However, plaintiff could not show that he was prejudiced by the employer's request: plaintiff resigned from his position before defendants had the chance to grant or deny his FMLA leave request. Therefore, plaintiff failed to state a claim.

Rains v. Newmont USA Ltd, 2014 WL 4810317 (D. Nev. Sept. 29, 2014)

Plaintiff was hired as a miner by Defendant, a mining company, in 2008. Sometime thereafter, Plaintiff had a foot and ankle injury and a heart complication that required him to take a period of "medical leave." Plaintiff returned from leave at an unspecified time, and alleges that he was later demoted in 2011. The day he was demoted, Plaintiff requested time off again because of "his serious mental and emotional health condition caused by the demotion." Defendant suspended him the next day and terminated him within the week for abandoning his position. Plaintiff sued his Defendant for interference under the FMLA and the Court considered Defendant's motion to dismiss the complaint.

The Court held that Plaintiff failed to establish a *prima facie* case for interference. The complaint did not allege that Plaintiff had exercised his rights under the FMLA by requesting or receiving FMLA leave for his absence concerning his foot and ankle injury or heart condition. Nor were there facts to establish at what point during his three-year employment Plaintiff returned from his "medical leave" and how soon after his return he was demoted. This vague allegation of temporal proximity did not permit the Court to draw a reasonable inference of retaliatory motive on the part of the Defendant. Furthermore, the Plaintiff presented only conclusory allegations that his request to leave after his demotion would qualify under the FMLA as a "serious health condition." He provided no proof that he required or received any medical treatment as required by the FMLA. Therefore, the Court held that the complaint alleged insufficient facts to support a claim for interference and dismissed the cause of action.

Pivac v. Component Services & Logistics, Inc., 570 Fed.Appx. 899 (11th Cir. 2014)

The district court granted the defendant's motion for summary judgment as to her FMLA interference and retaliation claims, and the plaintiff appealed. Plaintiff argued that the district court erroneously held that she failed to establish a "serious health condition," which was a prerequisite for both of Plaintiff's FMLA claims. There was no dispute that plaintiff suffered an incapacity during her employment. Plaintiff argued that she suffered from a serious health condition that required continuing treatment. The court rejected the plaintiff's argument, holding that plaintiff could not establish a "serious health condition" because she could not show that she

received treatment two or more times or that her doctor visit resulted in a regimen of continuing treatment. Moreover, the court also explained that there was no evidence that plaintiff suffered from a chronic condition, noting that plaintiff failed to show that her condition required periodic visits or continued over an extended period of time. Therefore, the court affirmed the district court's decision.

Newcomb v. Corinth School District, 2014 WL 1746066 (N.D.Miss. 2014)

Plaintiff was hired by defendant in 2005 to perform vehicle maintenance and a bus driver. In addition, plaintiff performed general building maintenance. During the 2009-2010 academic year, the school's state funding was reduced. In February 2010, school administrators met to discuss potential cost-saving options including a reduction-in-force. In May 2010, the school board received recommendations on cost-saving measures which included the elimination of plaintiff's position along with others. Over the course of the next several months, defendant terminated several positions, but plaintiff continued working. On August 3, 2010, plaintiff suffered an injury unrelated to work. Plaintiff informed defendant of the injury and kept them apprised of his health status over the next several weeks. On September 16, 2010, plaintiff underwent surgery and was released the next day to return home. When he arrived home, plaintiff received a termination letter from defendant indicating that his position has been eliminated as a part of the reduction-in-force. Plaintiff filed an EEOC charge followed by filing a complaint alleging defendant interfered with his rights under the FMLA and retaliated against him for exercising those rights, *inter alia*. Defendant filed a motion for summary judgment.

The court denied defendant's motion for summary judgment as to the retaliation claim. The court held that plaintiff established a *prima facie* case of retaliation based on the temporal proximity between the FMLA leave and the termination. Defendant argued that the district-wide reduction-in-force was the legitimate non-retaliatory reason for plaintiff's termination. However, the court found that plaintiff's argument that defendant failed to follow its own procedures was sufficient evidence to show a genuine issue of material fact that the reduction-in-force was a pretext for retaliation. On the other hand, the court granted defendant's motion for summary judgment as to the interference claim. The court explained that when an employee is unable to perform his previous duties, the employer is not required to reinstate the employee to the previous position or provide an alternative position. Plaintiff had been deemed totally disabled until at least January 11, 2011, which was longer than his remaining FMLA leave entitlement. As a result, he would no longer be protected under the FMLA and was not entitled to reinstatement.

Cribbs v. NFI Network Logistic Solutions, LLC, 2014 WL 4805328 (S.D. Ga. Sept. 26, 2014)

Plaintiff, a Shift Supervisor, sued his former employer for interference and retaliation under the FMLA. In February 2010, plaintiff suffered an anxiety attack while on the phone with the employer's HR Manager. Plaintiff was taken to the hospital and diagnosed with anxiety and associated cardiac-related symptoms. Doctors informed plaintiff he should not return to work immediately and prescribed him medications. The following day, plaintiff requested leave under the FMLA. The employer granted plaintiff's request. However, plaintiff alleged the employer's HR Manager and the regional vice-president repeatedly telephoned plaintiff and informed him that his attendance was required at various meetings. According to plaintiff, the HR Manager also informed plaintiff that the company wanted to "get rid of him" because it was tired of

paying his medical bills. While plaintiff was on FMLA leave, the employer assigned plaintiff's shift to another employee. While on that shift, the replacement employee informed management that several employees complained of low morale. The regional vice-president allegedly investigated the complaints and subsequently decided to transfer plaintiff to the employer's second warehouse, located directly across the street. While plaintiff's title, salary, and responsibilities did not change, his new position required him to work weekend nights. Previously, the plaintiff worked only week nights.

Plaintiff claimed the employer interfered with his FMLA rights: (1) by calling him while he was on FMLA leave and requesting he attend workplace meetings; (2) by reassigning him to the weekend night shift after his return from FMLA leave. The employer moved for summary judgment, contending that contacting plaintiff about upcoming meetings was not a violation of the FMLA and plaintiff's reassignment was not a change in the terms of his employment because he held the same position, pay, and benefits upon his return. The court granted summary judgment on the first issue because plaintiff identified no harm he suffered due to the requests to attend meetings. Plaintiff attended no meetings while on FMLA leave, and he did terminate his FMLA leave prematurely to attend any meetings. But the court held the employer's decision to transfer plaintiff to a new shift upon his return from FMLA leave may alter the terms and conditions of his employment such that the employer is was not entitled to summary judgment on the second issue.

Pearson v. Cuyahoga Cnty., 2014 WL 7384253 (6th Cir. Dec. 30, 2014)

Plaintiff, a custodial worker, worked for the defendant from June to 2006 up and until June 2012. Plaintiff missed work because of serious medical conditions on several occasions during the course of his employment with the defendant. The defendant approved FMLA leaves of absence and also approved intermittent leave for his medical conditions over the course of his employment.

Because of unpredictable flare ups, plaintiff was unable to work from January 30 through February 9. Plaintiff followed the defendant's call in procedures for taking intermittent leave for his flare ups. In response, on February 9, the defendant sent plaintiff a recertification form stating that he was eligible for leave beginning on February 6 and that he was required to return certain information to the defendant in a timely manner. In addition, the defendant also sent a letter stating that he was required to bring in a doctor's note upon his return to work. Thereafter, in late February, plaintiff missed four days of work and did not call in to report his absences. Upon returning to work, plaintiff provided defendant with a doctor's note as instructed. The parties' dispute what plaintiff said regarding these absences and why he missed these days, but the defendant designated the four days as away without working (AWOL) and ultimately scheduled a disciplinary conference regarding plaintiff's accrual of AWOL during the previous two years. After the disciplinary conference, the defendant determined that plaintiff failed to recertify his February absences and then terminated his employment. Plaintiff then brought suit for FMLA interference, among other things. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed.

The court reversed, finding that material issues of fact remained regarding whether the plaintiff was entitled to FMLA leave when he called in sick for four days in February. The court explained that there was conflicting evidence regarding whether the plaintiff timely submitted a medical recertification to the county covering his February absences, noting that other approvals by the defendant indicated that the defendant approved absences that were covered under invalid certifications and that the letter sent on February was unclear as to what information or documentation was required, particularly whether the doctor's note provided to the defendant satisfied the recertification request. In addition, the court also noted that there was conflicting evidence on the reason why plaintiff was absent in February, with the parties disputing whether plaintiff reported that his absences were due to a hip condition or chest pain. If they were due to a hip condition, then plaintiff's absences would have been covered under intermittent FMLA leave the defendant approved in 2011. Thus, the court reversed the district court and remanded plaintiff's FMLA interference claim.

Gabriel v. Colorado Mountain Med., P.C., 2014 WL 7336789 (D. Colo. Dec. 23, 2014)

Defendants' unsuccessfully moved for summary judgment as to plaintiff's FMLA interference claims and subsequently moved the district court to reconsider its order denying the defendants' motion. On reconsideration, the court reversed its earlier decision and granted the defendants' motion for summary judgment. The defendant terminated plaintiff's employment for poor performance, which plaintiff – and her physician – attributed to her mental illness. Plaintiff sometimes worked a twenty-four hour shift at an ambulance company immediately before her shift at the defendant. Defendant was concerned with plaintiff working a twenty-four hour shift and asked plaintiff to not work such shifts before reporting to work at defendant. Defendant terminated her employment when she refused to not work such shifts before working at the defendant. The court explained that the FMLA did not protect plaintiff for performance problems which are caused by her medical condition. Accordingly, the court found that plaintiff was discharged for her refusal to work such shifts and could not show that her discharged was related to her request for FMLA leave.

Gostola v. Charter Commc'ns, LLC, 2014 WL 7204924 (E.D. Mich. Dec. 17, 2014)

Plaintiff, an account executive, worked for the defendant from 2000 up and until her discharge in December 2013. Following the loss of a substantial client in 2010, the defendant placed plaintiff on an action plan in January 2012 because of her declining productivity. Over the next two years, plaintiff was primarily on an action plan for her performance, including the thirteen months immediately before her discharge. Plaintiff's performance was measured monthly based on her projected budget and revenue. An account executive's revenue is included in the month it is received from the client. Thus, if advertising is sold in one month but scheduled to run in another, that revenue will not be reflected until the revenue is realized and the advertising is completed. Beginning on August 1, 2013 and continuing up and until September 8, 2013, plaintiff took FMLA leave to care for her mother.

After returning from leave, plaintiff also requested intermittent leave to work only half days in September, but the defendant denied that request. Instead, the defendant allowed plaintiff to attend her mother's medical appointments. Plaintiff was absent a total of six hours in

September after she returned from leave. When plaintiff returned from leave, she remained on the action plan. To account for her FMLA leave, the defendant granted her a one month “ramp up” period in which it ignored plaintiff’s failure to achieve her required level of performance for one month after she returned from leave. However, over the next two months, plaintiff failed to meet her productivity requirements and the defendant then terminated her employment for poor performance. Over those two months, the defendant did not factor her FMLA leave into her performance, even though those months were calculated with three month rolling totals and thus included the months in which plaintiff went on leave. Plaintiff then brought suit, alleging FMLA interference and retaliation claims.

Plaintiff moved for summary judgment, arguing that the time in which she was on FMLA leave was factored in the defendant’s performance evaluations which ultimately led to her termination. The court agreed, reasoning that it was “undisputed” that the leave was a factor in her discharge. The court noted that plaintiff was absent all of August, which would be reflected in the revenue amounts for the following four months. Yet, the defendant used revenue data from the month in which she took FMLA as a negative factor in her performance evaluations for the following four months. The defendant argued that it had a legitimate, non-discriminatory reason for terminating plaintiff’s employment and that plaintiff could not rebut the defendant’s reason. The court agreed, but found that plaintiff was not required to rebut the defendant’s reason for terminating her employment because that reason was not unrelated to her FMLA leave in light of the fact that the data for the two subsequent months included revenue information from August, the month she was on FMLA leave.

Summarized Elsewhere:

***Castay v. Ochsner Clinic Foundation*, 2014 WL 68806 (E.D. La. Jan. 8, 2014)**

***Theiss v. Walgreen Co.*, 2014 WL 3908118 (N.D. Ohio Aug. 12, 2014)**

***Ross v. Gilhuly, et al.*, 755 F.3d 185 (3rd Cir. 2014)**

***Cantrell v. R.E. W., Inc.*, 23 WH Cases2d 1159 (M.D. Tenn. July 14, 2014)**

***Hughes v. B/E Aerospace, Inc.*, 2014 WL 906220 (M.D.N.C. March 7, 2014)**

***Levitant v. City of New York Human Resources Admin.*, 558 Fed.Appx. 26 (2d Cir. 2014)**

***Hudson v. Tyson Fresh Meats, Inc.*, 2014 WL 789147 (N.D. Ind. Feb. 26, 2014)**

***Rinaldi v. Quality King Distribs., Inc.*, 2014 WH Cases2d 160441 (E.D.N.Y. June 26, 2014)**

***Schofield v. Maverik Country Store*, 2014 WL 2765223 (D. Utah June 18, 2014)**

***Saleski-Shingara v. VNA Health Systems*, 2014 WL 5702928 (M.D. Pa. Nov. 5, 2014)**

***Capps v. Oklahoma, Office of Management and Enterprise Services*, 2014 WL 2949461 (W.D. Okla. Jun. 30, 2014)**

***Stranzl v. Delaware County*, 2014 WL 3418996 (E.D. Pa. Jul 14, 2014)**

***Aguirre v. Mayaguez Resort and Casino, Inc.*, 2014 WH Cases2d 164 (D. P.R. 2014)**

***Washington v. Acorda Therapeutics, Inc.*, 2014 WL 4467820 (S.D.N.Y. Aug. 28, 2014)**

***Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 22 WH Cases2d 1 (9th Cir. 2014)**

***Stewart v. White*, F. Supp. 2d, 2014 WL 3747664 (D.D.C. July 31, 2014)**

***Wesson v. Tyso Foods, Inc.*, 2014 WL 4388548 (W.D. Ark. Sept. 5, 2014)**

***Hartman v. Dow Chem. Co.*, 2014 WL 7338722 (E.D. Mich. Dec. 22, 2014)**

***Turner v. Eastconn Reg’l Educ. Serv. Ctr.*, 588 F. Appx. 41, 23 WH Cases2d 1778 (2d Cir. 2014)**

2. Interference Claims [New Topic]

Wainwright v. Davis Nursing Assoc., 2014 WL 183962 (E.D. Ark. Jan. 15, 2014)

Plaintiff sued her former employer for FMLA interference after she was fired upon failing to report to work after her leave was exhausted. Plaintiff began FMLA leave on August 8, 2011 because of her pregnancy. On that date, her employer told her that her FMLA leave would expire on October 30, 2011. That date was subsequently extended to November 8, 2011. Although Plaintiff gave birth on October 5, 2011, she failed to return to work on November 8, 2011 and was terminated effective November 10, 2011. The employer moved for summary judgment and in response, plaintiff argued that she had not exhausted her leave when she was terminated and noted that her doctor had recommended a return date of November 30, 2011. The court, in entering judgment for the employer, found that the undisputed evidence showed that plaintiff had, in fact, exhausted her leave. Indeed, plaintiff even testified that she was aware her doctor's suggested return date was beyond the expiration of her leave. Plaintiff could state no claim for FMLA interference when she took all the benefits to which she was entitled.

De Oliveira v. Cairo-Durham Cent. School Dist., 2014 WL 4900403 (N.D.N.Y. Sept. 30, 2014)

Plaintiff was hired in August 2007 as an elementary school teacher for the defendant school district. Plaintiff took 8 weeks paid leave and a subsequent 23 days of unpaid FMLA leave. During the 2009-2010 school year, the defendants learned that the budget required four teachers' layoffs. The defendants created a seniority list and credited teachers with each day of paid employment with the district, including paid leave days. However, unpaid leave was not credited for seniority calculation purposes. Because of this procedure, plaintiff's 23 days of unpaid FMLA leave did not count towards her tenure. As a result, plaintiff was informed she would be laid off in March. During the meeting informing her of her layoff, the superintendent told her the period of unpaid leave "got you." It was undisputed that plaintiff was fully reinstated to her two years of seniority upon her return from leave and the 23 unpaid days were not counted toward her seniority status, though her 23 unpaid days put her further down the seniority list than she would have been had all days been paid leave. After a series of administrative proceedings, plaintiff filed suit under the FMLA, alleging FMLA interference and retaliation. She also alleged disparate treatment claiming other teachers who took paid sick leave did not have their seniority reduced.

Plaintiff alleged defendants interfered with her FMLA rights by failing to restore her to an equivalent position because she returned to an "inferior" status. The court disagreed, finding that she returned to the same position and noting that the FMLA does not require an employee accrue seniority during unpaid leave. The court also rejected plaintiff's argument that defendants did not provide her notice that her FMLA leave would affect her seniority, finding that seniority accrual is not a substantive right protected by the FMLA. The court also ruled that plaintiff's discouragement theory, in which plaintiff alleged she was dissuaded from exercising her rights under the FMLA, failed as well because the FMLA does not require an employee accrue seniority during unpaid leave. Moreover, the court found that plaintiff failed to present any evidence showing the defendants discouraged her from using her FMLA leave. Accordingly, the court granted the defendant's motion for summary judgment on plaintiff's interference claims.

The court also dismissed plaintiff's retaliation claim, finding that plaintiff failed to provide sufficient evidence that the defendant's reason for terminating her employment was retaliation for her exercise of rights under the FMLA. The court explained that the "got you" statement was factually correct because it was the reason her seniority was less than other employees, which ultimately resulted in her being laid off.

Miller v. Federal Express Corporation, 2014 WL 2117098 (S.D. W. Va. May 21, 21014)

Plaintiff was a part-time customer service agent. When plaintiff was a few months pregnant, her nurse placed her on a 25-pound lifting restriction. Because defendant's position description for plaintiff's job classification required her to lift up to 75 pounds, the employer involuntarily placed her on a "temporary return to work" leave which capped her hours at 21 hours per week. Additionally, because plaintiff had previously averaged 27.23 hours per week, the employer counted 6.23 hours per week against her FMLA entitlement. As result, by the time plaintiff gave birth, she had exhausted her FMLA entitlement, and the employer eliminated her position while she was absent for childbirth and recovery. She was offered a different position at a different location when she was ready to return to work, but declined it because of the length of the commute.

In considering the employer's motion for summary judgment on the interference claim, the court held that there was a genuine issue of fact as to whether plaintiff was unable to perform the essential functions of her position when she was involuntarily placed on FMLA-designated leave. The court found the evidence was contested as to how often a counter agent would need to lift up to 75 pounds and whether the ability to lift that much was properly considered an essential function of her job.

The court also concluded that there was sufficient evidence to preclude summary judgment on the retaliation claim. While the employer argued that the elimination of her position came many months after the protected activity, and thus there was no temporal connection between the protected activity and the discharge, the court held that the employer's placing her on FMLA leave occurred promptly after her medical limitations were provided, and that act resulted in plaintiff's ultimate discharge. The court, however, granted summary judgment to plaintiff's supervisor, concluding that there was insufficient evidence to show that she made the ultimate decisions which resulted in plaintiff's discharge.

Tolston-Allen v. City of Chicago, 22 WH Cases2d 367 (N.D. Ill. 2014)

Plaintiff, a 15-year employee of defendant, was diagnosed with chronic asthma. Over the course of three years, plaintiff applied four times for intermittent FMLA leave for her asthma. She supported her requests with her physician's medical documentation stating that she needed intermittent leave. On each occasion, defendant denied plaintiff's request.

Plaintiff sued defendant for FMLA interference and retaliation triggered. Defendant moved to dismiss. The district court denied the motion, pointing to evidence that plaintiff's supervisor told her that defendant "did not like the amount of time that [plaintiff] needed for leave" and evidence that plaintiff was disciplined for her FMLA leave while other employees were not disciplined for other absences.

Carr v. Boeing, 2014 WH Cases2d 163, 2014 WL 3056807 (W.D. Wash. July 7, 2014)

The employee exhausted her available FMLA leave, but missed several additional days of work and was discharged for her absences. She filed a lawsuit for interference under the FMLA, arguing that the employer took her FMLA leave into account when it made the decision to issue a disciplinary memorandum, which referenced medically documented absences several months prior to her termination. Rejecting this argument and granting summary judgment to the employer, the court noted that the employer submitted an affidavit from the author of the disciplinary notice stating that none of the FMLA-related absences were the basis for the discipline. Rather, the absences at issue were non-FMLA medical documented absences.

Ray v. North American Stainless, Inc., 2014 WL 1047120 (E.D. Ky. March 18, 2014)

The employee worked for a steel company on a rotating shift as a backup turn leader. After the employee was diagnosed with Type I diabetes, he took FMLA leave to receive treatment. Upon his return, he requested an accommodation under the ADA to work only straight shifts, instead of rotating, and one supervisor told him that he could do so. Thereafter, however, the employer refused to schedule the employee on straight shifts and required him to take FMLA leave for the rotating shifts. Once the employee exhausted his FMLA leave, he was discharged.

The district court denied the employer's motion to dismiss or for summary judgment, and granted the employee's motion to amend his complaint. The employee stated a claim because he was able to return to work with accommodations, but the employer refused to allow him to do so and then terminated his employment when his allotted leave time expired. Under these facts, which were set forth in the employee's proposed amended complaint, the employee could state a claim for FMLA interference. Accordingly, the court denied the employer's motion and granted the employee leave to file his amended complaint.

Rinaldi v. Quality King Distribs., Inc., 2014 WH Cases2d 160441 (E.D.N.Y. June 26, 2014)

Plaintiff filed claims for wrongful termination pursuant to the Americans with Disabilities Act, the New York State Human Rights Law, and the FMLA. Regarding the FMLA claims, plaintiff alleged that her employer interfered with her FMLA rights because she was discouraged from taking intermittent leave. Moreover, plaintiff also alleged that defendant retaliated against her because she availed herself of FMLA leave. Defendant contended that she was terminated due to her chronic unexcused absenteeism. The parties filed cross-motions for summary judgment. In granting defendant's motion for summary judgment on all claims, the district court found that plaintiff's absenteeism was the cause of her termination, and that she was never discouraged from taking, or penalized for taking, FMLA leave such that her claims for interference and retaliation under the FMLA failed.

Regarding the interference claim, the court concluded that plaintiff was not entitled to intermittent FMLA leave because the parties made no such agreement. Even assuming she was entitled to intermittent leave, she did not raise a genuine issue of material fact showing that defendant discouraged her from taking FMLA leave because the defendant had previously granted or offered FMLA leave to plaintiff on three separate occasions. In addition, the court ruled that plaintiff abandoned her FMLA retaliation claim because she failed to address it in her

summary judgment brief. Even had it been addressed, the court found that she could not establish a *prima facie* case because of her absences and she took FMLA leave without repercussion. Moreover, although plaintiff speculated that temporal proximity indicated causation, the court concluded that her discharge two and a half months after her last FMLA leave request negated any inference of retaliation. Finally, the court found that plaintiff's final absences, which were due to pain in her side, did not qualify as a "serious medical condition" under the FMLA.

Schofield v. Maverik Country Store, 2014 WL 2765223 (D. Utah June 18, 2014)

Plaintiff brought wrongful termination claims pursuant to Title VII and interference and retaliation claims pursuant to the FMLA. Defendant moved for summary judgment. The district court denied summary judgment as to the FMLA claims. Regarding the interference claim, the defendant conceded that plaintiff had established her *prima facie* case, but argued that she suffered no prejudice because it would have terminated her for tardiness regardless of her request for leave. The court found that plaintiff presented sufficient evidence that a jury could conclude that had plaintiff not requested time off or, alternatively, if she had not returned to work after being assaulted, she would not have been terminated, and therefore denied summary judgment.

On the FMLA retaliation claim, defendant argued that plaintiff could not establish the reason for termination was pretext. Applying the *McDonnell Douglas* burden shifting analysis, the court concluded that plaintiff demonstrated that defendant's purported reason to terminate her was pretext. Specifically, plaintiff established close temporal proximity between the leave request and the termination. This evidence, in addition to evidence of defendant's failure to follow its usual process, its acquiescence to her tardiness in the past, and a possible forged written warning, provided sufficient circumstantial evidence to support the pretext inference. Finally, although defendant argued that the FMLA claims were untimely under a three-year statute of limitations, the court found sufficient evidence in the record for the finder of fact to conclude that the employer's actions were willful, particularly because the employer did not inquire further after she provided notice of her leave.

Sper v. Judson Care Ctr., Inc., 2014 WH Cases2d 163472 (S.D. Ohio July 08, 2014)

Plaintiff filed a wrongful termination suit under the Americans with Disabilities Act, the Ohio Civil Rights Act, and the FMLA. The employer moved for summary judgment on all claims, which the district court granted. As to her FMLA interference claim, plaintiff alleged that the employer interfered with her rights under the FMLA by not granting her leave to address a serious medical condition. The court found that this claim failed because plaintiff never provided notice to the employer that she required FMLA leave. Moreover, the court found that the employer terminated plaintiff for a legitimate reason unrelated to the exercise of her rights under the FMLA.

Hawkins v. Whole Foods Market Group, 23 WH Cases2d 290 (M.D. Fla. 2014)

The plaintiff was employed at the defendant grocery store from September 2009 through October 2011. In March 2011, the plaintiff met with the employer and explained that he required

FMLA leave for a hospitalization related to a thyroid condition. After he returned from FMLA leave in late March, he requested intermittent FMLA leave. Upon his return, the employer informed plaintiff that they had demoted him, then disciplined him for missing work and ultimately terminated plaintiff's employment. The plaintiff then brought FMLA retaliation and interference claims against his employer, alleging that his demotion, discipline, and termination were related to his FMLA leave.

The district court denied the employer's motion to dismiss, finding that plaintiff adequately alleged interference and retaliation claims under the FMLA. In doing so, the district court denied the employer's motion to dismiss as to plaintiff's FMLA interference claim in light of plaintiff's illness and subsequent request for intermittent leave. In addition, the district court noted that, although seven months between the protected activity and the plaintiff's termination was too remote to establish causation based solely on temporal proximity, the plaintiff had sufficiently stated a retaliation claim in light of other facts, particularly plaintiff's demotion while he was on FMLA leave.

Capps v. Oklahoma, Office of Management and Enterprise Services, 2014 WL 2949461 (W.D. Okla. Jun. 30, 2014)

The plaintiff, a thirty-year employee, worked as a comptroller in an agency that was eliminated and consolidated with the state's financial services agency. In September 2011, during the consolidation process, the plaintiff was offered a severance package, which she refused. Instead, she told her employer, via email, that she intended to take FMLA leave and annual leave throughout December 30, 2011, and then retire on January 1, 2012. In October, the plaintiff submitted an application to retire on January 1, 2012. Although the plaintiff took FMLA leave from October to December, she did not request any annual leave. Her physician released her to return to work on December 22, 2011. She attempted to return to work, but the employer required that plaintiff take annual leave and on leave. Even though plaintiff submitted her application to retire on January 1, plaintiff attempted to return to work on January 3, 2012, but the employer told her it had accepted her resignation and that she was no longer employed there.

The plaintiff brought several claims, including an FMLA interference claim. The district court denied the employer's motion for summary judgment as to plaintiff's FMLA interference claim. The district court rejected the employer's argument that plaintiff had not been released to work on the date in question and that it had already restructured its department in reliance on the plaintiff's resignation. The district court found that plaintiff established a *prima facie* case because it was undisputed the employer refused to allow the plaintiff to return to work in December, and the employer failed to carry its burden of demonstrating that its refusal to allow the plaintiff to return was unrelated to her FMLA leave.

Rowe v. United Airlines, Inc., 23 WH Cases2d 449 (D. Colo. 2014)

Plaintiff, a flight attendant, suffered from debilitating migraine headaches. Plaintiff applied for intermittent FMLA leave at the beginning of 2011. The employer approved intermittent leave of one to four times a month, for one to three days each time. Plaintiff also

scheduled time off for vacation from March 2 to March 27, 2011 and from February 24-26, 2011. Plaintiff was scheduled to work February 27-March 1, 2011. On the evening of February 23, 2012, plaintiff was informed that her uncle in Tapei, Taiwan was close to dying and flew there the next day. The plaintiff did not book a flight to return to Taipei even though she was scheduled to work on February 27. Plaintiff suffered a migraine when she was in Taipai and called in sick on February 27, placing herself on FMLA leave on February 28 and March 1, and then removed herself from FMLA on March 2 to begin her time off. Upon her return from time off in April, plaintiff's supervisor expressed that he did not believe that she had been sick on February 27, 28, and March 1. After an investigation, defendant uncovered that plaintiff had made no effort to book a return flight for February 26. Defendant also found that plaintiff had searched for flights to Tapei more than a month before her uncle's illness. Plaintiff was subsequently discharged for acting inconsistently with the airline's guidelines with respect to honesty when she falsely claimed illness as the reason she took FMLA leave. Plaintiff filed a complaint alleging interference and retaliation in violation of the FMLA.

The district court granted the airline's motion for summary judgment, finding that plaintiff was discharged for violating the airline's guidelines regarding honesty when she utilized FMLA time for an unauthorized purpose and then lied before and during an investigation into her FMLA leave. As a result, plaintiff's interference claim failed because defendant could prove that plaintiff would have been discharged regardless of her use of FMLA leave. The Court also held that plaintiff's retaliation claim failed because plaintiff could not refute the airline's legitimate, non-retaliatory reason for plaintiff's discharge.

Vaigasi v. Solow Mgmt. Corp., 2014 WL 1259616 (S.D.N.Y. Mar. 24, 2014)

The employee sued his employer for interference and retaliation in violation of the FMLA. After sustaining numerous work-related injuries, the employee took a medical leave of absence for one year. Near the end of his leave, he sent a letter to his supervisor explaining that he was unable to work due to his injuries, and he enclosed a report from his treating physician indicating that he was "totally disabled." The employee did not communicate whether his status as permanently disabled would ever allow him to return to work.

The court held that the employee failed to allege any facts supporting his allegation that his employer interfered with his FMLA rights or retaliated against him. The court pointed to the fact that the employee's status as "totally disabled" at the time he was terminated meant that he was not "qualified for his position" at that time, a necessary element in an FMLA retaliation claim. Furthermore, the court found that the employee had exhausted his leave entitlement under the FMLA. Finally, the court found the employee did not allege any causal connection between his termination and his participation in a protected activity. Accordingly, the court dismissed all of the employee's FMLA claims.

Knox v. Town of Southeast, 2014 WL 1285654 (S.D.N.Y. Mar. 31, 2014)

After the employee's position as Director of Parks and Recreation was eliminated due to the town's budgetary restrictions, the employee sued his former employer for various forms of discrimination, including under the FMLA. The court applied the *McDonnell Douglas* burden shifting framework and held the employee did not suffer an adverse employment action when the

Town Board adopted a new Automobile Usage Policy and relocated his assigned automobile while he was hospitalized. The court further held that even though the employee's termination was an adverse employment action, the circumstances did not demonstrate retaliatory intent. Finally, the court held that the employee could not demonstrate a causal connection between a protected activity and his termination because four months had passed between his leave and the vote on the town budget. Therefore, the court granted the employer summary judgment on all of the employee's discrimination claims.

Serlin v. Alexander Dawson Sch., 2014 WL 1573535 (D. Nev. Apr. 17, 2014)

Plaintiff asserted both FMLA retaliation and interference claims against the employer, after defendant chose not to renew her teaching contract two years after plaintiff began taking FMLA leave. As for plaintiff's retaliation claim, the court noted that plaintiff claimed her contract was not renewed due to the amount of FMLA leave that she utilized. The court noted that plaintiff's only "opposition" to that action was via her instant lawsuit. That opposition, the court reasoned, could not have resulted in retaliation because the adverse employment decision had already been made. As for plaintiff's interference claim, the court first described FMLA retaliation claims as those where an employer is accused of discriminating against an employee for opposing practices made unlawful by the FMLA. The court held that the decision not to renew plaintiff's contract did constitute an adverse employment action. However, plaintiff failed to show that the decision not to renew her contract was causally related to plaintiff's FMLA leave. The court reasoned that plaintiff's requests for leave had been repeatedly granted for several years prior to the decision not to renew her contract. The court held that plaintiff failed to present a triable issue of material fact as to her claims and granted summary judgment in favor of defendant.

Derus v. California Home Med. Equip., 2014 WL 3853898 (N.D. Cal. Aug. 5, 2014)

Plaintiff asserted an FMLA interference claim against defendant, alleging that defendant refused to grant her request for medical leave. The court noted from the outset that in order to be eligible for FMLA leave, plaintiff must have worked for defendant for twelve months. The court concluded that because plaintiff began work in April 26, 2010, she was not eligible for FMLA leave until April 26, 2011. Defendant pointed to evidence that plaintiff never missed a single doctor's appointment because defendant had prevented her from going to the doctor. Plaintiff offered no evidence to rebut defendant's evidence, and thus, the court found that no genuine dispute of material fact existed as to whether defendant refused to grant medical leave to plaintiff. Accordingly, the court granted summary judgment in favor of Defendant.

Additionally, for the first time in her opposition brief, plaintiff brought an interference claim on the theory that defendant failed to notify her of her rights under the FMLA. The court held that plaintiff could potentially support a claim for interference under this theory, so long as she was prejudiced by defendant's failure to give notice. The court granted leave for plaintiff to amend her complaint to add the claim under the additional theory.

Edusei v. Adventist HealthCare, Inc., 2014 WL 3345051 (D. Md. July 7, 2014)

Plaintiff brought suit against her employer for interference with her FMLA rights and retaliation for taking or attempting to take FMLA leave. Plaintiff requested and was approved for FMLA leave to care for her chronically ill father from December 14 to January 25. Plaintiff experienced an error with her return flight ticketing and called her employer to request an extension of her FMLA leave, which was denied. Plaintiff did not report back to work until February 1. On February 8, Plaintiff received a “final written warning” and a one-day suspension for taking unauthorized leave. Several months later, in August, plaintiff requested three days of personal leave to accompany her daughter to kindergarten. The employer approved two, but not three days. Plaintiff did not report to work for three days and failed to secure adequate coverage for her shift. Plaintiff was then discharged, and her termination paperwork specifically mentioned the earlier “final warning” for unauthorized leave.

In her suit, plaintiff claimed that the employer’s failure to extend her FMLA leave interfered with her FMLA rights and eventually led to her discharge. She also claimed that her one-day suspension and discharge were in retaliation for exercising her FMLA rights. The employer denied the employer’s motion summary judgment. With regard to the interference claim, the employer claimed that the only reason plaintiff stated she needed an extension of leave was due to a flight ticketing error; not because it was medically necessary for her to provide care for her father. Plaintiff, however, claimed that she needed to provide additional care for her father who suffered from a serious health condition. The court decided that a jury, not the court, should decide these facts. As to plaintiff’s retaliation claims, the suspension and discharge hinged on whether plaintiff should have received the February 8 final warning for unauthorized leave, which was the causal connection to both the suspension and discharge. The district court decided that a jury should decide if it was medically necessary for the plaintiff to extend her original FMLA leave or if the final warning was legitimate and non-retaliatory.

Elias v. Cnty. Res. For Independence, Inc., 2014 WL 1316071 (W.D. Pa. Mar. 28, 2014)

Plaintiff brought suit against her former employer for FMLA interference and retaliation, claiming that her employer violated the FMLA by terminating her immediately after she returned to work following an approved FMLA leave. Plaintiff requested, and was granted, FMLA leave for the birth of her child. During plaintiff’s FMLA leave, the employer assigned her job duties to another employee, and eventually decided to terminate plaintiff’s employment. Immediately upon plaintiff’s return from her FMLA leave, her employer informed her that she had been discharged.

Plaintiff argued that the employer interfered with her rights because she was not restored to the position she held when her leave commenced, nor was she restored to an equivalent position after she returned from her approved FMLA leave. The Court agreed, holding that plaintiff was entitled to be reinstated either to her former position or to an equivalent position. Based on deposition testimony of the individual defendant, the decision to terminate plaintiff had not been made until the employer determined that another employee could perform plaintiff’s job duties. As a result, the Court found that, when the employer terminated plaintiff, defendant unlawfully interfered with plaintiff’s FMLA rights, particularly her right to restoration. The court granted plaintiff’s partial motion for summary judgment on her FMLA interference claim.

Quick v. Playtex Mfg., Inc., 2014 WL 1285821(D. Del. Mar. 28, 2014)

Plaintiff brought suit against his former employer alleging FMLA interference and retaliation. Plaintiff requested, and was granted, FMLA leave for a medical procedure. Plaintiff then exhausted his FMLA leave and returned to work. After his return, he failed to show up to work for three consecutive days. As such, the employer terminated his employment pursuant to its attendance policy. The employer argued that since plaintiff exhausted his FMLA leave, he was no longer entitled to FMLA benefits and, thus, he could not have faced interference from the employer preventing him from using such benefits. The court agreed and granted summary judgment on plaintiff's interference claim.

Regarding plaintiff's retaliation claim, the employer argued that plaintiff could not establish that his termination was causally related to his invocation of FMLA rights, and that he could not demonstrate that the employer's reason for his termination was a pretext for FMLA discrimination. The court agreed, holding plaintiff could not put forth sufficient facts to demonstrate the employer's legitimate reason for terminating him – his violation of its attendance policy - was a pretext for discrimination. The court granted defendant's motion for summary judgment.

Alexander v. Carolina Fire Control Inc., 23 WH Cases2d 978 (M.D.N.C. July 25, 2014)

Plaintiff informed her employer that her son had been diagnosed with cancer, and she needed to be able to work intermittently to care for him. The employer sent her FMLA forms to complete, but prior to submitting the forms, plaintiff met with the owners of the company who informed her that she did not need to take FMLA leave because they would allow her to work from home on a reduced schedule so she could care for her son. Plaintiff accepted this offer and worked in this manner for several months before being informed she was being discharged for insubordination in the form of not being available to timely respond to calls and e-mails. Plaintiff then brought suit under the FMLA and Title VII.

The court denied the employer's motion to dismiss as to plaintiff's FMLA interference claim, finding that the employee's allegations that the owners actively dissuaded her from filing her FMLA paperwork and that she was discharged for alleged failures which would not have occurred had she been on protected intermittent FMLA leave were sufficient to state a potential FMLA interference claim. On the other hand, the court dismissed plaintiff's FMLA retaliation claim, finding that the plaintiff abandoned her claim by failing to respond to the employer's argument that plaintiff failed to raise an FMLA retaliation claim.

Bissonnette v. Highland Park Market, Inc., 2014 WL 815872 (Conn. Super. Ct. January 28, 2014)

A jury awarded the employee economic damages for his former employer's violations of the FMLA. The employer filed post-trial motions, including a motion for judgment notwithstanding the verdict, a motion to set aside the verdict, and a motion for remittitur. Plaintiff filed a motion for liquidated damages. The employer's motions were denied, and the employee's motion was granted.

With regard to the interference claim, the court noted that the employee was laid off 11 days after he returned to work from FMLA leave, and was replaced by an independent contractor. Because the employer negotiated with the independent contractor while the employee was on leave, and the cost savings-benefit to the employer was unclear, the court found that the jury may have reasonably concluded that the employee's reinstatement to his position was illusory and that the employer's reasons for laying him off after his return from leave were not credible. With regard to the retaliation claim, the court held that due to the temporal proximity between the employee's return from FMLA leave and his discharge, and because it was only after plaintiff went on FMLA leave that defendant decided to permanently replace him, the jury may have reasonably concluded that defendant's proffered reasons were pretext for discrimination and retaliation in violation of the FMLA. The court granted the employee's motion for liquidated damages, because the employer failed to meet its burden of proving that its violations of the FMLA were committed in good faith or that it had objectively reasonable grounds for believing that its actions were not in violation of the FMLA.

Keiderling v. RFM Services, Inc., 2014 WL 297522 (M.D. Pa., Jan. 27, 2014)

Plaintiff sued defendant for interference and retaliation under the FMLA. Plaintiff missed several days of work due to tooth abscess problems. Plaintiff had two doctors' notes, but he did not provide them to his employer until he returned to work. While he was off work, plaintiff also called in and told his employer that he had pain from his tooth abscess. The day after he returned to work, plaintiff again left work early for a dental appointment. That same day, defendant fired plaintiff for excessive absenteeism.

Defendant moved for summary judgment, but the court denied the motion. The court found that there was a genuine issue of material fact as to whether plaintiff suffered from a serious health condition. There was also an issue as to whether plaintiff's doctors' notes and oral communications of his pain were sufficient to put the employer on notice of his need for FMLA-qualifying leave. The true reason for plaintiff's discharge was also in dispute. The court noted that plaintiff was fired the day after returning from his fourth consecutive absence from work, which was "sufficiently suggestive" to create an inference of causation and defeat summary judgment.

Boles v. Wal-Mart Stores, Inc., 2014 WL 1266216 (D.N.J. Mar. 26, 2014)

The employee, a backroom associate at a retail store, claimed that the store unlawfully terminated his employment following a medical leave of absence. He filed a claim for interference under the FMLA, alleging that the employer failed to comply with the notice requirements set forth in the Department of Labor regulations. The employer moved for summary judgment, but the court denied the motion. The court found that an employer's failure to comply with the notice requirements may give rise to an interference claim and subject the employer to liability. To ultimately prevail, the employee would need to show that the employer's failure impaired his rights and resulted in prejudice to him. The court then found that there were genuine issues of material fact as to whether the employer met the notice requirements, and therefore, the court denied the employer's motion for summary judgment.

Floyd v. Mgmt. Analysis & Utilization, Inc., 2014 WL 971937 (D.S.C. Mar. 12, 2014)

The employee requested FMLA leave following an ankle injury. About three weeks after he returned to work, the employer told him that there was no record of his FMLA request, and that he needed to submit another request. About one month later, the employer advised the employee that he needed to provide a doctor's note for his absences to be excused. The employee responded that he could not procure an excuse from his doctor because he had not reported to the doctor earlier. Accordingly, the employee was discharged for excessive absences.

The employee filed a lawsuit for interference under the FMLA, but the court granted the employer's motion to dismiss for failure to state a claim. The employee failed to establish that he was entitled to FMLA leave because he failed to allege facts showing that he had a serious health condition. The employee argued that the employer failed to tell the employee that he needed to provide a doctor's note, when the employee initially requested FMLA leave. The employer argued that it had no duty to tell the employee that he needed to see a doctor in order to qualify for FMLA leave. The court agreed with the employer and dismissed the claim. Because the employee did not submit when requested a certification supporting his request for FMLA leave, the employer's duty to provide leave was never triggered, and the employee was not entitled to protections under the FMLA.

Spears v. Louisiana Dep't. of Pub. Safety & Corr., 2 F. Supp. 3d 873 (M.D. La. 2014)

The employee filed a lawsuit against the employer based on his discharge, which occurred after he returned from FMLA leave. The employee claimed FMLA interference, retaliation, and failure to comply with the FMLA's notice requirements. Before the leave began, the employee notified the employer that he had taken a second job as a private security guard. The employee subsequently submitted FMLA paperwork, which stated that he could not work at all due to stress. However, the employee continued to work as a security guard during his leave, which violated company policy. After the employee returned to work, he was discharged. The employee claimed that the discharge interfered with his FMLA rights, and that it was in retaliation for taking FMLA leave. In his deposition, the employee's doctor testified that the employee could continue to work as a private security guard because the stress came only from the job with the employer.

The employer filed a motion for summary judgment, which was granted as to the interference and notice claims, but denied as to the retaliation claim. The employer did not interfere with the employee's FMLA rights because the employee was not denied any FMLA benefits – he was granted leave and returned to work. The court also noted that the interference claim was actually the same as the retaliation claim. Additionally, the court granted summary judgment on the claim that the employer failed to provide the required notice of leave rights within two days of approving leave. The court found that the employee did not suffer any loss of benefits or prejudice. However, the court denied summary judgment on the retaliation claim. The court found that an employee need not be incapacitated from performing any and all jobs, but only the current job. Thus, the testimony by the employee's doctor that the employee should not work for the company because that job caused the stress was sufficient to create a material issue of fact.

The employee also sought summary judgment, but the court denied this motion because the employee only presented evidence that FMLA leave was a motive, but not the exclusive motive, for his termination. Thus, the employee alleged a mixed motive case. Given the dispute as to whether the employee lied or misled the company about whether he could work at all, there was an issue of material fact that made summary judgment improper.

McDaniels v. Group Health Co-op, 23 WH Cases2d 1272 (W.D. Wa. 2014)

Plaintiff, a former Patient Access Representative at a healthcare system, alleged multiple claims, including interference under the FMLA. Concluding that plaintiff had failed to adduce evidence sufficient to support any of her claims, the court granted summary judgment for defendant.

With respect to the FMLA interference claim, plaintiff requested and was granted two different periods of intermittent FMLA leave: one for arthritis in the knee, and another for sciatica resulting from a fall. However, plaintiff alleged that defendant had unlawfully denied her request for leave on two occasions when she wanted to attend medical appointments, and that defendant had erroneously recorded two unexecuted absences that were FMLA-protected. The court rejected both arguments. The court noted that plaintiff failed to produce any evidence showing that she had sought to schedule the appointments to accommodate defendant's operations. In particular, defendant had refused her requests because it already expected to be understaffed on those occasions, and plaintiff failed to demonstrate why this refusal was unjustified or unreasonably burdensome given her medical needs. Second, the court rejected plaintiff's contentions about the improperly recorded absences because she had failed to produce evidence showing that she had suffered harm, as a result. The court noted that defendant had not disciplined plaintiff for those absences.

Weinstein v. AutoZoners LLC, 2014 WL 898081 (D. Nev. Mar. 6, 2014)

The employee sued his former employer for retaliation and interference under the FMLA. The employee requested FMLA leave to care for his sick mother. He submitted a doctor's certification describing his mother's serious health condition, and the employer approved his request. Upon his return, the employee worked an adjusted work schedule, which allowed him to come to work late and leave early to care for his mother. Later that year, the employer implemented an attendance policy that penalized employees with points for tardiness and absences. Accumulating 12 points in one year would result in termination. Over the next year, plaintiff accumulated 12 points and was discharged. The employee alleged that he had been on intermittent FMLA leave when he accumulated the points, and that his termination constituted retaliation and interference with his rights under the FMLA.

The employer moved for summary judgment. The court first held that the employer was covered by the FMLA, and that the employee was entitled to FMLA leave. The employee provided sufficient notice of his intent to take leave, based on the doctor's certification and his request for an adjusted work schedule upon his return to work, which indicated his need for intermittent leave. The employer argued that it requested additional information for several dates when the employee was absent. The court held that a genuine issue of material fact existed as to whether the employee provided sufficient notice for those dates. Finally, because the employee

provided sufficient notice for the majority of his leave, the court rejected employer's argument that it discharged the employee for failing to follow its policies and procedures regarding notice. As for the interference claim, the court held that the employee had proven as a matter of law that employer interfered with his FMLA rights by assessing points against him for taking leave that he was entitled to take, for which he provided sufficient notice. Accordingly, the court granted partial summary judgment in favor of plaintiff.

Young v. McCarthy-Bush Corp., 2014 WL 1224459 (N.D. Ga. Mar. 24, 2014)

The employee filed suit against his former employer alleging interference and retaliation under the FMLA. The employer allegedly refused the employee's request for leave to care for his wife following her knee surgery, and discharged the employee to avoid providing him leave. After working for the employer for over 10 months, the employee's wife underwent knee surgery. Complications after the surgery left plaintiff's wife unable to walk or take care of herself, and led to two additional surgeries. The employee claimed he made two pre-eligibility requests for future leave under the FMLA. He made an additional request, several months later, to use FMLA leave on the two days immediately following his request. The second day of leave that the employee requested was the day before he was to become eligible for FMLA leave, according to the employer's calculation of the twelve-month period. On that day, the employee was discharged for being absent from work.

The employer moved for summary judgment, arguing that the employee had not worked for twelve months and therefore was not eligible for FMLA leave. The court disagreed for two reasons. First, pre-eligibility requests for post-eligibility leave under the FMLA are protected. Thus, even assuming that plaintiff had not become eligible until after his requests, he would still have a cause of action arising from his right to request post-eligibility FMLA leave. Second, the court held that the employee provided sufficient evidence to create a factual issue with regard to his date of hire. Furthermore, the fact that the employee was discharged the day before the employer claimed he would have become eligible for FMLA leave was evidence of interference. Thus, the court denied the employer's motion for summary judgment. The court also denied employer's motion for summary judgment on the employee's retaliation claim. The employee provided sufficient evidence of pretext to raise an issue of fact. In particular, there was close temporal proximity between the protected conduct and when the employer took adverse employment actions, creating "forceful evidence" of retaliation.

Holly v. Kindred Healthcare Operating, Inc., 2014 WL 4922607 (D. Utah Sept. 30, 2014)

Plaintiff was the Admissions Coordinator for defendant, a residential long-term health care facility. Plaintiff brought a claim for FMLA interference, and the U.S. District Court granted summary judgment for the employer. Plaintiff sought to return to work from FMLA leave with restrictions and the employer stated she was not allowed to return to work with any restrictions in place. The Court found that under the FMLA, if an employee cannot perform the essential function of her position, the employer is not obligated under the FMLA to accommodate the employee. The Court refused to allow plaintiff to read the ADA's reasonable accommodation provision into her FMLA interference claim.

Plaintiff also claimed her termination interfered with her rights under the FMLA, and pointed to the temporal proximity between her request for FMLA leave and her termination. The Court rejected this argument, finding defendant carried its burden of producing evidence that plaintiff would have been dismissed regardless of her FMLA claim because she discarded original client files.

Yontz v. Dole Fresh Vegetables, Inc., 2014 WL 5109741 (S.D. Ohio Oct. 10, 2014)

Plaintiff was a package machine operator for defendant for over six years. From the start of his employment, plaintiff expressed his interest in taking two weeks of vacation in May every year to travel to his time-share in Florida. Throughout his employment, this two week period was contentious and the company consistently believed plaintiff was abusing its policies to take a full two-week vacation. Plaintiff's wife had a baby in May 2010, and plaintiff sought eight weeks of leave to care for the baby, who had Down's Syndrome. Although the company was suspicious of the timing of the leave, they granted the FMLA leave, but warned plaintiff about leave for the next May. Plaintiff then sought and received FMLA intermittent leave to take care of his daughter with Down's Syndrome, which would include care from a number of specialists and episodic flare-ups preventing his daughter from participating in normal daily activities. The following May, Plaintiff only took the week off he was entitled to for vacation. He claimed his family was heading back home from vacation when his daughter became sick, and they could not return from their vacation as planned. Plaintiff claimed the illness was related to her Downs Syndrome. Plaintiff sought to use his FMLA intermittent leave. He also had to use an additional day of intermittent leave when they returned from the trip because his daughter's caregiver was sick. Plaintiff was discharged for misusing his pre-approved intermittent FMLA leave, in part because he could not provide documentation that his daughter was ill.

Defendant moved for summary judgment on plaintiff's interference and retaliation claims and it was denied by the Court. The Court found a reasonable juror could believe the testimony of the employer and his wife that their baby was ill, and that is sufficient under the FMLA. The Court found plaintiff did not need medical evidence to support his allegations. The Court further held that defendant failed to state a non-discriminatory reasons for terminating plaintiff. The employer's honest belief that plaintiff was misusing FMLA for vacation time was not sufficient.

Gillman v. Ikalooa County Florida, 2014 WL 4928923 (N.D. Fla. Sept. 30, 2014)

Plaintiff was a correctional officer who injured her wrist on the job. She was placed on concurrent FMLA and workers' compensation leave. After her FMLA leave was exhausted, Plaintiff was not medically cleared to return to her position, but requested to return to "light duty" on multiple occasions. Defendant denied the request because there were no light duty positions available. Defendant had a policy that at the end of six months, continued lost time for an on-the-job injury, annual and sick leave accrual will cease and the position can be re-filled. After six months, defendant terminated Plaintiff's position because she was not medically cleared to return.

Plaintiff filed suit for FMLA interference and retaliation, claiming that defendant's refusal to allow her to work a light duty position caused her to exhaust her FMLA leave and lose

her job. The U.S. District Court granted defendant summary judgment on both the interference and retaliation claims. The Court found plaintiff exercised all of her substantive FMLA leave rights without interference prior to her termination, and there is no dispute plaintiff was not medically cleared to return to full-time work in her original position until several months after she had exhausted her FMLA leave and been terminated. The Court emphasized an employer does not have an obligation under the FMLA to place an employee in a different position. The Court also rejected plaintiff's retaliation claims because the undisputed record showed at the time plaintiff requested a light duty job there were no available positions that could be considered light duty and plaintiff was unable to show pretext.

Rodriguez v. School Board of Hillsborough County, Florida, 23 WH Cases2d 1065 (M.D. Fla. 2014)

Plaintiff was a custodian for a public school in Florida. Plaintiff met with the school's principal to discuss problems plaintiff was having with the head custodian. In the course of the discussion plaintiff said she had previously considered suicide. Defendant placed the employee on unpaid administrative leave and referred her to a fitness-for-duty evaluation with a psychiatrist. The psychiatrist determined she suffered several disorders, including depression, and found her disabled and stated she could return to work in six months if she responded to treatment. Plaintiff was put on "administrative health leave" rather than FMLA leave. Although defendant initially refused to allow plaintiff to return to work until its psychiatrist cleared her in a follow-up fitness-for-duty evaluation, defendant allowed the employee to return to work at a different elementary school after receiving clearance from employee's psychiatrist and therapist.

Plaintiff filed suit against the school district on a number of theories including FMLA interference and retaliation. The Court granted summary judgment to the employer on all counts. The Court found the fitness-for-duty evaluation was job-related and consistent with business necessity, particularly because plaintiff's work was in close proximity to small children. The Court further noted the FMLA specifically allows an employer to delay restoration of employment until an employee submits a required fitness-for-duty certification. The Court also rejected plaintiff's claim that she was denied benefits because she was not on FMLA leave. Because the administrative leave plaintiff was placed on was more generous than FMLA leave, she suffered no damages based on her leave status, and there were no benefits to which she was entitled that she did not receive.

Jackson v. City of Hot Springs, 751 F.3d 855, 22 WH Cases2d 909 (8th Cir. 2014)

The employee went on FMLA leave for to undergo surgery. After his FMLA expired, the employer granted the employee's request for additional leave, however, the employee did not come back to work on his return to work date. The employee was discharged, but he sought reinstatement about one month later. The employee went through the application process, and although several supervisors believed that he was the most qualified applicant, no candidate was selected. One supervisor had stated that his opinion that hiring the employee would be a "mistake." The employer sought applicants again a few months later, and although he applied once again, another candidate was selected. The employee filed an FMLA retaliation claim, and the jury entered judgment for the employer. The jury found that the employer had acted in good

faith, and accordingly, the trial court declined to award liquidated damages. The trial court denied the employer's motion for judgment on the pleadings, and both parties appealed.

The employer first argued that there was not sufficient evidence to support the verdict, but the Eighth Circuit disagreed. The court noted that the supervisors who interviewed the employee thought he was the most qualified candidate when he initially reapplied, and the employer could not sufficiently explain why one supervisor thought that hiring him would be a "mistake." The employer also argued that the employee was unable to perform the essential functions of the job when he was not hired, because the employee was on painkillers. However, the painkillers did not categorically prohibit the employee from operating machinery, and the employee testified that he had built a tolerance to the painkillers' effects. Accordingly, there was sufficient evidence to support the jury's award. The court also held that it was an abuse of discretion to deny liquidated damages, because the employer could not point to any evidence that it had acted in good faith or with reasonable grounds for believing that its refusal to rehire was a violation of the FMLA. Therefore, the court reversed the district court's denial of liquidated damages, but affirmed in all other respects.

***Taylor-Novotny v. Health Alliance Medical Plans, Inc.*, 772 F.3d 478, 125 FEP Cases 646 (7th Cir. 2014)**

Plaintiff appealed the district court's grant of summary judgment on plaintiff's FMLA interference claim to defendant. While employed with defendant, plaintiff was diagnosed with multiple sclerosis and took intermittent FMLA leave for her condition. Because of excessive tardiness and absences, among other performance problems, defendant discharged plaintiff.

The Seventh Circuit agreed with the district court that plaintiff's admission that defendant had never denied her the opportunity to take FMLA leave was "fatal to her claim." Plaintiff argued that defendant interfered with her FMLA leave when it denied her request to only work in the office two one-half days per week. The court found that this schedule request was not a FMLA request, because plaintiff sought to be paid for the time she did not work, and the FMLA only provides for unpaid leave. Therefore, when defendant denied the request, it did not deny any right under the FMLA. Plaintiff also claimed that defendant interfered with her FMLA rights by not permitting her to scan her badge to report her work hours. The court noted that badge scans only reported plaintiff's time of entry, not the reason for her late arrivals, and therefore did not provide defendant with enough information to determine whether plaintiff's tardiness should be charged as FMLA leave. The court also found that this requirement did not deny plaintiff any FMLA right. The court affirmed the district court's grant of summary judgment.

Summarized Elsewhere:

***Burcar v. South Washington County School District*, 2014 WL 67954 (D. Minn. Jan. 8, 2014)**

***Outten v. Genesis Health Care, LLC*, 2014 WL 3964918 (E.D. Pa. Aug. 12, 2014)**

***Kendall v. Walgreen Co.*, 22 Wage & Hour Cases2d 1179 (W.D. Tex., Apr. 16, 2014)**

***Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 21 WH Cases2d 1315 (7th Cir. 2014)**

***Moore v. Loney*, 2014 WL 671446 (D. Md. Feb. 19, 2014)**

***Jarrett v. Nobel Learning Communities, Inc.*, 2014 WL 1612610 (N.D. Ill. Apr. 21, 2014)**

***Callan v. City of Dover*, F. Supp. 2d, 2014 WL 4243306 (D. Del. Aug. 26, 2014)**

Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 22 WH Cases2d 1436 (1st Cir. 2014)
Wisz v. Wells Fargo, 2014 WH Cases2d 162 (D. Md. 2014)
Freelain v. Village of Oak Park, 2014 WL 148739 (N. D. Ill. 2014)
Young v. United Parcel Service, 992 F. Supp. 2d 817 (M. D. Tenn. 2014)
Morris v. Pilgrim’s Pride Corporation, 2014 WL 3514987 (W.D. Ark. Jul 15, 2014)
Demyanovich v. Cadon Plating & Coating, L.L.C., 747 F.3d 419 (6th Cir. 2014)
Kelly v. Horizon Medical Corporation, 2014 WL 1293859 (M.D. Pa. Mar. 31, 2014)
Davis v. Tri-County Metropolitan Transp. Dist. of Oregon, 2014 WL 4425815 (D. Or. Sept., 8, 2014)
Jarvela v. Crate Carrier Corp., 754 F.3d 1283 (11th Cir. 2014); 22 WH Cases2d 1217 (June 8, 2014)
Thomas-Young v. Sutter Cent. Valley Hosps., 2014 WL 1096795 (E.D. Cal. Mar. 19, 2014)
Bellone v. Southwick-Tolland Regional School District, 748 F.3d 418 (1st Cir. 2014)
Eren v. Mars, Inc., 2014 WL 2765684 (M.D. Tenn. June 18, 2014)
Giddens v. UPS Supply Chain Solutions, 2014 WL 4954597 (D. Del. Sept. 30, 2014)
Halker v. Bob Evans Farms, Inc., 2014 WL 4472651 (S.D. Oh. Sept. 11, 2014)
Gabriel v. Colorado Mountain Med., P.C., 2014 WL 7336789 (D. Colo. Dec. 23, 2014)

B. Other Claims

Hudson v. Tyson Fresh Meats, Inc., Slip Copy, 2014 WL 789147 (N.D. Ind. Feb. 26, 2014)

Plaintiff, a former “kill floor” supervisor at defendant’s meat packing plant brought an action alleging FMLA by interference and retaliation. In analyzing plaintiff’s claims, the court applied the framework in *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012). The court explained that until *Pulczynski*, the Eighth Circuit recognized only two types of claims arising under 29 U.S.C. § 2615(a): interference claims (under 29 U.S.C. § 2615(a)(1)); and retaliation claims (under 29 U.S.C. § 2615(a)(2)). In *Pulczynski*, the Eighth Circuit established three types of claims arising under 29 U.S.C. § 2615(a): an interference/entitlement claim under 29 U.S.C. § 2615(a)(1); a discrimination claim under 29 U.S.C. § 2615(a)(1); and a retaliation claim under 29 U.S.C. § 2615(a)(2). The distinction between these claims turns on whether an employee must prove the employer’s discriminatory intent. An interference/entitlement claim only requires proof that the employer denied the employee his entitlement under the FMLA; discrimination and retaliation claims require proof of the employer’s retaliatory intent. The court applied the post-*Pulczynski* framework to plaintiff’s interference claim under 29 U.S.C. § 2615(a)(1), and reclassified it as one of “entitlement” because plaintiff asserted that he was deprived of a substantive right under the FMLA when he was granted non-FMLA leave rather than FMLA leave. The court found that although defendant did not grant plaintiff FMLA leave, it was undisputed that defendant timely granted him sick leave, despite it not being classified as FMLA leave. Further, the court found that plaintiff was not prejudiced by the misclassification of his absence or denied benefits. Accordingly, the court granted summary judgment to defendant as to plaintiff’s entitlement claim.

The court also reclassified plaintiff’s retaliation claim as a “discrimination” claim arising under 29 U.S.C. § 2615(a)(1), because plaintiff claimed that he was discharged for taking leave—not that he was discriminated against for opposing practices made unlawful under the

FMLA. Nonetheless, the court analyzed plaintiff's retaliation/discrimination claim as a pre-*Pulczynski* retaliation claim, noting that plaintiff is required to show discriminatory intent under either analysis. The court found that plaintiff's retaliation claim failed because he did not demonstrate that defendant's legitimate nondiscriminatory reason for terminating his employment was pretextual. Specifically, plaintiff did not demonstrate that defendant's proffered explanation had no basis in fact or that it was more likely that defendant terminated his employment because he asserted his FMLA rights than because he was a no show/no call for three days. Further, there was no indication that defendant had any discriminatory animus towards employees who sought or took FMLA leave. Accordingly, the court granted summary judgment with respect to the retaliation claim.

***Davies v. N.Y. City Dep't of Educ.*, 563 Fed. Appx. 818, 22 WH Cases2d 926 (2d Cir. 2014)**

The employee sued her former employer for retaliation in violation of the FMLA. The employee alleged the employer retaliated against her after she took FMLA leave by removing her from her previously-assigned classroom, ignoring her complaints regarding disruptive students, and subjecting her to intense scrutiny and evaluation. The parties did not dispute that the employee was qualified for FMLA leave; the disputed issue was whether she suffered a material adverse action.

The court applied the *McDonnell Douglas* burden-shifting framework and held that the employee established a *prima facie* case of retaliation because her former employer gave her unfavorable performance ratings after she returned from FMLA leave. The court then found that the employer had a legitimate, non-discriminatory reason for giving the employee poor reviews, namely the employee's documented underperformance in the classroom. Finally, the court found that she could not show that the poor performance reviews were pretext due to her history of poor performance. The court ultimately held the employee's retaliation claim was meritless and affirmed summary judgment in favor of her former employer.

Summarized Elsewhere:

***Vaigasi v. Solow Mgmt. Corp.*, 2014 WL 1259616 (S.D.N.Y. Mar. 24, 2014)**

***Freelain v. Village of Oak Park*, 2014 WL 148739 (N. D. Ill. 2014)**

***Peda v. New York Univ. Hospitals Ctr.*, 2014 WL 1013844 (S.D.N.Y. Mar. 17, 2014)**

***Bement v. Cox*, 2014 WL 4699620 (D. Nev. Sept. 22, 2014)**

***Mezu v. Morgan State Univ.*, 2014 WL 2452574 (D. Md. May 30, 2014)**

***Bowman v. CSX Transp., Inc.*, 2014 WL 3542118 (N.D.N.Y. May 22, 2014)**

1. Discrimination Based on Opposition

Summarized Elsewhere:

***Karaffa v. Township of Montgomery*, 560 Fed.Appx. 133, 22 WH Cases2d 361 (3d Cir., 2014)**

***Wages v. Stuart Management Corp.*, 21 F.Supp.3d 985, 22 WH Cases2d 1313 (D.Minn. 2014)**

***Hettler v. Entergy Enterprises, Inc.*, 2014 WL 1508699 (S.D.N.Y. Mar. 28, 2014)**

2. Discrimination Based on Participation

Downs v. Winchester Med. Ctr., 2014 WL 4093696 (W.D. Va. Aug. 18, 2014)

Plaintiff worked as an executive secretary for defendant hospital. During her employment, plaintiff took FMLA leave for her migraine headaches. Plaintiff received poor performance reviews relating to her unexcused absences and general problems with timeliness. Plaintiff also accessed her supervisor's email without authorization, and failed to let her supervisor know that she had this access, despite a company policy that required her to do so. While accessing her supervisor's email, plaintiff saw an email discussing her possible termination. She then sent management an email asserting her FMLA rights. Defendant terminated plaintiff two days later, because of the unauthorized access of her supervisor's email. Plaintiff sued for FMLA retaliation, alleging that the company terminated her employment because she took FMLA leave.

The court granted the employer's motion for summary judgment. The court found that the employee's failure to notify her employer that she had access to certain emails was a sufficient non-discriminatory reason for the employee's discharge. Plaintiff maintained that the close timing (two days) between her sending an email asserting her FMLA rights and her termination was evidence that the employer's reason for the termination was pretext for discrimination. The court rejected plaintiff's argument because the employee only mentioned her FMLA rights after seeing the email discussing her possible termination. Furthermore, the court found that plaintiff did not contest the employer's assertion that she had an obligation to let her supervisor know that she had access to emails that referenced her specifically. The court held that the fact that plaintiff did not let her employer know that she had access to these emails was a legitimate, non-discriminatory reason for her termination. Lastly, the court found that the employer provided additional evidence that the reason for plaintiff's discharge was not pretext when it identified two other employees whose employment had been terminated for similar breaches of company policy.

Hughes v. B/E Aerospace, Inc., 2014 WL 906220 (M.D.N.C. March 7, 2014)

The plaintiff, a project engineer, claimed that his employer and individual managers interfered with his rights under the FMLA and retaliated against him by placing him on paid administrative leave eight days after his return from leave, terminating his employment, and hiring a replacement. The defendants subsequently moved for summary judgment.

The court considered the FMLA interference claim, but determined that the plaintiff had failed to provide any evidence that the defendants had denied him any substantive right under the FMLA, as he used FMLA leave and had been returned to the same position, salary and benefits prior to being placed on paid administrative leave. The court therefore granted summary judgment as to the defendants on the interference claim.

The court next considered the plaintiff's FMLA retaliation claim using the *McDonnell Douglas* burden-shifting framework. The court first noted that the parties had agreed that the plaintiff had engaged in protected activity under the FMLA and that, shortly after his return from FMLA leave, he was placed on administrative leave and his employment was terminated. The court then ruled, based on the temporal proximity of the plaintiff's return to work and his

placement on administrative leave, he had satisfied his *prima facie* case. The court found, however, that the plaintiff had failed to provide evidence that retaliation for his exercise of rights under the FMLA was either the but-for cause of or a motivating factor in his termination, as the defendant employer had articulated a legitimate, non-retaliatory reason for plaintiff's discharge, i.e., the plaintiff's history of and continued poor work performance, as well as his placement on a performance improvement plan, prior to his taking FMLA leave. Plaintiff failed to provide any evidence demonstrating that this explanation was pretextual. The court therefore granted summary judgment to the defendants on the retaliation claim.

Levitant v. City of New York Human Resources Admin., 558 Fed.Appx. 26 (2d Cir. 2014)

The plaintiff, a city employee, claimed that the defendant employer had, *inter alia*, interfered with his rights under the FMLA by failing to provide him with medical leave and retaliated against him for his exercise of rights under the FMLA when it terminated his employment. The defendant subsequently moved for summary judgment on all claims, which the district court granted. The plaintiff subsequently appealed the grant of summary judgment.

The Second Circuit ruled that plaintiff failed to establish a *prima facie* case for FMLA interference or retaliation and further failed to prove that the defendant's reason for terminating plaintiff's employment was pretextual. The court therefore affirmed the judgment of the district court granting summary judgment to the defendant.

Clark v. New York State Office of State Comptroller, 2014 WL 823289 (N.D.N.Y. March 3, 2014)

The plaintiff, a clerk for a state comptroller's office, alleged that the defendants – her employer, her managers, her union, and an evaluating physician – had, *inter alia*, retaliated against her for her exercise of rights under the FMLA by eliminating many of her job duties upon her return from FMLA leave and placing her on administrative leave three months later. The state defendants (the employer and managers) subsequently moved for summary judgment on all claims.

The court considered the plaintiff's FMLA retaliation claim using the *McDonnell Douglas* burden-shifting framework. The court found that the plaintiff had failed to meet her initial burden to establish a *prima facie* case of retaliation under the FMLA. While the plaintiff had alleged that she had engaged in protected activity under the FMLA, the adverse employment actions which she identified had, in the case of the elimination of her duties, preceded FMLA leave. Moreover, the defendants had placed her on involuntary leave three months after she returned from FMLA leave. The court determined that plaintiff failed to establish an inference of retaliatory intent and further found that the defendants' position that plaintiff had been placed on involuntary leave because of her erratic and disruptive behavior constituted a legitimate and nondiscriminatory reason for her placement on such leave. The court therefore granted summary judgment to the defendants on, *inter alia*, the plaintiff's claims under the FMLA.

Summarized Elsewhere:

Musoke v. KeyBank Nat. Ass'n, 2014 WL 969896 (W.D. Wash. Mar. 11, 2014)

Plange v. Christ Hosp., 22 WH Cases2d 1170 (D.N.J. May 5, 2014)

Moore v. Loney, 2014 WL 671446 (D. Md. Feb. 19, 2014)

Porter v. Five Start Quality Care-MI, LLC, 2014 WH Cases2d 159197 (E.D. Mich. June 20, 2014)

Bissonnette v. Highland Park Market, Inc., 2014 WL 815872 (Conn. Super. Ct. January 28, 2014)

Keiderling v. RFM Services, Inc., 2014 WL 297522 (M.D. Pa., Jan. 27, 2014)

Taylor v. Rite Aid Corp., 21 WH Cases2d 1687 (D. Md., Jan. 27, 2014)

Fresquez v. County of Stanislaus, 2014 WL 1922560 (E.D. Cal. May 13, 2014)

Thomas-Young v. Sutter Cent. Valley Hosps., 2014 WL 1096795 (E.D. Cal. Mar. 19, 2014)

Gillman v. Ikalooosa County Florida, 2014 WL 4928923 (N.D. Fla. Sept. 30, 2014)

III. ANALYTICAL FRAMEWORKS

A. Substantive Rights Cases

1. General
2. No Greater Rights Cases

Hayes v. Tennessee, 2014 WL 3408344 (Tenn. Ct. App. July 10, 2014)

A state employee who was tardy for work on numerous occasions was discharged after she was, once again, late for work. Prior to receiving the letter recommending her termination, the employee requested FMLA leave. The leave request was approved after the termination recommendation, but before the civil service commission affirmed the discharge decision. The employee filed a claim for interference under the FMLA, which was dismissed. On appeal, the dismissal was affirmed. The court concluded that the employee failed to comply with the employer's absence policies. Thus, the employer demonstrated that it would have terminated the employee's employment notwithstanding any attempt to use FMLA leave.

Summarized Elsewhere:

De Oliveira v. Cairo-Durham Cent. School Dist., 2014 WL 4900403 (N.D.N.Y. Sept. 30, 2014)

Saulter v. Detroit Area Agency on Aging, 562 Fed.App. 346, WH Cases2d 461 (6th Cir. 2014)

B. Proscriptive Rights Cases

Summarized Elsewhere:

Downs v. Winchester Med. Ctr., No. 5:13CV00083, 2014 WL 4093696 (W.D. Va. Aug. 18, 2014)

IV. APPLICATION OF TRADITIONAL DISCRIMINATION FRAMEWORK

Perry v. Lancaster County, Nebraska, 2014 WL 2574523 (D. Neb. June 9, 2014)

Plaintiff, a former juvenile detention officer at the defendant's Youth Services Center, alleged she was discriminated against, retaliated against, harassed, and terminated due, in part, to her FMLA leave usage. Plaintiff requested leave on April 7, 2011, for approximately one week for her husband's surgery. Despite her request for FMLA leave, plaintiff completed two of her shifts during her requested leave time because her husband's surgery had been rescheduled, yet she did not notify defendant of the change. Thus, her leave request was treated as leave without pay rather than FMLA leave. The plaintiff requested additional leave on April 20, 2011, and was granted leave for three days, but defendant notified her that the remaining days were under review. Later that month, plaintiff received a letter from her supervisor proposing to suspend her for violating policies regarding appropriate procedures for requesting and obtaining leave, among other reasons. During plaintiff's pre-disciplinary hearing, the proposed suspension was reduced to a written warning. She also was given additional FMLA leave time in connection with her husband's medical condition. Following this incident, plaintiff had several run-ins with her supervisors, and her colleagues claimed she was watched more closely than other employees. Plaintiff's employment ultimately was terminated for her repeated violation of the defendant's personal observation checks policy, for which she had been disciplined on 25 separate dates, and which she violated again 40 times during a shift on January 5, 2012.

The court granted defendant's motion for summary judgment. First, the court rejected plaintiff's claim that she was unlawfully denied FMLA leave for the entire period for which she requested leave because she failed to establish that she was harmed by the alleged violation. Specifically, because FMLA leave is unpaid, plaintiff lost no compensation or benefits when defendant classified her leave as approved leave without pay. Additionally, her first discipline was reduced to a written warning rather than a suspension and, therefore, she did not suffer any direct consequences from taking the leave. Second, the court held that plaintiff was unable to establish a prima facie case of FMLA discrimination because the warning she received was not an adverse employment action, the alleged "harassment" due to run-ins with her supervisors did not create any sort of material disadvantage to plaintiff, and her termination was solely the result of her policy violations on January 5, 2012. The court reasoned defendant would have discharged plaintiff even if she had never exercised her rights under the FMLA.

Summarized Elsewhere:

Jarrett v. Nobel Learning Communities, Inc., 2014 WL 1612610 (N.D. Ill. Apr. 21, 2014)

Ammons v. Cook County of Illinois, 2014 WL 4116956, (N.D. Ill. Aug. 20, 2014) (unpublished)

A. Direct Evidence

Kumar v. Johnson & Johnson, Inc., 2014 WL 5512549 (D.N.J. Oct. 31, 2014)

In June 2009, plaintiff, a human resources employee, took FMLA leave for her pregnancy. Upon her return to work in January 2010, her new supervisor informed her that her position had been "leveled" within the company's pay scale and that he had implemented a number of other changes that affected several employees in his department. In doing so, plaintiff's supervisor removed or reduced several of her job duties. In February, plaintiff

received her 2009 performance evaluation, where her former supervisor noted in five separate places that plaintiff's FMLA leave disrupted her accomplishment of her job duties and objectives. The former supervisor likewise recommended that plaintiff's overall rating be reduced. In conjunction with this recommendation, the former supervisor referenced plaintiff's leave of absence, noting that her leave of absence caused her to miss deadlines. In April, plaintiff was informed that a new position was created in her department that comprised substantial portions of the job duties plaintiff had prior to taking FMLA leave. Later that year, the defendant rated plaintiff as a 2/4 on the company's succession scale, meaning that she was not a good candidate for promotion. When she asked her supervisor for the basis of the rating, he informed her that other leaders had reported to him that she was not "reliable."

Plaintiff subsequently applied for alternative positions with Johnson & Johnson and transferred to a different Johnson & Johnson company. In January 2011, the defendant reduced 2010 discretionary bonus. Thereafter, plaintiff also met with the defendant's Vice President of Diversity and Inclusion, who advised her to file an internal complaint with the company regarding the discrimination she believed she experienced. On April 4, 2011, plaintiff was informed that her job duties would be substantially altered as a result of a restructuring. One day later, plaintiff met with the company regarding her complaint. The company investigation ultimately determined that plaintiff was not discriminated against. A few weeks later, plaintiff was offered a replacement position at the same pay band as her current position, but she rejected the offer and subsequently received a severance agreement. Plaintiff's employment ended approximately two months later.

Plaintiff filed suit alleging, among other things, that she had been retaliated against for taking FMLA leave. Plaintiff alleged that the company retaliated against her by downgrading her 2009 evaluation, removing and/or reducing her job duties, reducing her succession rating, reducing her 2010 bonus, denying her continued employment, and constructively discharging her. The district court granted in part and denied in part the defendant's motion for summary judgment. The district court concluded that direct evidence of FMLA retaliation existed because her former supervisor explicitly referenced her FMLA leave as a factor considered in her performance evaluation. The court similarly concluded that plaintiff presented sufficient circumstantial evidence as to whether the changes in her job duties was motivated by her FMLA leave. On the other hand, the district court ruled that plaintiff could not demonstrate any causal connection between her FMLA leave and any of the other employment decisions that occurred over the course of the next two years. The court stressed that there was no temporal proximity between the other employment actions and plaintiff failed to provide any evidence of a causal connection between her FMLA leave and any other adverse employment action.

Tegley v. Lancaster County, 2014 WH Cases2d 163 (D. Neb. July 7, 2014)

Plaintiff sued her employer after she was discharged, alleging that her employer retaliated against her for taking intermittent FMLA leave. The employer argued that it discharged plaintiff because her migraine headaches prevented plaintiff from performing the essential functions of her position; not because of her FMLA leave. The district court granted the employer's motion for summary judgment. Plaintiff attempted to prove her retaliation claim through direct evidence, claiming that a supervisor made a disparaging comment that sick leave and FMLA

were a waste of the employer's time and money. But the court held that this comment, which was alleged to have occurred more than 10 months prior to plaintiff's discharge, was not sufficiently close in time to be causally connected to plaintiff's discharge and there was no other evidence to link the statement with her discharge. The court held that evidence of the employer's criticisms of plaintiff's absences did not establish causation because those criticisms were limited to plaintiff's non-FMLA absences. Plaintiff's attempt to establish her retaliation claim through indirect evidence also failed. Again, the court found no causal connection between plaintiff's use of FMLA and her discharge. Plaintiff was not discharged until 42 days after she had exhausted her FMLA leave. And, during that time, her employer allowed her to take several days of leave without pay. The court held that, under these circumstances, it was not reasonable to infer that plaintiff was discharged due to taking FMLA leave. Moreover, plaintiff presented no evidence that the employer's stated reason for her discharge – that her migraine headaches made her unqualified for her position – was pretext for retaliation.

Ray v. United Parcel Serv., 587 Fed. Appx. 182, 23 WH Case2d 1522 (5th Cir. 2014)

Plaintiff worked as a manager for defendant. During his employment, he accumulated several performance-related reprimands and eventually he was put on a performance improvement plan. About a month later, plaintiff suffered a heart attack. After his return to work, plaintiff continued to have performance issues and also took several periods of FMLA leave, with the parties disputing whether plaintiff supplied the requisite FMLA notice. After his unit failed several service audits, plaintiff was demoted. Plaintiff brought a claim for FMLA retaliation. The district court granted summary judgment to the employer and plaintiff appealed.

On appeal, the Sixth Circuit affirmed summary judgment for the employer. It found that the employer's culture of general negative perceptions of medical leave did not constitute direct evidence of FMLA retaliation, without further reference that the general attitude was specifically applied to the employee. It also found that the employer could not, for the first time on appeal, challenge the employee's *prima facie* showing of causation or notice. Nonetheless, the court found that the employer did not retaliate against the employee for FMLA leave, but that plaintiff's performance and leadership issues were legitimate reasons for demoting the employee and withholding certain bonuses. Further, the employee was unable to show pretext. In particular, the court found that satisfactory scores in certain areas and several past performance awards did not mean that the employee had "good performance" to refute the employer's explanation. In addition, the court found that temporal proximity supported the employer's non-retaliatory reason because the periods of FMLA leave were four and thirteen months previous to the adverse decisions, whereas the events that the employer cited were highly proximate to the adverse decision.

Medley v. Comcast Cable Communications Mgmt., 2014 WL 4829643 (E.D. Mich. Sept. 29, 2014)

On August 27, 2012, plaintiff began an FMLA leave. While plaintiff was on FMLA leave, nobody from the employer interfered with her leave nor disputed her entitlement to time off. Plaintiff's supervisor even texted the plaintiff while on leave, telling her to "take it easy!" But the supervisor's support of plaintiff contrasted with her alleged statements concerning

FMLA leave generally and plaintiff's specific use of such leave. Before plaintiff requested FMLA leave, the supervisor allegedly told plaintiff that "if people keep taking FMLA [leave]," they "won't have jobs," and "the call center would close...." Further, another supervisory level employee testified that plaintiff's supervisor was not happy about plaintiff's use of FMLA leave and even stated "if [plaintiff] thought she was going to use FMLA she has another thing coming because I will get rid of her." On September 14, 2012, while plaintiff was still on leave, the employer's security team informed the employer's Inbound Sales Manager that plaintiff had violated the employer's Risk Management Policy in June 2012, prior to her FMLA leave. The Inbound Sales Manager asked plaintiff's supervisor to audit plaintiff's customer files to determine whether plaintiff had committed other violations of the Risk Management Policy. The supervisor randomly selected ten files to audit, and she completed her review of the files by September 18th or 19th. It was determined that plaintiff had violated the employer's Risk Management Policy regarding six of the ten audited files. The day after plaintiff returned from leave, she met with her supervisor and an HR Manager, who informed her an internal investigation would be conducted into the violations. Less than a week later, by letter dated September 24, 2012, the supervisor informed plaintiff that the employer had "concluded its investigation" and that "as a result, [her] employment with [the employer] is being terminated...." The supervisor told plaintiff that the "termination is based on violation of the Comcast Conduct Policy."

Plaintiff claimed the employer violated the FMLA by discharging her for taking FMLA leave and the employer moved for summary judgment. The district court denied summary judgment, holding plaintiff presented sufficient evidence to support a finding that her supervisor was pre-disposed to discriminate against employees who used FMLA leave and that the supervisor retaliated against the plaintiff for taking such leave. The court determined the supervisor's aforementioned comments to be sufficient direct evidence of FMLA retaliation. The court further determined that the employer failed to undisputedly show it, absent any discriminatory motivation, would have made the same decision to fire the plaintiff.

Nigh v. School Dist. of Mellen, 2014 WL 4794521 (W.D. Wisc. Sept. 25, 2014)

Plaintiff, an employee who worked as principal and school district administrator, sued the school for FMLA interference and retaliation. In February and March 2012, plaintiff requested leave under the FMLA. The employer granted plaintiff's requests. While out on her second FMLA leave, the school board voted to hire of a part-time Interim Superintendent, to cover the eight week period until plaintiff returned to work. On May 1, 2012, plaintiff returned to work in the position of Principal/District Administrator, with no reduction in her pay or benefits or change in her title, but the school board retained the Interim Superintendent. On May 2, 2012, the school board met to discuss the roles plaintiff and the Interim Superintendent would assume following plaintiff's return from leave. Ultimately, the school board took away plaintiff's responsibility for, and authority over, all finance, personnel and building and grounds matters. Additionally, she was excluded from hiring decisions and no longer received meeting agendas. On December 18, 2012, the school voted 6-0 to not renew plaintiff's original contract for performance issues starting before and continuing after the plaintiff's FMLA leave requests.

Plaintiff claimed the school interfered with her FMLA when by failing to restore her to an equivalent position after her return from leave and by using her leave as a “motivating factor” in the decision to not renew her contract. Plaintiff also claimed the school retaliated against her for exercising her FMLA rights. The court held the changes in plaintiff’s authority and responsibilities established a genuine dispute of fact as to whether the school failed to restore plaintiff to an equivalent position after her leave and whether the school would made the same decision absent plaintiff’s FMLA leave. The court highlighted the fact the school board was well aware of plaintiff’s struggles in her role as district administrator months before she took her second FMLA leave, but it did not divest her of her authority in that area until after that leave. The court, however, granted the school summary judgment on plaintiff’s second interference claim because she did not produce sufficient evidence that the board used her leave a negative factor in its decision to not renew plaintiff’s contract. Finally, the court denied the school’s motion for summary judgment on the retaliation claim. The court held there was a genuine dispute of fact whether plaintiff’s admitted struggles in her District Administrator capacity would have alone been enough to persuade the school board to terminate her employment. Plaintiff continued to receive reasonably positive remarks on her performance as a principal and complied with most of the expectations given to her in her performance evaluations. Further, the school board was careful to leave open the possibility of her improving and being renewed until after she took FMLA leave, at which point the door was, at least arguably, closed.

***Ushman v. Horace Mann Service Corp.*, 2014 WL 4724474 (C.D. Ill. Sept. 23, 2014)**

Plaintiff, a billing account technician, sued her former employer for retaliation under the FMLA. As a billing account technician, plaintiff was responsible for processing annuity, life, and auto insurance payments received from schools in her assigned states, one of which was Delaware. On June 21, 2012, plaintiff informed her supervisor that she needed to undergo back surgery. That same day, plaintiff requested and obtained information about FMLA leave from the employer. But, at the time, plaintiff’s back surgery was not scheduled. On or about August 2, 2012, an internal auditor informed plaintiff that she wanted to meet with her regarding an audit conducted on the Delaware account. The auditor told plaintiff the audit revealed various mistakes on the account. During the meeting, plaintiff claimed she was not familiar with the exact errors made on the Delaware account. On August 15, 2012, plaintiff informed her supervisor that her surgery would be on September 11, 2012. On August 16, 2012, plaintiff was told she was being discharged for being an unfit processor. The employer explained that her termination resulted from discrepancies in the Delaware account which cost the company money in back pricing.

Plaintiff claimed the employer violated the FMLA by discharging her for requesting FMLA leave. The employer moved for summary judgment on the retaliation claim, which the court granted. The court found that even though the timing of plaintiff’s termination seemed suspicious, plaintiff could not show the proffered reason for plaintiff’s termination was a pretext for an impermissible reason. And the court stated nothing prohibited the employer from basing the termination decision on information discovered approximately one month before FMLA leave is scheduled to begin. Though plaintiff denied making any intentional mistakes, the court held it was not enough to show the asserted reasons were mistaken – to establish pretext a plaintiff must show that the employer is lying when it claims that the proffered justifications were the real reasons for the adverse employment action.

McBeth v. Shearer's Foods, Inc., 2014 WL 4385764 (W.D. Va. Sept. 4, 2014)

Plaintiff, a human resources generalist, started working for defendant beginning in October 2010. After the defendant decided to eliminate a human resources position in another facility and incorporate those responsibilities into plaintiff's position, plaintiff began to complain about her increased workload and advised her supervisor that a part-time clerk should be hired to assist her in performing her duties. Her supervisor said this could be an option down the road, but plaintiff scheduled a meeting with a potential candidate the following week. The very next day, plaintiff advised defendant that she required FMLA leave for shoulder surgery. Thereafter, plaintiff informed defendant that she would require FMLA leave from June 11, 2012 through August 6, 2012. In May 2012, before her scheduled leave began, plaintiff participated in a facility walkthrough to look for safety hazards. After the walkthrough, a manager approached plaintiff to discuss defendant's hiring strategy. During that conversation, plaintiff allegedly had a tape recorder and was recording conversations at the facility. Plaintiff denied having a tape recorder, claiming that the device was her daughter's cell phone. Defendant did not believe her explanation and terminated her employment, explaining that this was another instance of her failure to work with other employees and that he believed that her relationship with management at the defendant could not be salvaged. Prior to this incident, several management level employees at the defendant had complained about plaintiff's inability to be a team player and work with management at the defendant. After her discharge, defendant learned that plaintiff filed an anonymous complaint with the Virginia Occupational Safety and Health Commission in March 2012, identifying numerous safety violations and ultimately resulting in two citations and a fine against the defendant. Thereafter, Plaintiff brought suit, alleging that defendant discharged her in retaliation for requesting FMLA leave.

The court granted the defendant's motion for summary judgment, finding that plaintiff could not present a genuine issue of material fact under the direct or indirect method of proof. The court rejected the plaintiff's argument that statements made by defendant were direct evidence of discrimination, explaining that the statements, in which the defendant advised plaintiff to "get the paperwork in on time" and that she needed to submit the "appropriate document", were consistent with decisions interpreting the FMLA. The court also found that the plaintiff failed to produce evidence that the defendant's reason for terminating her employment was pretextual. The court noted that plaintiff could not present any evidence from which a reasonable jury could conclude that the defendant did not believe that she had secretly recorded the walkthrough. Moreover, the court found that the fact that only two weeks separated her request for leave and discharge was not independently sufficient to create a genuine issue of material fact.

Summarized Elsewhere:

Langenfeld v. Armstrong World Industries, Inc., 2014 WL 4272789 (S.D. Ohio Aug. 29, 2014)

Demyanovich v. Cadon Plating & Coating, L.L.C., 747 F.3d 419 (6th Cir. 2014)

Langenbach v. Wal-Mart Stores, Inc., 761 F.3d 792, 23 WH Cases2d 182 (7th Cir. 2014)

B. Application of *McDonnell Douglas* to FMLA Claims

Ross v. Gilhuly, et al., 755 F.3d 185 (3rd Cir. 2014)

Plaintiff was placed on a performance improvement plan (PIP) after complaints from customers and poor performance reviews. Soon after the PIP was implemented, the plaintiff was diagnosed with prostate cancer and took FMLA leave for surgery and recovery. After he returned to work, the PIP was extended. Plaintiff filed suit against defendants—both the employer and his individual supervisor—alleging FMLA interference against his supervisor and retaliation against both defendants. Two months later, plaintiff was terminated for failing to meet the goals of the PIP. Defendants filed a motion for summary judgment, which was granted by the district court, and plaintiff appealed.

In affirming the district court’s decision, the Third Circuit found that plaintiff could not prove a *prima facie* case of interference because he received all the benefits to which he was entitled and was reinstated to the same position upon his return from leave. With respect to the retaliation claim, the court clarified that it has adopted the *McDonnell Douglas* burden-shifting framework. The court found that, even assuming the plaintiff could establish a *prima facie* case of retaliation, the employer had articulated a legitimate, non-discriminatory reason—namely, the plaintiff’s poor performance—and the plaintiff had not presented evidence to show pretext.

Ash v. Walgreens Specialty Pharmacy, LLC, 2014 WL 234334 (E.D. Mich. Jan. 22, 2014)

Plaintiff, who suffered from HIV, sued his former employer alleging FMLA interference and retaliation claim. Defendant moved for summary judgment. With respect to the retaliation claim, the court determined that plaintiff met his *prima facie* case because of the close proximity between his discharge and his continuous leave, coupled with discriminatory remarks attributed to his supervisor. Although defendant alleged that plaintiff was fired for performance reasons – a legitimate, non-discriminatory reason – the court found that plaintiff presented sufficient evidence of pretext to survive summary judgment. In particular, there was a factual dispute as to whether plaintiff’s supervisor increased her criticism of his performance because he requested leave, and whether she terminated him because he used FMLA leave. Accordingly, the court denied defendant’s motion for summary judgment as to plaintiff’s FMLA retaliation claim.

With respect to plaintiff’s FMLA interference claim, plaintiff argued that the employer interfered with his FMLA rights by denying his request for leave to attend a doctor’s appointment and by failing to reinstate him when he returned from FMLA leave. The court granted summary judgment on plaintiff’s claim arising out of his request for leave to attend a medical appointment because defendant did not outright deny plaintiff’s request, but rather merely asked him to try to reschedule his appointment for a better time. The court, however, denied defendant’s motion for summary judgment on the interference claim for failure to reinstate based on the same reasons it denied defendant’s motion for summary judgment on plaintiff’s retaliation claim.

Wallner v. J.J.B. Hilliard, 23 WH Cases2d 1203 (6th Cir. Oct. 31, 2014)

Plaintiff, an options trader, worked for the defendant for twenty-seven (27) years, and requested FMLA leave in June 2009 for knee-replacement surgery. Plaintiff’s physician

informed the defendant that she would be unable to work for two months. During plaintiff's leave, plaintiff's short term disability insurance carrier set plaintiff's return to work date earlier than her physician. Plaintiff attempted on two separate occasions to explain the difference between short term disability and FMLA leave to defendant's human resources manager, but defendant's human resources manager conflated short term disability leave with FMLA leave and thus set plaintiff's return to work date as the date set by her short term disability insurance carrier. Upon returning from leave, plaintiff received a final written warning for her husband's behavior during a telephone call with the human resources manager and for purportedly failing to remain in contact with the defendant during her FMLA leave. Thereafter, one of plaintiff's colleagues started to record when plaintiff arrived to work each morning. Nine days after returning from FMLA leave, the employer terminated plaintiff's employment because she was a few minutes (two to eight minutes) late on five days following her return to work and failed to pass two exams she was not required to take, among other reasons. Plaintiff's supervisor created a "document of deficiencies" listing the reasons for plaintiff's termination, specifically referencing plaintiff's FMLA leave and her failure to communicate with the defendant during leave. Plaintiff's supervisor later testified that five minutes late is "not necessarily a swing factor," but being five minutes late was a major problem.

Plaintiff brought suit, alleging FMLA interference and retaliation. The district court granted the defendant's motion for summary judgment, and plaintiff appealed. Plaintiff argued that her interference claim was distinct from her FMLA retaliation claim and thus the district court wrongly granted summary judgment on her FMLA retaliation claim. The court rejected plaintiff's argument, finding that plaintiff proceeded under a FMLA retaliation theory only and never argued that she was deprived of an FMLA benefit to which she was entitled. Moreover, the court held that plaintiff's interference claim was without merit because she was provided all of the FMLA leave she requested, returned to work at the time her physician released her, and was reinstated to her previous job. On the other hand, the court held that plaintiff presented enough circumstantial evidence to create a jury question as to whether plaintiff's FMLA leave was a motivating factor that led to her discharge. The court explained that a reasonable jury could find that plaintiff's exercise of FMLA rights was a motivating factor in her discharge because of the temporal proximity between her exercise of rights and the adverse action, the reference to her FMLA leave in the "document of deficiencies," and the fact that the defendant only started tracking her tardiness at work once plaintiff returned from FMLA leave even though she had been employed with the defendant for twenty seven years, among other things.

Montone v. Schuylkill Health Sys., 23 WH Cases2d 260 (M.D. Pa. 2014)

Plaintiff was the Director of Patient Accounts for her employer, a hospital. The employer was experiencing serious financial difficulties, and according to plaintiff, put an enormous amount of pressure on plaintiff and her department to process patient claims and get them paid quickly. During this time, plaintiff was diagnosed with multiple sclerosis ("MS") and suffered from crippling headaches, leg pain, vision and memory problems, and exhaustion. Plaintiff requested and was approved for intermittent FMLA leave. Plaintiff claimed that her supervisors repeatedly questioned her about the days she took off for FMLA, inquiring into whether she was, in fact, looking for another job on those days. When plaintiff returned to work after taking a FMLA leave on Friday and Monday, the employer terminated plaintiff's employment for failure

to manage her department. Plaintiff brought suit, claiming her discharge was in retaliation for taking FMLA leave.

The district court denied the employer's motion for summary judgment. The court applied the familiar *McDonnell Douglas* framework to analyze plaintiff's retaliation claim. The court concluded that the temporal proximity between plaintiff's discharge and her intermittent FMLA leave was sufficient to establish causation for a *prima facie* claim. In doing so, the court noted that plaintiff took FMLA leave the day immediately before the employer discharged her employment. And, while the employer could articulate a legitimate reason for plaintiff's discharge, plaintiff presented sufficient evidence to create disputed issues of fact on the issue of pretext. Plaintiff submitted evidence that she never received anything but good performance reviews; that the employer's revenue problems were related to new software, not her management of the patient accounts department; that her supervisor frowned on her taking time off; and that her supervisors repeatedly questioned her use of FMLA. The court ruled that plaintiff presented material facts to preclude summary judgment as to her FMLA claims.

Word v. AT&T, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)

After being terminated for chronic absenteeism, plaintiff brought suit against the defendant for violations of Title VII, § 1981, the ADA and the FMLA. Plaintiff claimed that defendant interfered with her FMLA rights by forcing her to return to work prior to the expiration of her leave. Plaintiff also claimed that defendant retaliated against her for taking FMLA leave by counting FMLA leave absences against her when implementing its disciplinary policy. Defendant's progressive discipline policy permitted frontline managers to exercise discretion, including using "reasonable criteria" when taking disciplinary actions in response to attendance issues. Plaintiff's attendance issues included her failure to submit a copy of a subpoena to excuse her from work for appearance in family court and a request for time off to move to a new apartment. Plaintiff filed a grievance challenging a letter in lieu of suspension, ultimately changing plaintiff's discharge into a thirty day suspension. Thereafter, plaintiff requested to use vacation time for four days, but did not submit a vacation request form because she allegedly was informed that she was not in the system and instead called in each day and reported that she would miss work for personal reasons. The union declined to arbitrate her discharge. The district court granted summary judgment on behalf of defendant on all counts and plaintiff appealed.

The Eleventh Circuit affirmed the district court's entry of summary judgment on plaintiff's FMLA claims. The court rejected the plaintiff's argument that defendant impermissibly counted her approved FMLA absences against her in support of its ultimate disciplinary action and interfered with her FMLA rights by ordering her to return to work before her FMLA leave expired. In doing so, the court explained that plaintiff's only evidence in support of her interference claim was her own affidavit, which was insufficient standing alone to survive a motion for summary judgment, particularly in light of her failure to submit two exhibits referenced in her affidavit. In addition, the court found that no reasonable jury could find that plaintiff's termination was retaliatory in light of her admissions that she was assured that her FMLA leave was not a factor in her discharge during her grievance hearing and the fact that no FMLA days were counted toward the suspension.

Lindner v. Donatelli Bros. of White Bear Lake, 2014 WL 3908292 (D. Minn., August 11, 2014)

Plaintiff, a prep cook, worked for the defendant for eighteen (18) years prior to his discharge. Plaintiff asserted eight (8) claims against the defendant, one of which included allegations that defendant prevented him from taking the full FMLA leave he was entitled to by terminating his employment. Plaintiff suffered an injury on the job on January 11, 2013 when he fell in the parking lot and he was also injured on January 20, 2013 after inhaling chemicals on the job. Defendant learned of plaintiff's first injury on the day it happened through plaintiff's coworkers. Plaintiff's doctor gave him a note for two days off work. Plaintiff's doctor also gave him a note of excuse from work for a week following his second on the job injury. Thereafter, defendant's insurance carrier requested a site visit. During that visit, defendant was told plaintiff's first injury qualified for workers' compensation. After the visit, defendant pulled the footage from their security camera for both injuries and sent copies to their insurance carrier. Defendant reviewed the footage from the January 11th incident and concluded that it was "clear" that plaintiff had fabricated his injury. Around the same time, plaintiff's doctor had excused him from work for two more weeks due to his second injury. Defendant drafted an FMLA form for plaintiff to complete, stating he was eligible for FMLA leave beginning January 22, 2013. Plaintiff sent completed FMLA paperwork and his doctor's note from his January 11th injury to defendant on February 11. Defendant then terminated plaintiff's employment for providing false information surrounding his injury on January 11.

On its motion for summary judgment, defendant argued that it could not have "interfered with plaintiff's FMLA request because he never made one." The district court reject the defendant's argument, and instead found that the record "clearly contradicted" defendant's argument. Plaintiff submitted a completed FMLA form the day before he was terminated. Also, defendant was "clearly on notice" of his potential need for FMLA leave because it raised the issue with Plaintiff and sent him FMLA paperwork stating he was eligible for leave. The court then explained that whether the injury was the only reason the defendant terminated plaintiff's employment was a question for the jury to decide.

Demeo v. The Vanguard Group, Inc., 2014 WL 272030, 22 WH Cases2d 276 (E.D. Pa., Jan. 24, 2014)

Plaintiff requested and was granted FMLA leave due to a mental health condition. Following his return from FMLA leave, plaintiff claimed that his manager increased his workload, would not meet with him upon request, and gave him a false and harshly negative performance review. He also claimed that the relationship with his supervisors deteriorated to the extent that he needed to take a second leave of absence not protected by FMLA. Plaintiff claimed that this conduct constituted retaliation and harassment in violation of the FMLA.

Defendant moved for summary judgment. Drawing all reasonable inferences in favor of plaintiff, the court held that a jury could reasonably infer that the relationship between plaintiff and his supervisors deteriorated after plaintiff took his FMLA leave, and that the leave was the most significant change that affected their interactions. As a result, the court denied the defendant's motion for summary judgment on plaintiff's FMLA claim.

Taylor v. Rite Aid Corp., 21 WH Cases2d 1687 (D. Md., Jan. 27, 2014)

Plaintiff filed a lawsuit against defendant, her former employer, alleging retaliation in violation of the FMLA. Defendant moved for summary judgment. Viewing the evidence in the light most favorable to plaintiff, the court denied defendant's motion to dismiss the FMLA retaliation claim. The court held that plaintiff established a prima facie claim because she engaged in FMLA-protected activity by complaining to managers that her supervisor discriminated against employees who took FMLA leave. She also offered evidence that she herself took FMLA leave. Further, she offered sufficient evidence of a causal connection because one of the managers to whom she complained played a role in the decision to terminate her employment. The court held that this evidence was sufficient for a reasonable jury to infer that she would not have been terminated if she had not complained about discrimination or taken FMLA leave. While the employer offered evidence of documented performance problems in plaintiff's work history, the court found there was a triable issue of fact with regard to pretext.

Downs v. Winchester Medical Center, 2014 WL 4093696 (W.D. Va. Aug. 18, 2014)

The employee claimed that the employer discharged her in retaliation for using FMLA leave due to migraine headaches. The employer asserted that she was discharged because she gained access to her supervisor's email inbox without permission, read the supervisor's communications containing complaints about plaintiff's job performance, printed those communications, and removed them from the office. Defendant had previously discharged two other employees for similar conduct. Plaintiff pointed out that the employer suspended her for these actions only two days after she sent an email responding to defendant's concerns over her use of FMLA leave, and that this timing was indicative of pretext.

The district court granted summary judgment for the employer. Plaintiff's own statements in her deposition indicated that she was attempting to use her FMLA leave as a shield against an impending adverse employment action, and that was the reason why she sent the email to her employer. Although the parties disputed whether plaintiff's supervisor had granted plaintiff access to the inbox, plaintiff conceded that she should not have read or removed the emails about herself. Therefore, since at least one of the reasons defendant provided for terminating plaintiff was valid, the disputes as to any other proffered reason were immaterial. The court also rejected plaintiff's argument that defendant's reason was illegitimate because defendant could not have known the extent of plaintiff's misuse of email on the day it suspended her, reasoning that an employer may validly terminate an employee for violation of company policy "even without 100% certainty."

Eren v. Mars, Inc., 2014 WL 2765684 (M.D. Tenn. June 18, 2014)

Defendant hired plaintiff in May 2011 to work as a Product Development Manager to oversee specialists responsible for developing Nutro products. In October 2011, defendant was made aware of plaintiff's performance concerns from her supervisor. That same month, plaintiff was hospitalized for an ulcer. Because she was not yet eligible to take FMLA leave, defendant granted plaintiff a non-FMLA leave of absence; plaintiff supplemented her unpaid leave with accrued vacation time. During her 2011 end-of-year and 2012 mid-year reviews, plaintiff received a "below expectations" evaluation. In an effort to improve plaintiff's performance, defendant placed her on a 90-day performance improvement plan (PIP) beginning in July 2012. Approximately two weeks later, plaintiff had a meeting with her supervisor to discuss her progress; during the meeting, plaintiff informed her supervisor that she needed surgery and possibly FMLA leave. Defendant sent plaintiff FMLA paperwork for the potential leave request, which she never returned. As part of her PIP, plaintiff was required to provide defendant with a progress update during her August 2012 review. The progress update that plaintiff provided in August did not demonstrate improvement and, therefore, defendant terminated her employment.

Plaintiff sued defendant, asserting various employment discrimination claims, including an FMLA interference claim. In its summary judgment motion, defendant conceded that plaintiff established a *prima facie* case when she claimed that defendant "interfered with her FMLA rights by terminating her employment after she gave notice of her intent to take FMLA leave". Defendant responded by stating that plaintiff was terminated for poor job performance. Plaintiff relied upon temporal proximity to rebut defendant's proffered explanation of poor job performance. The court concluded, however, that pretext cannot be established solely by temporal proximity. Plaintiff also identified other circumstantial evidence in an effort to disprove the defendant's explanation for her dismissal, including but not limited to: (i) conversations with her supervisor; including a stray "sleep well" comment made by her supervisor; and (iii) the fact that defendant prepared a severance agreement before her PIP presentation in August 2012. Unpersuaded by plaintiff's arguments, the court granted summary judgment in favor of defendant, finding that the employer's actions were routine business measures which the court had no basis to second guess.

Summarized Elsewhere:

Musoke v. KeyBank Nat. Ass'n, 2014 WL 969896 (W.D. Wash. Mar. 11, 2014)

Young v. Sungard Financial Systems, LLC., 29 A.D. Cases 1815, 2014 WL 1576903 (N.D. Ala., Apr. 17, 2014)

Williams v. Luminator Holding, LP, 2014 WL 174413 (E.D. Texas Jan. 10, 2014)

Kumar v. Johnson & Johnson, Inc., 2014 WL 5512549 (D.N.J. Oct. 31, 2014)

Davies v. N.Y. City Dep't of Educ., 563 Fed. Appx. 818, 22 WH Cases2d 926 (2d Cir. 2014)

Tegley v. Lancaster County, 2014 WH Cases2d 163 (D. Neb. July 7, 2014)

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314, 23 WH Cases2d 174 (3d Cir. 2014)

Museau v. Heart Share Human Servs. of New York, 2014 WL 1277006, 2014 WH Cases2d 154 (E.D.N.Y. Mar. 27, 2014)

Davis v. Tri-County Metropolitan Transp. Dist. of Oregon, 2014 WL 4425815 (D. Or. Sept., 8, 2014)

Hodges v. Greenspun Media Grp., LLC, 2014 WL 814231 (D. Nev. Feb. 28, 2014)

Bement v. Cox, 2014 WL 4699620 (D. Nev. Sept. 22, 2014)
Imeson v. Eagle View Technologies, Inc., 2014 WL 1047165, 22 WH Cases2d 406 (W.D. Wash. Mar. 14, 2014)
Davis v. George Washington University, 22 WH Cases2d 547 (D.D.C. Mar. 20, 2014)
Bowman v. CSX Transp., Inc., 2014 WL 3542118 (N.D.N.Y May 22, 2014)
Ketchum v. St. Cloud Hospital, 994 F.Supp.2d 1012 (D.Minn. 2014)
Lamonte v. Western & Southern Life Insurance Co., 2014 WL 346079 (E.D.La. 2014)
Ross v. Gilhuly, et. al. 755 F.3d 185 (3d Cir. 2014)
Medley v. Comcast Cable Communications Mgmt., 2014 WL 4829643 (E.D. Mich. Sept. 29, 2014)
Santiago v. Dept. of Transp., 2014 WL 4823869 (D. Conn. Sept. 25, 2014)

1. *Prima Facie* Case

Williams v. Luminator Holding, LP, 2014 WL 174413 (E.D. Tex. Jan. 10, 2014)

Plaintiff was fired after she failed to return to work after exhausting her FMLA leave. Plaintiff was repeatedly warned about the importance of returning at the end of her leave. Plaintiff ignored her employer's warnings and gave no indication that she would not return after her leave was exhausted on May 15, 2012 and, instead, failed to show up to work that day. Prior to her termination, Plaintiff had never contested that her return date would be May 15, 2012 and she admitted that she informed her physician of this date when they were discussing her certification paperwork. Despite these events, plaintiff still sued her former employer for alleged violations of the FMLA. In her brief opposing the employer's motion for summary judgment, Plaintiff proffered arguments regarding FMLA retaliation even though she had never alleged this cause of action in her complaint. Conversely, she had pled a cause of action for FMLA interference, but failed to address that count in her summary judgment brief and therefore waived it. The court also ruled in favor of the employer on plaintiff's FMLA discrimination claim, finding that she had failed to establish a *prima facie* case of discrimination because she proffered no evidence that she was treated less favorably than someone who had not taken FMLA leave nor had she demonstrated that her termination was in retaliation for her request for leave.

Perhaps realizing that she could not establish a *prima facie* case, Plaintiff also argued that her employer's stated reason for firing her was pretextual and encouraged the court to eschew the *McDonnell Douglas* framework as having lost its utility (as theorized by Seventh Circuit Judge Diane Wood in a 2012 concurring opinion). The court rejected plaintiff's argument, noting that *McDonnell Douglas* remained the law in the Fifth Circuit and plaintiff's attempt to argue pretext in the absence of a *prima facie* case would not salvage her claim.

Coleman v. Redmond Park Hosp., LLC, 23 WH Cases2d 1218 (11th Cir. 2014)

The plaintiff, a registered intensive care unit nurse, worked for the defendant, a hospital, for six years when she voluntarily transferred to another hospital under the same corporate family as the defendant. In 2012, the plaintiff took FMLA leave and was terminated from the hospital she had transferred to while she was on leave. She applied for several ICU nurse positions at the defendant hospital, and the clinical nurse recruiter who received her application spoke to the plaintiff about her application, her previous employment with the defendant, and her

discharge. After the conversation, the plaintiff allegedly left a voicemail where she was upset and crying, used profanity, and raised her voice. The plaintiff claimed she left a voicemail but that she only requested a status update on her application and asked the recruiter to call her back. The defendant did not keep a record of the voicemail and rejected her application. According to the plaintiff, the defendant rejected her application because the recruiter learned she took FMLA leave. The defendant argued it rejected the plaintiff's application because of the profanity-laced voicemail.

On appeal, the court first rejected defendant's argument that the district court applied the wrong standard for determining whether the plaintiff established a *prima facie* case of retaliation under the FMLA. In so reasoning, the court relied on *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303 (11th Cir. 2001), which held the FMLA provides a right of action to a former employee against her former employer if she was not rehired because she took FMLA leave. *Id.* Thus, under *Smith*, a plaintiff can establish a claim under the FMLA if she can prove her past use of FMLA leave was a motivating factor in refusing to rehire her. The court concluded that because of a factual dispute regarding the voicemail, the district court's grant of summary judgment to the defendant was improper. The court agreed with the district court's finding that the plaintiff established a *prima facie* case of FMLA retaliation. The court also agreed with the district court's finding that the defendant articulated a legitimate, non-discriminatory reason for rejecting the plaintiff's candidacy, the alleged unprofessional voicemail. However, the court found the plaintiff offered enough evidence of pretext to undermine the defendant's legitimate reason. The court noted that there the parties disputed the contents of the voicemail. Without the actual recording, the court ruled the plaintiff's claim depended on which version of the story a jury would believe considering the defendant's only reason for not rehiring the plaintiff was based on the voicemail. For that reason, the court reversed and remanded the district court's grant of summary judgment.

Flamberg v. Israel, 2014 WL 1600313 (S.D. Fla. Apr. 21, 2014)

A former information-technology professional brought a claim for FMLA retaliation against defendant sheriff's department after he took FMLA leave to seek medical treatment for lymphoma.

Defendant filed a motion to dismiss, asserting that plaintiff lacked an adequate factual basis to support each asserted claim. The court denied the motion to dismiss the FMLA retaliation claim, holding that plaintiff's pleading adequately alleged the elements of the claim, i.e., (1) the availment of a FMLA protected right; (2) an adverse employment action; (3) and a causal connection between the protected activity and adverse employment action.

Butler v. East Lake Management Group, Inc., 2014 WL 273650 (N.D. Ill. Jan. 24, 2014)

Plaintiff worked as a janitor at an apartment complex, managed by defendant, for over six years. After plaintiff was laid off, he filed a complaint against defendant alleging, among other things, that defendant interfered with his rights under the FMLA. Specifically, plaintiff alleged that defendant laid him off in lieu of providing him with an FMLA leave of absence.

The court found that plaintiff failed to establish a *prima facie* case because the record contained no evidence that defendant interfered with plaintiff's FMLA rights or denied a request for leave. Plaintiff admitted that he never communicated his intent to take FMLA leave. Furthermore, it was undisputed that plaintiff's termination was self-inflicted, and that his layoff would have occurred regardless of any request for FMLA. Accordingly, the court dismissed plaintiff's FMLA claim against defendant.

Thomas v. St. Mary Medical Center, 2014 WL 2199408 (E.D. Pa. May 23, 2014)

Plaintiff sued her former employer and three supervisory employees under the FMLA. Plaintiff claimed that her employer: (1) committed "unlawful interference;" (2) retaliated against her for exercising her FMLA rights; (3) retaliated against her for reporting violations of the FMLA; and (4) wrongfully discharged her in violation of the FMLA. Defendant moved to dismiss all of plaintiff's claims.

The court first concluded that the FMLA did not allow for a generic wrongful discharge claim. Concerning plaintiff's interference claim, plaintiff alleged that she had been denied job restoration and discharged in retaliation for seeking and taking FMLA leave. The court noted that plaintiff had failed to allege in the complaint that she was able to return to work and was denied restoration to her job by the end of her FMLA leave. The court found this flaw to be dispositive and dismissed the retaliation claims. As for the retaliation claims, the court held that neither claim was viable because plaintiff did not allege a causal connection between her employment termination and her ability to return to work from FMLA leave. Concerning her claim that she reported FMLA violations, the court noted the lack of allegations concerning to whom she complained, when she complained, or what she complained about. Accordingly, the court dismissed the retaliation claims.

Finally, the court addressed the issue of individual liability under the FMLA. In doing so, the court held that an individual could be liable for an FMLA violation if the individual exercises "supervisory authority" over the plaintiff and was responsible, in whole or in part, for the alleged FMLA violation while acting in the employer's interest. Because the complaint contained allegations against two individual defendants that had processed plaintiff's FMLA leave request and spoke with plaintiff about her return from FMLA leave, the court concluded there was a plausible basis for individual liability against them and did not dismiss the FMLA claims on this basis.

Wheat v. Fla. Parishes Juvenile Justice Comm'n, 2014 WL 2155239 (E.D. La. May 21, 2014)

Plaintiff sued her former employer alleging she was discharged and mistreated during employment in retaliation for her filing of a prior lawsuit under the FMLA. The defendant moved for summary judgment on all of plaintiff's claims.

Concerning the FMLA retaliation claim, the court initially reviewed whether the defendant's alleged adverse actions short of discharge were sufficient to establish a *prima facie* case of retaliation. In doing so, the court noted that generally only "ultimate employment decisions" may constitute an adverse employment action (such as hiring, denying leave,

discharge), but a lesser action may suffice if it “makes the job objectively worse.” Based on its review of the record, the court concluded that the plaintiff’s pre-termination retaliation claim under the FMLA failed because she offered no evidence that the alleged incidents of mistreatment made her job “objectively worse.” The court held that plaintiff failed to make out a *prima facie* case and granted defendant summary judgment on this claim. As for the alleged retaliatory discharge, the court concluded that plaintiff had failed to establish a material fact issue concerning pretext after the defendant had articulated a legitimate, non-retaliatory rationale for its discharge decision.

Menekse v. Harrah's Chester Casino & Racetrack, 2014 WL 2726103 (E.D.Pa., June 16, 2014)

A beverage server asserted an FMLA retaliation claim, among other claims, against her employer. The district court found that plaintiff made out a *prima facie* case of FMLA retaliation, because plaintiff had stated she needed to take FMLA leave and was discharged a week after her last leave request. The court found that defendant stated a legitimate reason for the termination, namely, a history of disciplinary problems culminating in an incident where there was evidence she cursed at and threatened a coworker. Plaintiff could not demonstrate pretext – her only evidence to rebut the legitimate reason was that the final altercation was more minor than defendant alleged, and the court found this insufficient for a reasonable jury to find defendant’s proffered legitimate reason for the termination pretextual.

Wade v. Baptist Health, 2014 WL 2593731 (E.D.Ark., June 10, 2014)

Plaintiff filed suit, alleging violations of the FMLA and ERISA, as well as wrongful termination. The employer moved for summary judgment, which was denied. In the year before she was discharged, plaintiff received two written warnings for excessive absences under the employer’s progressive discipline policy. Three months before she was discharged, she hurt her back lifting a patient. She returned to work with restrictions and the employer coordinated her doctor’s appointments because she was pursuing a workers compensation claim. She then took a two-week FMLA leave to care for her son after a surgery. She was then given a written warning and discharged for getting her flu shot late and missing work without calling in, based the employer’s policy of termination after the third write-up.

The court found that whether considered at the *prima facie* stage or as a matter of pretext, there was a genuine issue of material fact whether the third and fourth warnings were issued in retaliation for exercising her FMLA rights, and that a reasonable juror could so conclude. The court ordered further briefing on whether front pay was available when the plaintiff was unable to work (due to the workplace injury), and ordered further briefing on this damages issue.

Fresquez v. County of Stanislaus, 2014 WL 1922560 (E.D. Cal. May 13, 2014)

Plaintiff proceeded *pro se* in a suit against her former employer, the Stanislaus County Tax Revenue Department. Plaintiff brought claims under the FMLA and Title VII for disability discrimination, harassment, and retaliation. Plaintiff did not, however, plead any facts supporting her allegation that she had a disability, claiming only that she was “a Hispanic Female

person fully competent to perform the duties to which she was assigned.” The court found that Plaintiff’s claim that she was a “Hispanic Female” was not sufficient to trigger any obligations of her employer under the FMLA. The court also noted that plaintiff failed to allege any facts that would show that defendant interfered with her FMLA rights, or that they discriminated or retaliated against her for exercising those rights. Accordingly, the court granted the defendant’s motion to dismiss all of plaintiff’s FMLA claims.

Cooper v. Matrix Serv. Co., 2014 WL 7243265 (N.D. Okla. Dec. 19, 2014)

Plaintiff, a welder, was injured in a motorcycle accident. Less than a day after the injury, plaintiff informed defendant that he had been hospitalized and that his injuries prevented him from being able to perform his job. Plaintiff believed that he was on FMLA leave once he informed the defendant that he was injured and could not work. The defendant terminated plaintiff’s employment a few weeks after his injury. Plaintiff then brought suit, alleging FMLA interference and retaliation claims, among other things. The defendant then moved for summary judgment.

The court denied the employer’s motion for summary judgment, finding genuine issues of material fact as to whether the defendant’s discharge of plaintiff was related to his request for leave. The defendant argued that summary judgment was appropriate as to plaintiff’s FMLA interference claim because he testified that he believed that the defendant discharged him to avoid paying him a bonus. The court rejected the defendant’s argument, finding that plaintiff’s testimony did not preclude a causal relationship between plaintiff’s leave request and his discharge. Therefore, the court found that the defendant was not entitled to summary judgment as to plaintiff’s FMLA interference claim. As to plaintiff’s FMLA retaliation claims, the court noted that it was irrelevant that the plaintiff did not mention the FMLA in his conversations with the defendant after the accident. The court then found that plaintiff’s FMLA retaliation claim survived summary judgment as well, explaining that a rational jury could find a causal connection between his leave and his discharge. The court also ruled that the defendant could not maintain a legitimate, non-discriminatory reason for its decision to discharge the plaintiff because it maintained that the plaintiff resigned his employment.

Turner v. Eastconn Reg’l Educ. Serv. Ctr., 588 F. App’x 41, 23 WH Cases2d 1778 (2d Cir. 2014)

Plaintiff, a special education teacher, alleged that the defendants placed her on FMLA leave involuntarily and then refused to extend her FMLA leave after she gave birth and exhausted her twelve weeks of leave under the FMLA, among other things. The district court granted the defendant’s motion for summary judgment as to plaintiff’s FMLA interference and retaliation claims, and plaintiff appealed. The court affirmed, finding that the defendant did not interfere with her rights under the FMLA by requiring plaintiff to start her leave period early. The court emphasized that the defendant’s decision to initiate her FMLA early was, in fact, motivated by her own physician’s restrictions. The court also found that the defendant did not retaliate against her for exercising her FMLA rights, explaining that plaintiff was provided the full extent of leave required under the FMLA. The court stressed that plaintiff simply decided that she would not return to work after defendant denied her request to extend her leave and that

plaintiff could not establish that she was entitled to additional FMLA leave. Moreover, plaintiff failed to provide any evidence of pretext in light of her failure to return to her position.

Summarized Elsewhere:

***Cantrell v. R.E. W., Inc.*, 23 WH Cases2d 1159 (M.D. Tenn. July 14, 2014)**

***Lehtinen v. Town of Greenport*, 2014 WH Cases2d 163 (N.D.N.Y. July 11, 2014)**

***Thomas v. Dana Commercial Vehicle Products, LLC*, 2014 WL 1329948 (W.D. Ky. Mar. 31, 2014)**

***Garcia v. Randall's Food and Drugs, LP*, 2014 WL 2931841 (N.D. Tex. Jun. 30, 2014)**

***Word v. AT&T*, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)**

***Budhun v. Reading Hospital and Medical Center*, 765 F.3d 245, 23 WH Cases2d 312 (3d Cir. Aug. 27, 2014)**

***Newcomb v. Corinth School District*, 2014 WL 1746066 (N.D.Miss. 2014)**

***Gostola v. Charter Commc'ns, LLC*, 2014 WL 7204924 (E.D. Mich. Dec. 17, 2014)**

a. Exercise of Protected Right

***Doering v. Wal-Mart Stores, Inc.*, 2014 WL 3395745 (D. Minn. July 11, 2014)**

Plaintiff, a retail worker, alleged that the defendant violated the FMLA by failing to provide her notice of her statutory rights, denying FMLA leave, refusing reinstatement and terminating her employment following a period of medical leave. At the outset, the district court in Minnesota noted the Eighth Circuit recognizes three types of FMLA claims: (1) entitlement, (2) retaliation, and (3) discrimination. The court first explained that, though plaintiff characterized her claims as interference and retaliation claims, her claims were more properly characterized as discrimination claims because she alleged that her employer terminated her employment because she exercised her rights to use FMLA leave.

The court denied the defendant's motion for summary judgment. The court rejected the defendant's argument that the plaintiff was not entitled to FMLA protection because her leave of absence was not protected under the FMLA. The court noted that plaintiff had requested, and the defendant granted, FMLA leave, and held that the employer could not escape liability merely because it did not provide plaintiff with the necessary paperwork to properly designate the leave as FMLA leave. The court also held that summary judgment was inappropriate because a jury might find pretext where the evidence also demonstrated that the defendant did not enforce its policy against other similarly situated employees.

***Crowley v. Burlington Electric Department*, 992 F. Supp. 2d 370 (D. Vt. 2014)**

During her employment with defendant, plaintiff developed problems with her left eye, which ultimately had to be removed. When plaintiff first began working for defendant, she enjoyed a good relationship with her supervisor. As her eye problems worsened, however, so did that relationship. In particular, after her eye problems progressed, her supervisor called plaintiff "wood eye," left an Easter egg labeled "wood eye" on plaintiff's desk, and made fun of emotional problems plaintiff suffered from. In October 2011, plaintiff took a 90-day FMLA leave due to post-traumatic stress and depression. Prior to returning from leave, a doctor evaluated her condition and advised defendant's human resource department that she return to

work on a part-time basis. Plaintiff informed her supervisor of the evaluation but not the conclusion reached by the doctor. A few days later, on January 17, 2012, the supervisor directed plaintiff to meet with her. Plaintiff thought the meeting was to discuss whether Plaintiff could take additional leave or if she could work part-time. Instead, the supervisor informed plaintiff she was being discharged, explaining that plaintiff had engaged in a romantic relationship with an employee that had previously been fired and that she had disclosed confidential information. Plaintiff filed suit challenging her termination on a theory of FMLA retaliation. Defendant filed a motion for summary judgment seeking to dismiss her retaliation claim.

The Court noted that, because plaintiff had been fired shortly after returning from FMLA leave and because she had no prior discipline before filing for leave, a causal link could be inferred. Defendant met its burden to produce a legitimate non-discriminatory for discharge by relying on the two reasons mentioned by the supervisor during the January 17 meeting she had with plaintiff. It also adduced the additional reason that plaintiff was consistently tardy and failed to follow instructions. However, the Court held that plaintiff met her burden at the pretext stage, reasoning that (1) defendant offered reasons for plaintiff's discharge that were not discussed at the January 17 meeting; (2) the supervisor's animosity toward plaintiff (e.g., calling her "wood eye"); and (3) the supervisor made her decision to fire plaintiff in early January 2012, which implied that the supervisor waited to fire plaintiff under after the doctor filed his report notifying defendant of plaintiff's intent to pursue additional leave.

Stroud v. Greystar Management Services, LP, 2014 WL 937366 (D. Md. Mar. 10, 2014)

Plaintiff alleged that defendant had retaliated against her in violation of the FMLA for complaining that its leave policies were unfair. The court granted summary judgment for defendant on the grounds that plaintiff had neither engaged in protected activity under the statute nor shown that her termination was causally connected to the complaints she had made about defendant's policy.

Plaintiff alleged that her termination stemmed from a written complaint she had made regarding defendant's denial of another employee's request for time off using the company's own "sick and vacation leave." Two months after the alleged complaint, defendant issued plaintiff a warning letter for unrelated issues including allegedly disclosing medical information of another employee. Plaintiff sent defendant a written response, indicating that she believed this warning was retaliation earlier protected activity. Following several clashes with a newly appointed supervisor, plaintiff filed an EEOC complaint alleging the same. Seventeen months after plaintiff's original complaint, defendant terminated her employment.

The court held that plaintiff had failed to establish two elements of a retaliation claim. First, plaintiff's original complaint did not constitute protected activity under FMLA because she had not alleged that defendant's denial of her coworker's leave request was "unlawful" under the statute, merely that she believed it "defied" the employer's "principles and creed." This allegation did not trigger FMLA protection—and plaintiff had mentioned FMLA nowhere in either of her complaints. Second, the court held that even if plaintiff's activity had been protected, plaintiff had failed to make a showing of a causal connection between that activity and her termination. She had offered no "specific evidence" of such connection, and the court could

not infer it based on temporal proximity because too much time (seventeen months) had elapsed between the two events.

Finally, the court noted that even if plaintiff had made out a *prima facie* retaliation claim, defendant would still prevail. Aside from presenting her own belief to the contrary, plaintiff had failed to make a showing that defendant's legitimate, nondiscriminatory reason for her termination (namely, insubordination) was pretextual particularly as there was "ample evidence" of conflict between plaintiff and her supervisor.

Summarized Elsewhere:

***Ditman v. Alyeska Pipeline Serv. Co.*, 22 WH Cases2d 633 (D. Alaska Apr. 21, 2014)**

***Preddie v. Bartholomew Cnty. Consol. Sch. Corp.*, 2014 WL 4259625 (S.D. Ind. Aug. 27, 2014)**

***Resler v. Koyo Bearings USA LLC*, 2014 WL 1272114 (M.D. Ga. Mar. 27, 2014)**

***Rains v. Newmont USA Ltd.*, 2014 WL 4810317 (D. Nev. Sept. 29, 2014)**

***Brown v. Northrop Grunmman Corp.*, 2014 WL 4175795 (E.D. N.Y., Aug. 19, 2014)**

b. Adverse Employment Action

***Hurt v. International Services, Inc.*, 2014 WL 2440247 (E.D. Mich., May 30, 2014)**

Plaintiff was employed by defendant as a Senior Business Analyst. His position involved frequent international travel. Plaintiff claimed that his work conditions were "inhumane" and caused physical and mental illness. After being off work for five days due to anxiety and depression, plaintiff applied for intermittent FMLA leave for nine to 12 months and that leave was granted. Plaintiff claimed that immediately after applying for leave, his compensation was reduced, certain travel expenses were discontinued, and he was required to front the cost of travel and submit expenses for reimbursement. Plaintiff alleged that these actions constituted constructive discharge and he did not return to work. Plaintiff filed suit against defendant alleging, among other claims, FMLA interference and retaliation. Defendant filed a motion for summary judgment, which was granted by the court.

The court found that plaintiff could not maintain a *prima facie* case of either FMLA interference or retaliation. The court noted that plaintiff was granted leave on the date he submitted his paperwork for intermittent leave, and although his doctor indicated he could return to work the next day, he failed to do so. The court held that the employer did not interfere with plaintiff's FMLA rights because he was granted leave on the day he submitted paperwork, and the employer did not retaliate against plaintiff because he voluntarily chose not to return to work and thus could not prove an adverse action.

***Wright v. Kent County Dep't of Social Services*, 2014 WL 301026 (D. Md. Jan. 24, 2014)**

Plaintiff filed various employment claims against her employer and her two supervisors ("individual defendants"), including an FMLA retaliation claim against only the supervisors. The individual defendants moved to dismiss the claim because: (1) plaintiff was not on FMLA leave during the relevant time; (2) at a public agency, an employee's supervisors cannot be held liable

for an FMLA violation and are entitled to qualified immunity; and (3) plaintiff failed to alleged that she suffered an adverse employment action or harm due to the alleged retaliatory conduct.

The court found that even if plaintiff was on FMLA leave during the relevant time, she could not demonstrate that she suffered adverse employment action. Much of the conduct plaintiff complained of in connection with her FMLA claim was completed, or at the very least began, well before the start of her alleged FMLA leave. The only allegation that was contemporaneous with plaintiff's purported FMLA leave was that the individual defendants harassed her about work-related matters. The court determined that this conduct falls well-short of being "materially adverse" under applicable legal standards. Additionally, the court noted that although plaintiff mentioned a failure to promote allegation in her opposition papers, she failed to connect these allegations to her FMLA claim in her amended complaint. She also failed to plausibly allege a causal connection between any FMLA leave taken with any failure to promote her three years later. Accordingly, the court dismissed plaintiff's FMLA retaliation claim without addressing the individual defendant's remaining arguments.

Butler v. SunTrust Bank, 22 WH Cases2d 259 (M.D. Ga. 2014)

Plaintiff claimed that the employer failed to promote her in retaliation for her exercise of rights under the FMLA. In considering the employer's motion for summary judgment, the court applied *McDonnell Douglas* and applied the so called burden shifting analysis as it was used in *Martin v. Brevard County Pub. Sch.* 543 F3d 1261, 1268 (11th Cir. 2008). As in *Martin*, plaintiff was required to show 1) she engaged in statutorily protected activity; 2) she suffered an adverse decision; and 3) the decision was causally related to the protected activity. In the instant case, the court, taking the evidence in a light most favorable to plaintiff, found that the employer articulated a legitimate, non-discriminatory reason for plaintiff not being promoted in that she was not the most qualified candidate. Since plaintiff could not provide sufficient evidence demonstrating that this reason was pretext, the court granted summary judgment on the FMLA claim.

Stranzl v. Delaware County, 2014 WL 3418996 (E.D. Pa. Jul 14, 2014)

Plaintiff, a case worker, took advantage of a program by which the defendant would pay her education costs for her master's degree, in exchange for which she agreed to stay in her job for two years after completing the program. While in school and working, plaintiff was diagnosed with ADD and her doctor recommended a three month FMLA leave, which was later extended. When she returned from leave, the employee began the internship component of the program in, an office in a different location from her original assignment.

After being transferred to a different office, plaintiff brought suit against the defendant for FMLA retaliation, among other claims, alleging that defendant retaliated against her because it transferred her to a different office upon her return from FMLA leave. The district court granted the defendant's motion for summary judgment because the transfer was not an adverse job action, explaining that the transfer caused plaintiff no harm, and she had never been promised that she would remain in the same location, and the fact another employee in a similar

position as not transferred was not dispositive absent discriminatory intent. Thus, the district court ruled that plaintiff failed to prove an adverse employment action.

Basch v. Knoll, Inc., 2014 WL 911865 (W.D. Mich. Mar. 10, 2014)

The employee brought suit against her former employer, alleging that she was treated harshly and that she was discharged in retaliation for using FMLA leave on several occasions. The employer moved for summary judgment, which the court granted in part and denied in part. The employee raised numerous allegations of differential treatment. Allegedly, her work was unfairly scrutinized, she was refused training opportunities, she was not allowed to rotate between jobs, she was not permitted to use the restroom without scrutiny, co-workers were disrespectful and spoke harshly. She also claimed that she was discharged in retaliation for her use of FMLA leave.

The court found that the employee failed to establish a prima facie case on all but the discharge claim. Other than the discharge, the employee's allegations did not constitute an adverse employment action. The allegations did not result in any reduction in "pay, benefits or [detrimental change in] on-the-job hours," but instead were de minimis. As for the employee's discharge, the employee argued that there was temporal proximity because the termination occurred within three months of her most recent use of FMLA leave. The court disagreed, noting that the correct time measurement was from the employee's first use of FMLA leave, because no adverse action occurred after any previous periods of leave. The employee further claimed that being subjected to a performance review after returning from her first leave, and being criticized for deficiencies related to her disability, constituted adverse actions. The court rejected those arguments because the review was a normal function of the employer, and the criticism based on disability was not actionable under the FMLA. Finally, the employee was relying on a long-expired FMLA certification to make her argument. The court found that the employee failed to state a prima facie case of retaliation. The court also noted that the three month period between the plaintiff's return from FMLA leave and her discharge was not sufficient to establish pretext.

Housel v. Rochester Institute of Technology, 6 F. Supp. 3d 294 (W.D.N.Y 2014)

The employee was a lecturer for the employer, a university. The employee filed a lawsuit for retaliation under the FMLA against the employer and the chair of her department. The employee informed the employer by telephone that she had been diagnosed with "exacerbation of neurological symptoms" from a previous brain tumor, and would require eight weeks of FMLA leave. Soon after, the employee was informed by letter from a dean that her contract as a lecturer would not be renewed based on poor performance and insubordination. The letter was dated seven days after the employee requested FMLA leave.

The employer moved for summary judgment. The court held that the employee failed to establish a *prima facie* case of retaliation because the employee could not show retaliatory intent. The employee argued that the close temporal proximity between her request and discharge was sufficient to establish a causal connection. However, the court reasoned that no jury could infer from the evidence that the dean had actual knowledge of the employee's leave request when he made the termination decision. Furthermore, the employer provided a legitimate and non-discriminatory reason for Plaintiff's termination, namely, the employee's insubordination and

poor performance, which were corroborated by the employee's poor performance evaluations. There was no evidence of pretext, and temporal proximity was not sufficient to establish pretext. Therefore, the court granted summary judgment for the employer. The court also granted summary judgment for the chair of the department, finding that he did not have sufficient involvement in day-to-day personnel decisions relating to FMLA leave to qualify as an "employer" under the FMLA. The chair had no involvement in the employee's requests for FMLA leave, and had no control over whether the employee's contract would be renewed.

Adams v. Anne Arundel Cnty. Pub. Sch., 158 WH Cases2d 198 (D. Md. 2014)

Plaintiff, an assistant principal, brought claims against defendant school district alleging, among other claims, interference and retaliation under the FMLA. On January 19, 2010, plaintiff had a physical altercation with a female student. An investigation by Child Protective Services determined there was no child abuse, and defendant informed plaintiff of such on February 24, 2010. On February 25, 2010 and again on March 22, 2010, plaintiff was diagnosed with stress and anxiety disorders. Plaintiff was unable to work and was placed on temporary medical leave through July 21, 2010. The physician and psychologist who treated plaintiff each stated that he should and/or must be reassigned to a different, less stressful school upon his return to work. During his leave, on May 24, 2010, defendant formally reprimanded the plaintiff for the January 19 incident. When plaintiff returned to work, he was reassigned to a small alternative school with a smaller student body, a higher staff to student ratio, and more support staff. Due to the reassignment, plaintiff received a slightly reduced salary under the terms of the applicable collective bargaining agreement.

The court granted summary judgment for the defendant on the plaintiff's interference and retaliation claims. Specifically, the court rejected plaintiff's argument that he suffered adverse employment actions when the defendant "reopened the investigation" into the January 19 incident, brought him to a pre-discipline conference, issued a written reprimand, and reassigned his employment. First, the court found plaintiff had not suffered an adverse employment action with respect to the investigation into his conduct, because while the Child Protective Services' investigation had closed, defendant's investigation into plaintiff's behavior was ongoing. Second, the court found that the pre-discipline conference and written reprimand did not constitute adverse employment actions because these actions were a normal part of the school district's investigatory procedure. Finally, the court dismissed plaintiff's assertion that the reassignment of his position constituted retaliation, stating that while the category of employment actions rising to the level of an adverse action for retaliation purposes is broader than that under a claim of discrimination, reassignment of job duties is not automatically actionable. Instead, the action should be judged from the view of a reasonable person, considering all circumstances as to whether an action was materially adverse. Here, the court assumed that the reassignment to a position with a lesser salary was adverse. Assuming plaintiff had met his *prima facie* case, the burden then shifted to defendant to articulate a non-retaliatory reason for the transfer, which defendant was able to do – plaintiff's own medical professionals advised defendant to reassign plaintiff for health related purposes. Because plaintiff was unable to provide any evidence to support a finding of pretext, the court granted summary judgment to the defendant on this claim as well.

Summarized Elsewhere:

Maya v. Leprino Foods Co., 2014 WL 1091251 (E.D. Cal. Mar. 18, 2014)

Langenbach v. Wal-Mart Stores, Inc., 761 F.3d 792, 23 WH Cases2d 182 (7th Cir. 2014)

Osei v. Coastal Int'l Security, Inc., 2014 WL 6608762 (N.D. Va. Nov. 19, 2014)

c. Causal Connection

Bloom v. Group Health Plan, Inc., 2014 WL 3955668 (D. Minn. Aug. 13, 2014)

Plaintiff worked as a certified medical assistant at Defendant's OB/GYN clinic when she became pregnant with her third child. She told her supervisor in March 2012 that she was pregnant and would need maternity leave sometime in July, to which her supervisor allegedly stated "I thought you were done having kids." Plaintiff alleged her supervisor's tone and body language indicated she was displeased with the news. She also claimed that the supervisor treated her differently after the announcement, including singling her out because of her internet use texting while at work. Plaintiff went on maternity leave, but visited work several times during her leave. Defendant received a report that Plaintiff was taking formula samples and baby supplies from the clinic. Plaintiff's supervisor investigated and confirmed that the allegation was accurate. When questioned about the report, plaintiff admitted to taking the samples, but stated she thought other employees had done so in the past and she did not know that it was against defendant's policies to do so. As a result of the investigation, defendant terminated plaintiff's employment on September 11, 2012.

Plaintiff sued her employer for FMLA retaliation and interference, but the district court granted summary judgment in favor of defendant on all claims. According to the court, plaintiff failed to establish a causal connection between her FMLA leave and her termination. The court relied on the date plaintiff put defendant on notice of the need for leave as the relevant date when assessing temporal proximity, and determined that a six-month gap between the notice of need for FMLA leave and her discharge could not support an inference of causation. The Court also found the allegations of differing treatment to be only minor annoyances that did not raise an inference of causation, especially in light of the fact that plaintiff did not receive any discipline for her internet usage and texting at work. The court also held that plaintiff failed to provide any evidence of pretext that would have allowed her claim to proceed even if she had been able to establish a *prima facie* case of FMLA retaliation. Plaintiff's admission of the facts underlying the policy violation that ultimately led to her termination meant that the reason given for her termination was not pretextual, and plaintiff had no evidence that similarly-situated employees were treated more favorably. The court also dismissed plaintiff's interference claim, noting that an employee could not shield herself from wrongdoing simply by taking FMLA leave. According to the court, the reason given by defendant for her termination was legitimate, and there was no evidence that the termination was for the purpose of interfering with her FMLA rights.

Smith v. St. Francis Hospital, 2014 WL 793063 (D. S.C. Feb. 24, 2014), *aff'd*, 581 Fed. Appx. 218 (4th Cir. 2014)

Plaintiff sued for retaliation under the FMLA, but the district court granted the employer's motion for summary judgment. Plaintiff could not establish the causation element of

her prima facie case of retaliation because she was disciplined for tardiness before her request for intermittent leave. Her tardiness continued despite her FMLA-protected leave, and her tardiness was unrelated to her leave. The court held that the FMLA does not protect an employee on leave from an adverse employment action that would have occurred had she not taken leave.

Ransel v. CRST Lincoln Sales, Inc., 2014 WL 1207432 (N.D. Ind. 2014).

Plaintiff was a truck driver for defendant. Plaintiff collided into another truck on the highway, damaging his company-owned truck and injuring his back. While plaintiff was not cited by the Highway Patrol for his role in the accident, plaintiff acknowledged to his supervisors that he was ultimately at fault. Plaintiff's supervisor reassured him that he had an impeccable driving record for the company and that he was eager to have him return to driving. Because of his injuries, plaintiff ended up requesting FMLA leave. Shortly after his request, a more senior supervisor notified plaintiff that his employment would be terminated for his role in causing the accident, under company policy.

Plaintiff sued his employer defendant claiming that his discharge was motivated by his FMLA leave request and functioned to deprive him of his FMLA leave. Plaintiff pointed to another driver had been involved in a similar accident in which he was at fault, who was not discharged. The court found that plaintiff's claim survived summary judgment, citing both the evidence of the employee who was treated differently, and the evidence of the support plaintiff received after the accident but before he requested FMLA leave.

Greineder v. Masonic Homes of the R.W. Grand Lodge, 2014 WL 1632143 (E.D. Pa. Apr. 23, 2014)

Plaintiff worked as a nurse for defendant. She took FMLA leave for back surgery. After recovering from the surgery, she returned to work with a lifting restriction, which was subsequently lowered after she continued to experience back pain. Although she claimed that she could perform the essential functions of her position, she was terminated under the employer's policy that allowed termination for employees who were on restricted duty for longer than 6 months. She was also told that her lifting restriction and physical condition made her a "liability." She brought a, FMLA retaliation claim.

Defendant filed a motion to dismiss the FMLA claim. The court granted the motion, holding that plaintiff's FLMA claim failed to adequately plead the issue of causation. The court found that defendant was simply following the recommendation of plaintiff's doctors in implementing the lifting restriction, so there was no causal proof of retaliation for taking FMLA leave.

Barnhart v. Regions Hospital, 2014 WL 258578 (D. Minn. Jan. 23, 2014)

Plaintiff, a Scheduling Specialist for defendant, was terminated when her position was eliminated during a departmental reorganization. Plaintiff filed a lawsuit alleging that she was retaliated against in violation of the FMLA. Defendant moved for summary judgment.

In support of its motion for summary judgment, defendant argued that plaintiff could not prove that a causal connection existed between her protected activity and any adverse employment action because the defendant: (1) granted plaintiff's FMLA leave a year a half before any alleged adverse employment action occurred; (2) allowed plaintiff to take intermittent leave when it was arguably not medically necessary; (3) allowed plaintiff to start her shift late if she called in; and (4) did not track plaintiff's intermittent FMLA leave with respect to her start time. Plaintiff contended that the gap in time between the protected activity and adverse action did not break the causal link because her termination occurred after a change in supervisors. Plaintiff also argued that the initial flexibility afforded to her in terms of her start time was taken away from her after this change in supervisors. The court agreed with plaintiff and denied the defendant's motion for summary judgment. In doing so, the court reasoned that a jury could conclude that defendant retaliated against plaintiff, if the jury found that the flexibility given to plaintiff was scaled back under her new supervisors and that plaintiff complained.

DiBlasi v. Liberty Mutual Group Inc., 2014 WL 1331056 (D. Mass. Apr. 3, 2014)

Plaintiff, a former senior product analyst in defendant's product division, brought suit alleging that defendant violated FMLA by discouraging plaintiff's exercise of FMLA leave and retaliating against plaintiff for exercising rights guaranteed under the FMLA. In granting defendant's motion for summary judgment as to the FMLA retaliation claim, the district court found that plaintiff failed to establish a threshold case that retaliation for plaintiff's FMLA leave was the "but-for" cause of her termination.

The court found that plaintiff failed to make out a *prima facie* case of FMLA retaliation. In particular, plaintiff failed to proffer evidence that the employer's nonretaliatory explanation for plaintiff's termination—plaintiff's documented poor job performance, which predated any indication that she intended to request FMLA leave—was pretextual. In addition, plaintiff's testimony about her supervisor's apparent displeasure at her absence was insufficient to establish pretext. Specifically, the court found that mere expressions of managerial concern at the potential disruption to the workplace caused by an employee's absence did not constitute evidence of an employer's retaliatory motive. Similarly, the court found that the temporal connection between plaintiff's taking of FMLA leave and her termination was inadequate to support a showing of pretext. The court reasoned that the temporal proximity between the FMLA leave and the termination will not ordinarily by itself establish pretext unless the proximity is "very close." In this case, plaintiff's termination occurred more than a year after she took FMLA leave. Therefore, the court granted summary judgment on plaintiff's FMLA retaliation claim.

Saulter v. Detroit Area Agency on Aging, 562 Fed.Appx. 346, WH Cases2d 461 (6th Cir. 2014)

Following a management decision to restructure her department, Plaintiff was terminated from her position several days after returning from FMLA leave. She brought a number of claims under state and federal law, including under the FMLA, and the district court granted summary judgment for the employer. On appeal, a majority of the a Sixth Circuit panel,

applying the *McDonnell Douglas* burden-shifting analysis, held that there was a triable issue of whether the decision to eliminate plaintiff's position was due to her use of FMLA. While the dissent noted that an employer may deny reinstatement when the employer can show that the employee would have been terminated anyway, the majority pointed to evidence that the defendant did not consider eliminating plaintiff's position until after she was on leave. That is, while the defendant may not have realized until the work was redistributed that her services were not needed, as the redistribution was *because of* the plaintiff's use of leave, there arose a question of fact as to whether the duties would have been redistributed.

Cheeks v. Gen. Dynamics, 22 F.Supp.3d 1015, 157 WH Cases2d 507 (D. Ariz. 2014)

The employee sued her former employer for retaliation under the FMLA. The employee alleged that defendant terminated her for taking Fridays off in order to care for her autistic son. The employee alleged that she received emails during one weekend with task requests and that, in response, she stated that she did not work Saturday or Sunday. The employee alleged that defendant expressed dissatisfaction with her email, and sent her a return email expressing doubt toward her commitment to her job. The email stated "this has caused them to question your role [at work] and certainly your commitment to making the program a success."

As a threshold matter, the court noted that the appropriate legal framework is not a *McDonnell Douglas* burden-shifting framework. Instead, the employee need only establish that (1) she took FMLA-protected leave; (2) she suffered an adverse employment action; and (3) the adverse action was causally related to her FMLA leave. The employee pointed to the email from defendant as direct evidence that her termination was causally related to her FMLA leave. She alleged that the word "this" referred to her FMLA leave. Defendant claimed that the term "this" referred to the insolent tone she used in her previous email to Defendant. The court concluded that a genuine issue of material fact precluded summary judgment on the employee's retaliation claim.

Popko v. Penn State Milton S. Hershey Medical Center, 2014 WH Cases2d 163 (W.D. Pa. Jul 14, 2014)

Plaintiff made a lewd comment while working with other employees and, on the very same day the employer questioned plaintiff regarding the lewd remark, requested FMLA leave. The employer terminated plaintiff's employment less than a week later and also informed plaintiff that his request for FMLA leave was denied because he failed to provide documentation for FMLA leave.

Plaintiff then brought suit for FMLA interference and retaliation. The district court granted the employer's motion to dismiss. The district court dismissed plaintiff's interference claim because plaintiff failed to demonstrate that he suffered from a serious medical condition at the time he was denied leave in light of plaintiff's failure to allege anything more than "anxiety" and his failure to provide medical documentation. Moreover, the district court also dismissed plaintiff's FMLA retaliation claim, ruling that the employer made the decision to terminate plaintiff's employment before plaintiff requested FMLA leave. On the other hand, the district court did not dismiss plaintiff's FMLA retaliation claim for FMLA leave plaintiff took well

before his lewd remark, finding that plaintiff's allegations that he was excluded from meetings and not notified of significant events after returning from FMLA leave sufficient to establish a "pattern of antagonism" between plaintiff's taking of FMLA leave and his discharge. Finally, the district court ruled that plaintiff also adequately stated FMLA claims against two individual supervisors, finding that plaintiff's allegations that two individual supervisors excluded him from meetings and information, ignored other similarly situated individuals for behavior similar to plaintiffs, and had secret meetings with other employees as a result of their bias sufficient to infer that his individual supervisors retaliated against him for exercising his rights under the FMLA.

Jones v. SEPTA and Alfred Outlaw, 2014 WL 3887747 (E.D. Pa., August 6, 2014)

Plaintiff worked as an administrative assistant in defendant's revenue department from 2001 to 2011. On December 1, 2010, plaintiff's supervisor informed her that she was suspended with pay pending an investigation into possible fraud related to her timesheets and/or false reporting of her time. The following day, plaintiff filed a sexual harassment complaint against her supervisor. Plaintiff was interviewed by the defendant on December 7, 2010 and denied that she had submitted a falsified timesheet and, instead, alleged that her suspension by her supervisor was in retaliation for opposing his alleged harassment. Plaintiff had not reported any issues about her supervisor to the defendant before her complaint on December 2.

Plaintiff eventually brought suit against the defendants, alleging that defendant terminated her employment in retaliation for exercising her rights under the FMLA and taking FMLA leave between August 16, 2010 and November 5, 2010. The defendants argued plaintiff's termination "bore no relationship" to her FMLA leave. The district court found that there was no evidence her supervisor was meaningfully involved in the investigation into plaintiff's timesheets or the decision to terminate her employment, and the decision to terminate plaintiff's employment ultimately was premised on information independent of what was provided by her supervisor.

Buzulencia v. Ohio Bell Telephone Co., 2014 WL 3735134 (N.D. Ohio July 28, 2014)

Plaintiff, a union employee, had approved intermittent FMLA leave for migraine headaches. Approximately six months after his last use of FMLA time, and while working under a new supervisor, plaintiff was disciplined repeatedly and ultimately discharged. Plaintiff filed suit claiming his discharge was in retaliation for his prior use of FMLA.

The court denied the employer's motion for summary judgment. The court found that plaintiff's testimony that he thought his supervisor knew, or should have known, about his migraines created a genuine issue of material fact, despite a sworn statement from the supervisor that he had no such knowledge. Though the court found that the employer presented a legitimate, non-retaliatory reason for plaintiff's discharge, the court ruled that there were material facts in dispute as to whether the plaintiff's discharge was pretextual to preclude summary judgment. The court was troubled by the employer's use of GPS data from the plaintiff's truck to establish many of the policy violations for which he was disciplined, despite testimony that the data was not supposed to be used for disciplinary purposes. In addition, the court gave weight to plaintiff's

testimony that eight other employees in the company informed plaintiff that the company was “targeting” him because of his FMLA use, as well as a five year old e-mail expressing frustration with plaintiff’s FMLA use and a desire to get rid of him.

Mathis v. BDO USA, LLP, 2014 WL 975706, 22 WH Cases2d 740 (S.D. Tex. Mar. 12, 2014)

The employee filed a lawsuit against the employer, alleging that the company discharged him in retaliation for taking FMLA leave. The employee used FMLA leave in the fall of 2010, and requested FMLA leave again in June 2011, just two days before he was discharged. The employer argued that it discharged the employee because of his lack of productivity. In the Complaint, the employee did not specifically identify the protected activity that he believed caused the discharge.

Both parties moved for summary judgment. The court denied the employee’s motion, and granted the employer’s motion with regard to the FMLA claim. The employer claimed that the employee failed to establish a causal connection between the FMLA leave and his discharge because the employee’s lack of specificity caused the company to have to defend against “a moving target.” The court agreed, recognizing that the employee repeatedly failed to identify which action formed the basis of her retaliation claim. The court noted one of the alleged adverse actions occurred before the employee’s second request for FMLA leave and, thus, could not possibly be in retaliation for such a request. The employee’s failure to specifically identify the basis for the retaliation claim impaired the efficacy of the McDonnell Douglas framework. Therefore, the court granted summary judgment to the employer on the FMLA claim and denied summary judgment to the plaintiff.

Malin v. Hospira, Inc., 762 F.3d 552, 23 WH Cases2d 165 (7th Cir. 2014)

Plaintiff sued her employer for retaliating against her for making a Title-VII complaint and for exercising her FMLA-rights. In 2003, plaintiff complained to the employer’s human resources department about sexual harassment by an indirect supervisor. Through her direct supervisor, plaintiff was told by a higher-level manager not to lodge a complaint. Plaintiff nonetheless did so. Subsequently, when the higher level manager was head of the department and had control over all promotions within it, plaintiff received no salary increases or promotions, despite excellent performance reviews. Then, in the summer of 2006, plaintiff requested and received FMLA leave shortly before a departmental reorganization was announced. The reorganization created a new position above plaintiff’s in pay grade and responsibility; although plaintiff effectively exercised the responsibilities of the position for a year while the position remained unfilled, she did not receive a promotion or pay increase. The court granted the defendant’s motion for summary judgment, and the plaintiff appealed. Plaintiff argued that there was sufficient evidence to establish a causal connection between her FMLA leave and the defendant’s decision to not promote her in 2006. The court agreed, finding that a reasonable jury could find that the defendant retaliated against her for requesting FMLA leave, particularly in light of the fact that the reorganization was not finalized prior to the plaintiff’s request for FMLA leave. The court noted that plaintiff was a candidate for a promotion yet, upon her return for leave, she not only failed to get a promotion but was, in fact, demoted. Thus, the court reversed the district court and remanded the court’s decision on the FMLA retaliation claim.

Lundy v. Park Nicollet Clinic, 2014 WL 3573626 (D. Minn. July 21, 2014)

Plaintiff worked as a registered nurse at a mental health clinic. In September, 2010, she applied for and was granted intermittent FMLA leave as a result of severe breathing issues. Over the next year, plaintiff took time off of work for various doctors' appointments. In the summer of 2011, plaintiff sought and received additional FMLA leave to deal with a separate medical condition requiring surgery. On her first day back to work in the fall of 2011, plaintiff's employment was terminated. Plaintiff thereafter brought FMLA entitlement and discrimination claims against her employer. More specifically, she alleged that her supervisor's comments stating "is that really necessary," "no more doctor's notes," and "I can't believe this. I don't have enough employees" when presented with plaintiff's FMLA paperwork interfered with or deterred her from seeking FMLA benefits and that she was discharged because she took FMLA leave.

The court granted the employer's motion for summary judgment on the entitlement claim on the ground that plaintiff did not provide any evidence that her supervisor's comments did, in fact, deter her from seeking benefits. The court observed that a plaintiff's claim for entitlement cannot be based solely upon the possibility that an employer's behavior would have discouraged a reasonable person from seeking FMLA leave. On the other hand, the court denied summary judgment as to the retaliation claim and, in so doing, the court engaged in significant review of plaintiff's *prima facie* case and evidence of pretext. With respect to the former, the court noted that in addition to temporal proximity, additional evidence that may prove causation includes evidence that a plaintiff was subject to greater scrutiny than were other employees or that the plaintiff faced greater scrutiny after exercising her FMLA rights. With regard to the issue of pretext, the court focused on plaintiff's supervisor's alleged displeasure with plaintiff's taking FMLA leave, her increased scrutiny of plaintiff's attendance and performance following the first leave period, and the differential treatment provided to other nurses with attendance or performance issues. In fact, the court explained that a reasonable jury would well conclude that the employer's instigation of an investigation into plaintiff's performance issues was itself retaliatory.

McCarroll v. Somerby of Mobile, LLC, 2014 WL 6996300 (11th Cir. Dec. 12, 2014)

Plaintiff, who appeared *pro se*, appealed the district court's grant of summary judgment to defendant. Plaintiff was a former part-time bus driver for defendant. Defendant had an attendance policy requiring that employees give at least four hours' notice of any absence. After plaintiff had two absences without the requisite notice, defendant terminated his employment. During the meeting where he was informed of the decision, plaintiff produced a doctor's note recommending that plaintiff take a two-week leave of absence for treatment purposes. The note did not affect defendant's termination decision.

Plaintiff argued that he stated FLMA claims because: (1) he was denied the leave that was recommended in his doctor's note; and (2) that the doctor's note proves that his request for FMLA leave and his termination were causally related. The Eleventh Circuit found that summary judgment was proper on plaintiff's FMLA interference claim because defendant made the decision to terminate plaintiff before he requested leave. The court further found that it was

unlikely that plaintiff would be considered an “eligible employee” under the FMLA, because he had already been terminated by defendant. The court also found that these same reasons supported summary judgment on plaintiff’s FMLA retaliation claim, namely because plaintiff was unable to show a causal connection between his request for leave and his termination.

McElroy v. Sands Casino, 23 WH Cases2d 1514 (3d Cir. 2014)

Plaintiff appealed from the district court’s grant of defendant’s motions for summary judgment and to strike plaintiff’s opposition to summary judgment. The Third Circuit affirmed the lower courts holdings. While plaintiff was employed by defendant, he contacted a member of defendant’s human resources department to inquire about FMLA leave. The human resources employee directed plaintiff to the outside organization that handled FMLA leave and she did not tell anyone about plaintiff’s inquiry. Plaintiff was told by the outside organization that his FMLA form was incomplete, but was terminated by defendant before he was able to supplement the information. Plaintiff was terminated after an altercation with another employee in an elevator. Plaintiff then filed suit for FMLA retaliation.

In response to defendant’s motion for summary judgment, plaintiff filed an over-length opposition brief that was late and missing a referenced exhibit. For these reasons, the district court granted defendant’s motion to strike plaintiff’s opposition brief. The district court went on to grant the motion for summary judgment, finding that despite the fact that plaintiff’s FMLA inquiry and termination were temporally close, there was no causal relationship because the party making the termination decision had no knowledge of the FMLA request.

Reviewing the district court’s decision, the Third Circuit found that plaintiff was unable to show causation for the purposes of proving his *prima facie* case because he could not point to any evidence that the decision-makers who investigated the elevator incident knew about his FMLA inquiry. Further, even if plaintiff could prove his *prima facie* case, he could not show that defendant’s reason for termination was pretextual, in that he did not dispute that the elevator incident occurred.

Summarized Elsewhere:

Karaffa v. Township of Montgomery, 560 Fed.Appx. 133, 22 WH Cases2d 361 (3d Cir., 2014)

Pallatto v. Westmorland County Children’s Bureau, 2014 WL 836123 (W.D. Pa. March 4, 2014)

Oliver v. Williams Companies, Inc., 2014 WL 1344496 (N.D. Okla. Apr. 4, 2014)

Porter v. Five Start Quality Care-MI, LLC, 2014 WH Cases2d 159197 (E.D. Mich. June 20, 2014)

Serlin v. Alexander Dawson Sch., 2014 WL 1573535 (D. Nev. Apr. 17, 2014)

Edusei v. Adventist HealthCare, Inc., 2014 WL 3345051 (D. Md. July 7, 2014)

Smith v. City of Birmingham, 2014 WL 66485, 22 WH Cases2d 445 (N.D. Ala. Jan. 8, 2014)

Stroud v. Greystar Management Services, LP, 2014 WL 937366 (D. Md. Mar. 10, 2014)

Edwards v. Nat’l Vision Inc., 568 Fed. Appx. 854 (11th Cir. 2014)

Jarvela v. Crate Carrier Corp., 754 F.3d 1283, 22 WH Cases2d 1217 (11th Cir. 2014)

Brown v. Northrop Grunmman Corp., 2014 WL 4175795 (E.D. N.Y. Aug. 19, 2014)

Ginwright v. Dept. of Revenue for Alabama, 158 WHCases 2d 393 (M.D. Ala. 2014)

Fulkerson v. Yaskawa America, Inc., 2014 WL 4638982 (S.D. Oh. Sept. 16, 2014)
Bennett v. Trinity Marine Prods, Inc., 2014 WL 4674764 (E.D. La. Sept. 18, 2014)
McBeth v. Shearer's Foods, Inc., 2014 WL 4385764 (W.D. Va. Sept. 4, 2014)

i. Temporal Proximity

Karaffa v. Township of Montgomery, 560 Fed.Appx. 133, 22 WH Cases2d 361 (3d Cir., 2014)

Plaintiff, a dispatcher for a police department, took FMLA-based maternity leave. She returned from leave and started the modified schedule that she requested. She alleged, however that, three and a half months after returning to work she faced “ostracism and antagonism” and was assigned non-dispatcher duties. After allegedly expressing concern in an informal email to her supervisor, and subsequently filing a formal complaint with the township claiming harassment and retaliation for having taken FMLA leave, she resigned. Plaintiff brought suit against the township and two individual supervisors, alleging FMLA interference and retaliation. The district court granted summary judgment to defendants, and plaintiff appealed.

The Third Circuit affirmed. First, it found that the temporal proximity between plaintiff’s return from her FMLA leave and the alleged adverse employment action was insufficient to raise an inference of causation. Second, even if the informal email message amounted to protected conduct under the FMLA, it did not rise to the level of a complaint for purposes of the FMLA’s provisions. Third, the court found that plaintiff’s formal complaint to the township could not support a retaliation claim because it occurred only after the alleged adverse employment actions.

Langenfeld v. Armstrong World Industries, Inc., 2014 WL 4272789 (S.D. Ohio Aug. 29, 2014)

Plaintiff, a former director of a manufacturing company, brought claims for interference and retaliation under the FMLA. Over her two-year tenure, plaintiff regularly clashed with plant managers (who resisted her efforts to reform operations) and her supervisors. A few weeks before defendant discharged plaintiff, her supervisor revised her performance review to note that in a recent group meeting, plaintiff was extremely negative and openly critical of a vice president and her subordinates. He recommended her termination and, in written comments, noted that plaintiff’s husband required a major medical procedure and that she would have to take two weeks’ leave to care for him in the next month. Plaintiff maintained that the memorandum was direct evidence of FMLA retaliation or interference, or in the alternative, was indirect evidence that established a causal connection between her protected FMLA activity and the adverse employment action.

The district court granted the company’s motion for summary judgment on both theories of liability. Plaintiff maintained that her FMLA retaliation claim was supported by the temporal proximity between her FMLA request and defendant’s decision to terminate her (one month) and because the memorandum specifically referenced her FMLA leave request. The court found that the memorandum did not constitute direct evidence of discrimination, but indirect evidence, because it expressly described other factors for plaintiff’s termination. It then held that a jury could not make a reasonable inference that simply because it noted the employee’s leave in context of comments regarding the termination of plaintiff’s employment. Significantly,

plaintiff's supervisor had considered terminating her employment before she requested FMLA leave, rendering the timing "less probative" of retaliatory motive. Without other evidence, plaintiff's temporal proximity argument was insufficient to prove a causal connection, and create a triable issue. Plaintiff's FMLA interference claim similarly failed because, the court concluded, there was no evidence to suggest that the dismissal would not have occurred absent her FMLA request. Notably, plaintiff did not make any arguments to distinguish her FMLA interference claim from her retaliation claim.

Outten v. Genesis Health Care, LLC, 2014 WL 3964918 (E.D. Pa. Aug. 12, 2014):

Plaintiff worked as a nurse supervisor for the night shift at two of defendants' facilities. During her employment, plaintiff requested FMLA leave to undergo and recover from kidney surgery. Defendant granted plaintiff nearly four months of FMLA leave as a result of her surgery. After being released to return to work, plaintiff resumed her registered nursing duties. Approximately a month after she returned from her FMLA leave, Hurricane Sandy hit the east coast, and Plaintiff received multiple phone calls from employees attempting to call off from work on account of the hurricane. Plaintiff informed them that defendant did not accept "call-outs" due to weather. Nevertheless, the next day plaintiff called work and stated that she would not report for her next shift on account of the storm. Later, plaintiff had another discussion with her superior, who informed her that she needed to report to work (especially in light of her role as a supervisor). Upon plaintiff's refusal to do so, she was told there would be consequences under the policy. After plaintiff failed to report to work, defendant terminated her employment as "job abandonment," pursuant to the handbook policy.

Plaintiff sued defendant for FMLA retaliation and interference, but the district court granted summary judgment in favor of defendant on both claims. At her deposition, plaintiff admitted that defendant had not, in fact, interfered with her FMLA claim. On the retaliation claim, the court found no causal connection between her leave and her termination because she undisputedly violated a known rule of the defendants, which was the stated reason for her discharge. According to the court, the evidence of her job abandonment broke the causal connection, even though the termination occurred less than a month after Plaintiff returned to work from leave, and even though plaintiff's supervisor had allegedly made several comments regarding the possibility of plaintiff's retirement. As a result, plaintiff's FMLA claims were dismissed.

Eriksson v. Deer River Healthcare Center, Inc., 2014 WL 1608260 (D. Minn. Apr. 18, 2013)

Plaintiff, a physician, was hired by defendant to work a minimum of two (2) 10-hour days per week in its clinic, where it was expected to grow his practice. The employer counseled the employee on several occasions for being so far behind on charting patient records that revenue was lost and for frequently having others fill in for him so he could work in the Emergency Room instead, which the employer believed further limited his ability to attract permanent patients to the clinic. Plaintiff also received complaints by patients of poor bedside manner and attentiveness; and concerns by peers regarding his clinical skills. Plaintiff applied for intermittent FMLA leave relating to care for his spouse. At the time he applied, he was under a pre-existing directive to catch up on a backlog of 180 documents requiring his electronic

signature. On June 12, 2012, the employer e-mailed him a reminder to finish his charts by June 15, 2012, or risk suspension of his “privileges” to practice. The employee missed the deadline, but was caught up before the suspension could be processed. A Performance Improvement Plan was subsequently drafted and presented to the employee. In late July, the employer decided that the employee was not a good fit for the organization and invoked the 90-day termination clause in the employee’s employment agreement. Plaintiff sued for FMLA retaliation, alleging that he was terminated as a result of taking approved, intermittent FMLA leave to care for his spouse.

The court, on a motion to dismiss, recognized the claim as one for discrimination and analyzed it as such under *McDonnell Douglas*. The court found that the employee did not sufficiently allege a *prima facie* case; specifically the causal-connection requirement of the test. The employee attempted to show that timing was the causal nexus of his termination. Reviewing Eighth Circuit precedent, the court held that the 50 days between the request and termination was too long to infer causation. The court measured the start of the days based on when the supervisor who terminated learned of the request and not when the time off was taken because the supervisor had no knowledge of actual time off. Addressing plaintiff’s pretext argument, the court found that the employee’s performance had been at issue for 18 months prior to the request as evidenced by several e-mails and the employee’s own admission of repeated previous counseling by the employer. The quality of the documentation did not dissuade the court from granting the employer’s motion to dismiss based on a non-shifting, legitimate, nondiscriminatory reason for termination.

Rumanek v. Ind. Sch. Mgmt., Inc., 2014 WL 104966 (D. Del. Jan. 10, 2014)

Plaintiff sued her former employer for FMLA retaliation, among other things. Plaintiff’s job performance was unremarkable for the first several years of her employment, which began in 2002. In November 2009, plaintiff was involved in two car accidents, which left her with fatigue, headaches, tingling and weakness in her shoulders and upper arms, and short-term memory loss. Because of these symptoms, plaintiff requested and was granted certain job-related accommodations, including permission to work from home on occasion. In August 2010, plaintiff requested permission to record a meeting with her supervisor to discuss plaintiff’s compensation. Plaintiff claimed she needed the recording because of her short-term memory loss. The supervisor denied plaintiff’s request but agreed to have a third-party present to take notes of the meeting, which was scheduled for August 30, 2010. This meeting would be postponed, however, because plaintiff requested and was given FMLA leave on August 27, 2010. Ultimately, plaintiff used all of FMLA leave and returned to work on November 18, 2010. The postponed compensation meeting was rescheduled to occur on November 24, 2010. At the meeting, plaintiff again reiterated her request to record the proceedings and again her supervisor denied the request. Plaintiff refused to participate in the meeting despite her supervisor warning her that failure to participate would be an act of insubordination. Plaintiff did not heed her supervisor’s warning and was terminated that day for insubordination.

The district court granted the employer’s motion for summary judgment on plaintiff’s FMLA retaliation claim. The district court ruled that plaintiff had failed to demonstrate a causal connection between her taking leave and being terminated. The court noted that the temporal proximity of plaintiff’s discharge to her leave, which was the only evidence of causation plaintiff

provided, was insufficient to establish a *prima facie* case of retaliation where all other evidence showed that her employer had every intention to continue with plaintiff's employment upon her return from leave. Indeed, plaintiff was fully reinstated and continued her employment until she was insubordinate.

***Distefano v. Essentia Health*, 2014 WL 3101324 (D. Minn. July 8, 2014)**

An employee alleged that her discharged constituted retaliation for exhausting her remaining three hours of her FMLA leave. Rejecting this argument and dismissing the case, the court noted that it "simply beggars belief" that the employer would permit the employee to take numerous medical leaves during the course of her employment, including two leaves of absences totaling 14 weeks in the six months prior to the termination, and then fire her for exhausting the remaining three hours. The claim was also undercut because the employee understood that, four days before she exhausted the leave, she was at risk of being discharged for violating a "no call, no show" policy.

***Heffernan v. U.S. Bank National Association*, 2014 WL 3408594 (S.D. Ohio 2014)**

A bank employee requested and was approved for two periods of FMLA leaves in 2010. The employee was discharged on December 19, 2011 for violation of company policies. The employee filed a lawsuit under the FMLA, but the court granted summary judgment to the employer. The court noted that there was no evidence of causation between the leave in 2010 and the termination a year later. Without any additional evidence, the lack of temporal proximity was fatal to the employee's claim.

***Ditman v. Alyeska Pipeline Serv. Co.*, 22 WH Cases2d 633 (D. Alaska Apr. 21, 2014)**

Plaintiff filed suit against his former employer after he was discharged for insubordination, Code of Conduct violations, and threats of workplace violence. Plaintiff brought a claim against defendant under the FMLA, alleging that defendant relied on statements that plaintiff made to a nurse for purposes of obtaining FMLA leave as a basis for his termination. Plaintiff told the nurse that he did not trust himself, and he failed to assure the nurse that he would not hurt other employees. The court concluded that those communications created a threat to safety that were not protected simply because the context in which they were made was FMLA-related.

The court further held that to the extent that plaintiff claimed that he was discharged because he took FMLA protected leave, he failed to point to any evidence to show that his termination was causally connected to such leave. Moreover, the court noted, defendant established a legitimate reason for plaintiff's termination that were not connected to plaintiff's leave. To court further noted that even though temporal proximity existed between plaintiff's return from leave and his termination, given the uncontroverted evidence as reason for his termination, no reasonable jury could find that causation existed. The court granted summary judgment in favor of defendant.

Jackson v. Logistics & Tech. Servs., Inc., 2014 WL 4264839 (N.D. Ala. Aug. 27, 2014)

Plaintiff was employed by defendant as a production cleaner, which required her to clean and maintain military vehicles at an army depot. Plaintiff fell while cleaning a tank and later missed six months of work because of the injury. The first five months were directly related to plaintiff's injury; the last month was because plaintiff was cleared to return to an "office work only" position, but no such job was available. When plaintiff returned to work, defendant retroactively designated her time off as FMLA leave. Approximately nine months after plaintiff returned to work, plaintiff was discharged from the company for various reasons, including violating company policies. Plaintiff filed a lawsuit against defendant alleging claims of retaliation and interference under the FMLA.

The defendant filed a motion for summary judgment, which the district court granted. Initially, the district court noted that plaintiff abandoned her FMLA claims because she failed to respond to the defendant's arguments in favor of summary judgment. Nevertheless, even if plaintiff had adequately responded, the court concluded that the interference claim failed because plaintiff received all of the leave to which she was entitled. As to the retaliation claim, the court held that the temporal proximity between plaintiff's return from leave and her discharge (nine months) was insufficient on its own to demonstrate a causal connection between a request for FMLA leave and an employee's discharge. Without any additional evidence supporting her retaliation claim, a reasonable jury could not find in her favor.

Summarized Elsewhere:

Hughes v. B/E Aerospace, Inc., 2014 WL 906220 (M.D.N.C. March 7, 2014)

Clark v. New York State Office of State Comptroller, 2014 WL 823289 (N.D.N.Y. March 3, 2014)

Massey v. Bellsouth Telecommunications, 2014 WL 6801301 (W.D. Ky. Dec. 2, 2014)

Carrero-Ojeda v. Autoridad de Energía Eléctrica, 755 F.3d 711, 22 WH Cases2d 1436 (1st Cir. 2014)

Rinaldi v. Quality King Distribs., Inc., 2014 WH Cases2d 160441 (E.D.N.Y. June 26, 2014)

Hawkins v. Whole Foods Market Group, 23 WH Cases2d 290 (M.D. Fla. 2014)

Freelain v. Village of Oak Park, 2014 WL 148739 (N. D. Ill. 2014)

Montone v. Schuylkill Health Sys., 23 WH Cases2d 260 (M.D. Pa. 2014)

Basch v. Knoll, Inc., 2014 WL 911865 (W.D. Mich. Mar. 10, 2014)

Housel v. Rochester Institute of Technology, 6 F. Supp. 3d 294 (W.D.N.Y. 2014)

Rains v. Newmont USA Ltd, 2014 WL 4810317 (D. Nev. Sept. 29, 2014)

Malin v. Hospira, Inc., 762 F.3d 552, 23 WH Cases2d 165 (7th Cir. 2014)

Newcomb v. Corinth School District, 2014 WL 1746066 (N.D.Miss. 2014)

Ray v. United Parcel Serv., 587 Fed. Appx. 182, 23 WH Cases2d 1522 (5th Cir. 2014)

Judge v. Landscape Forms, Inc., 23 WH Cases2d 1517 (6th Cir. 2014)

ii. Statements

Massey v. Bellsouth Telecommunications, 2014 WL 6801301 (W.D. Ky. Dec. 2, 2014)

Two call center employees were discharged for policy violations, and subsequently filed suit alleging that their terminations were retaliation for using FMLA leave. After granting the

employer's motion for summary judgment, the court granted reconsideration, vacated the prior order, and denied summary judgment. The court had originally determined that six months between taking leave and the terminations was insufficient to establish causation. On reconsideration, however, the court held that summary judgment was improper. The record contained non-hearsay statements that unspecified people in the company were trying to "get rid of" plaintiffs because of their use of FMLA leave, and this was sufficient to establish a connection between the employees' FMLA leave and their discharge. The court also determined that evidence of increased scrutiny of their work could support a reasonable inference of retaliatory motive, establishing that the proffered reasons for the terminations may not have actually motivated the employer.

Summarized Elsewhere:

Jones v. Children's Hospital, 2014 WL 5824902 (E.D.La. Nov. 10, 2014)

2. Articulation of a Legitimate, Nondiscriminatory Reason

Bailey v. City of Daytona Beach Shores, 560 Fed.Appx. 867, 22 WH Cases2d 358 (11th Cir., 2014)

Defendant employer terminated plaintiff after determining that, while on FMLA leave, she violated defendant's drug-free workplace policy by failing to inform defendant that she was using prescribed narcotics. Plaintiff filed suit, claiming that her termination constituted FMLA interference and retaliation. She later added a claim that the employer also violated the Health Insurance Portability and Accountability Act ("HIPAA") by disclosing her personnel health information in its defense against her FMLA claims, and she asked the court to strike the evidence.

The court denied plaintiff's motion to strike and granted the employer's motion for summary judgment on her FMLA claims, and the Court of Appeals affirmed. While acknowledging that HIPAA prohibits the use of personal health information in employment-related decisions, the court found that the law does not prevent a defendant from using a plaintiff's personal health information in defending itself against a lawsuit. The court then determined that defendant had established that plaintiff's termination was based only on her violation of the drug-free workplace policy and was unrelated to her FMLA leave.

Hopkins v. City of Columbus, 2014 WL 1121479 (S.D. Ohio, March 20, 2014)

Plaintiff was a refuse collection vehicle operator for defendant city. During his employment, he was part of a bargaining unit governed by a collective bargaining agreement. Pursuant to the agreement, plaintiff accumulated a disciplinary history which put him on a "Last Chance Agreement," whereby if he violated any more rules, he would be terminated. Plaintiff was approved for intermittent FMLA leave for psychologist visits for himself and his son. Plaintiff left work early one day without notifying a supervisor, and when he was questioned about it, he said it was for his FMLA leave. His supervisor recommended counseling for the infraction. Because of the Last Chance Agreement, however, a hearing was held and it was determined that plaintiff should be terminated. Plaintiff then sued for interference and retaliation under the FMLA.

The employer moved for summary judgment, offering undisputed evidence that it based the termination not on plaintiff's FMLA status but rather on his failure to comply with a general work rule which (a) he was aware required all employees who left work early to provide notice and (b) the employer had consistently enforced through progressive discipline, including in scores of situations not implicating the FMLA. The court, noting that plaintiff's FMLA status "did not absolve him of the responsibility to follow defendant's customary procedures for requesting leave," found that plaintiff presented no evidence to suggest the employer's asserted non-discriminatory reason for the termination was a pretext for discrimination and granted the employer's motion as to all claims.

LaFleur v. Hugine, 587 F. Appx. 536 (11th Cir. 2014)

The plaintiff brought suit, alleging retaliation and interference under the FMLA against the defendants and various officials of the Alabama Agricultural and Mechanical University ("Alabama A&M"). The district court granted summary judgment to the defendants, and the plaintiff appealed. The Eleventh Circuit affirmed.

Alabama A&M entered into an agreement on September 1, 2010, whereby it would deliver the Alabama Technology in Motion Program on-site and online to participating K-through-12 schools. As part of the agreement, from October 1, 2010 through September 30, 2011, plaintiff worked at the University providing services under the agreement. On August 22, 2011, the plaintiff requested and was granted FMLA leave from August 23, 2011 through September 6, 2011. After returning from her FMLA leave, on September 12, 2011, the plaintiff received notice her employment was being terminated effective September 30, 2011. Plaintiff's supervisor made the decision to terminate plaintiff's employment in April 2011 for poor performance, but informed the president about his decision on September 7, 2011. Moreover, plaintiff acknowledged she knew her supervisor was considering terminating her employment as early as March 2010.

In analyzing the plaintiff's retaliation claim, the district court concluded the plaintiff had abandoned her claim because she explicitly stated in her brief that she would not respond to defendants' arguments on that claim. The Eleventh Circuit held the district court did not err in not addressing that claim and refused to consider it on appeal. As to her interference claim, the court noted that plaintiff arguably abandoned that claim as well because she only made "passing reference" to the claim in her brief. Nevertheless, the court found that the decision to terminate plaintiff was due to her poor performance and occurred long before her request and use of FMLA leave. Accordingly, the court ruled that the district court did not err in granting summary judgment in favor of defendants on the FMLA interference claim.

Moore v. Loney, 2014 WL 671446 (D. Md. Feb. 19, 2014)

Plaintiff sued her former employer and supervisors, alleging interference and retaliation under the FMLA. The district court granted summary judgment for defendants. After being out on sick leave for about one month, plaintiff received her FMLA forms in mid-December. Shortly thereafter, the employer referred plaintiff to a doctor for a determination as to her ability to

perform the essential functions of her job. The doctor determined on January 10 that plaintiff could not perform the essential duties of her position, with or without reasonable accommodation. The employer asked her to resign on January 12, and gave her until January 26 to do so. Plaintiff returned her FMLA forms on January 26 – well after the fifteen-day deadline for submitting the forms. Nevertheless, the employer granted request for her FMLA leave on January 26. Plaintiff did not resign on January 26, and was terminated on February 24 based on her excessive use of sick leave. The employer provided evidence that it would have terminated her for this reason regardless of her FMLA leave: the decision to terminate, made January 12, came before she returned her forms and before the approval of her FMLA leave. This was sufficient under Fourth Circuit authority, the court held, which permits termination of an employee even if the reason for termination is discovered while the employee is out on FMLA leave. Her excessive absenteeism was a legitimate reason for her termination notwithstanding her FMLA leave, and her interference and retaliation claims failed.

Hamilton v. Republic Airways Holdings, 2014 WH Cases2d 162 (S.D. Ind. July 2, 2014)

Plaintiff filed suit alleging FMLA interference and discrimination, among other claims. Plaintiff, who suffered from migraine headaches, was granted intermittent FMLA leave and discharged after the first instance in which she tried to take such leave. The court granted summary judgment to the defendant because plaintiff's discharge was based on her commission of a disciplinary infraction, and also because the defendant believed that the plaintiff was abusing her leave rights under the FMLA. In so holding, the court reiterated Seventh Circuit precedent that an employer may defeat an employee's FMLA interference claim by showing that the employee did not take the leave "for the intended purpose," and that the employer need only have "an 'honest suspicion' that [the employee] was abusing her leave." The court further held that, while it did not typically make credibility determinations at the summary judgment stage, no reasonable fact finder could find the plaintiff credible regarding her request for the leave at the time that she made it. The plaintiff repeatedly provided other explanations for not being able to work, and then hastily switched her reason for being unable to work to a migraine when the defendant would not accept her original, non-FMLA reasons for declining her assignment. The court found that these facts, when coupled with other relevant evidence, allowed defendant to meet its burden of showing that it had an "honest suspicion" of the plaintiff's abuse of her FMLA rights.

The court further held that the fact that the plaintiff was terminated after only her first request to use intermittent FMLA leave was insufficient to change its ruling on summary judgment. The court deemed the temporal proximity of the plaintiff's leave request to her termination, on its own, was insufficient to demonstrate discriminatory intent, particularly in light of the absence of other relevant evidence showing discriminatory intent and defendant's non-pretextual, legitimate reason for terminating plaintiff's employment.

Hamilton v. Ortho Clinical Diagnostics, 2014 WL 2968497 (E.D.Ark. July 2, 2014)

Plaintiff filed a complaint alleging claims under various federal and state disability and leave laws, including the FMLA. The court granted the defendant's summary judgment motion as to plaintiff's FMLA discrimination claim. The court held that the temporal proximity between

the end of the plaintiff's FMLA and related disability leaves and his subsequent discharge was insufficient to establish retaliatory animus. The court noted that plaintiff's FMLA leave ended four months before his discharge. Accordingly, the court held that this timing was insufficient to prove a causal connection between his discharge and his exercise of rights under the FMLA.

Cundiff v. Lenawee Stamping Corp., 2014 WL 1389306 (E.D. Mich. Apr. 9, 2014)

Manufacturing employee sued his employer, a supplier of automotive parts, alleging that defendant employer discharged him when it should have granted him FMLA leave. Three days after a string of six consecutive unexplained absences, and two days after his employer had decided to terminate his employment, plaintiff delivered a physician-provided "Work Excuse" statement, placing it in defendant's human resources drop box. Plaintiff sought reinstatement.

On defendant's motion for summary judgment, the United States District Court for the Eastern District of Michigan found that undisputed facts established plaintiff violated the employer's well-known "no-call-no-show" rule, which provided an employee would be discharged after three days of absence without informing management. The court found that the employee did not give notice "as soon as practicable" and was therefore untimely under the FMLA. The court also found no material dispute of fact as to defendant's reason for the termination, and no evidence to show the employer had any knowledge that the employee's absence was due to medical reasons. Therefore, the court granted defendant's motion for summary judgment and dismissed the case with prejudice.

Campbell v. KY Spine & Rehab, PSC, 2014 WL 1056553, WH Cases2d 381 (W.D. Ky. Mar. 19, 2014)

The employee was an office coordinator who claimed that she was harassed and discharged for taking FMLA leave. The employee had a history of tardiness, and was put on probation. At the conclusion of her probation, the employee had emergency surgery and went on FMLA leave. Upon her return, her tardiness continued. She was eventually discharged eight months after returning from FMLA leave because of her tardiness. The employee argued that her discharge occurred just after she took three days off for blood work related to her prior serious health condition. However, the employee failed to notify the employer that the blood work was related to her serious health condition, and she did not request FMLA leave for those days.

The district court granted summary judgment for the employer because there was no evidence supporting the employee's claim of retaliatory harassment. There was some evidence that the employer made a reference to an unacceptable number of unpaid hours incurred by the employee, including FMLA leave time, and the court recognized that this could be evidence that the FMLA leave was a factor in the decision to discharge the employee. However, the court held that this evidence alone could not establish a *prima facie* case, given the eight months between the employee's FMLA leave and her discharge, along with the employee's continued, habitual tardiness.

Brown v. Diversified Distribution Systems, LLC, 2014 WL 2718760 (D.Minn., June 16, 2014)

Plaintiff brought FMLA interference and discrimination claims, as well as state law claims, against her employer after they demoted her and later terminated her employment. The district court granted summary judgment for defendant. On the entitlement claim, the court found that defendant had not interfered with plaintiff's entitlement to take FMLA leave, because plaintiff had applied for and was approved for a leave of absence for the birth of her child, and her need to take intermittent leave during her pregnancy was accommodated. On the discrimination claim, the court held plaintiff failed to make out a *prima facie* case based on her demotion. She had not demonstrated a causal link between her leave of absence and demotion because defendant had presented uncontested evidence that it had decided to move plaintiff into another position before she announced her pregnancy. Although plaintiff did present testimony from others at the company, the court found that testimony failed to raise an issue of fact, because it was from people who played no role in deciding her reassignment.

The court further found that plaintiff established a *prima facie* case of retaliation regarding her discharge, because (1) she engaged in protected activity by complaining to HR about what she perceived as FMLA retaliation (being demoted when she returned from FMLA leave); (2) her termination was an adverse employment action; and (3) there was a temporal proximity between her complaints and her termination. The court further found that defendant stated legitimate reasons for plaintiff's termination, namely, that the company had lost business and began instituting layoffs, and that plaintiff was laid off instead of another employee because the other employee had strong ties to an important client. Finally, the court found that plaintiff had not demonstrated a genuine issue of material fact as to whether defendant's legitimate reasons for her termination were pretextual.

Carlson v. WellStar Health System, Inc., 2014 WL 2711924 (N.D.Ga., June 16, 2014)

Plaintiff, a hospital emergency department technician, brought FMLA interference and retaliation claims, as well as ADA and common law claims, against his former employer and supervisors. Because plaintiff had not opposed the individual defendants' summary judgment motions, the court addressed only the FMLA and ADA claims against the employer. Plaintiff had cerebral palsy and hydrocephalus, which caused him limitations including being unable to efficiently perform secretarial duties. He became upset after a meeting with a supervisor, and asked for a 15-minute break, which was denied. He then had what he described as "a breakdown," clocked out, and requested FMLA leave, which he was granted. Thereafter, other employees reported to management that plaintiff made threatening statements or made them fear for their safety at work. Defendant's assistant vice president then decided that plaintiff could not continue in a patient care position and offered him a position as a chart preparation technician in another department. Approximately two months after going on leave, the plaintiff returned to work, in the new position. Defendant discharged plaintiff on his first day back, after reports that he had treated staff with "contempt and disrespect and . . . had an intimidating and threatening manner."

The court granted summary judgment on the FMLA interference claim, finding that plaintiff had not introduced evidence showing that defendant's decision not to reinstate him to his previous position or an equivalent was based on his FMLA leave, or any factor other than the negative reports of his behavior. Although plaintiff may have introduced evidence that he did not behave in a threatening manner, the court found that the accuracy of other employees' reports was not relevant to the FMLA interference claim. The court further found that defendant had offered a legitimate, non-discriminatory reason for plaintiff's termination – namely, the reports of plaintiff's threatening behavior – and that plaintiff had not provided evidence of pretext. A notice from security dated before plaintiff's breakdown and request for FMLA leave, which noted that plaintiff was terminated, may have been sufficient to show a genuine dispute of material fact as to the timing of the termination decision, but was not sufficient to show that the decision was pretext for FMLA discrimination.

Jones v. Elmwood Centers Inc., 2014 WL 1761567 (N.D. Ohio Apr. 30, 2014)

Plaintiff, a licensed practical nurse, brought claims against her former employer, alleging interference and retaliation under the FMLA, arising out of her termination while on pregnancy leave. On the defendant's motion for summary judgment, the court granted in part and denied in part, holding that factual issues existed as to whether the employer had an "honest belief" in the basis for terminating plaintiff. In particular, the court noted that although defendant argued that plaintiff was discharged for poor performance but defendant's ultimate decision-maker did not personally investigate any of the bases for plaintiff's termination, relying instead on information from third parties. The court found in favor of defendant with regard to FMLA interference claim, holding that plaintiff did not prove a nexus between her pregnancy and the adverse employment decision because the employer knew of the pregnancy for nine months before terminating plaintiff, the majority of defendant's employees were female and some had been promoted post-pregnancy, and plaintiff did not provide a single example of a non-pregnant employee who was treated differently.

Berry v. Maker's Mark Distillery, Inc., 122 FEP Cases 1400 (W.D. K.Y. Apr. 30, 2014)

Plaintiff brought suit against her employer alleging FLMA interference and retaliation. Plaintiff, a factory worker, took FMLA leave for several months. Plaintiff and defendant disagreed about when her leave ended, with plaintiff claiming it ended a month later, in February rather than January. In February, Plaintiff was told that, due to her unexcused absences prior to her leave, she would be moving from her part-time forklift position to a part-time bottling-line job. This move did not affect her pay, but she alleged it impacted her seniority, and that because of this change in seniority, she was not allowed to go home one day where another employee, with less seniority, was allowed to leave.

The court determined that plaintiff did not assert any facts to suggest defendant prevented her from using her FMLA leave, and therefore dismissed her FMLA interference claim. In regards to her FMLA retaliation claim, the court found that, even assuming plaintiff's allegation that her leave ended in February, temporal proximity was insufficient to show that defendant's

legitimate reason for her position change – her unexcused absences – was pretextual. In addition, plaintiff was unable to show that similarly-situated employees were treated any differently. The court dismissed plaintiff’s FMLA retaliation claim.

Reed v. Tetra Tech, Inc., 2014 WL 931426, 22 WH Cases2d 747 (W.D. Okla. Mar. 10, 2014)

The employee filed a lawsuit against her former employer, claiming the employer interfered with her FMLA rights when she was discharged her as part of a reduction in force. The employee claimed that her supervisor and a human resource manager, both of whom were aware of her need for FMLA leave, made the decision to eliminate her position. The employee further claimed that her supervisor gave her a negative rating, which was a factor that led to her discharge.

The employer filed a motion for summary judgment, but the court denied the motion. The employer argued that the decision makers in the reduction in force were not aware of the employee’s need for FMLA leave, and that the evaluation was not a factor in the decision to eliminate her position. The reduction in force was due to overstaffing, and positions were also eliminated at the employer’s other facilities. The employer conceded that the employee established a *prima facie* case of interference, which did not require any showing regarding the employer’s intent. The employer argued that it would have eliminated the position regardless of the employee’s request for FMLA leave. However, the court found that a genuine issue of material fact existed, and denied the motion for summary judgment.

Campbell v. Northway Health & Rehabilitation, LLC., 23 WH Cases2d 405 (N.D. Ala. Aug. 19, 2014)

Plaintiff was a former Licensed Practical Nurse for the employer. Plaintiff was in a car accident for which she was absent from work for four days. During those absences, plaintiff called her employer to inform it of her situation. The employer’s officer responsible for reporting FMLA-qualifying events told plaintiff that she needed to file for FMLA. Plaintiff returned to work as scheduled with her doctor’s note excusing her absences. The employer did not designate plaintiff’s absences as FMLA leave and plaintiff did not file the FMLA form the employer gave her. Four days after returning to work, plaintiff left work early to attend to a doctor’s appointment related to her accident. Plaintiff claimed that she told her superiors about her need to leave early while the employer contended she left work without permission.

In deciding defendant’s summary judgment motion, the court held that, although plaintiff could establish a *prima facie* case for FMLA retaliation, she did not meet the burden of showing that the employer’s actions were motivated by an impermissible retaliatory or discriminatory animus. Plaintiff tried to compare her action in leaving work early with that of another employee who punched-in late after lunch. The court held that to prove pretext using “comparators”, plaintiff’s burden is to show similarity “in all relevant respects” to show “that the quantity and quality of the comparator’s misconduct [was] nearly identical.” (Internal citations omitted). Summary judgment was granted.

Wiseman v. New Breed Logistics, Inc., 2014 WL 7272646 (N.D. Miss. Dec. 18, 2014)

Plaintiff, who started working as a material handler and was later promoted to a yard driver, requested paid time off for a heart procedure and returned to work the week after the procedure. A few days after returning to work, plaintiff crashed a trailer into a shipping dock, causing three hundred and fifty dollars of damage to the trailer. The defendant then terminated plaintiff's employment because of the incident, reasoning that plaintiff failed to secure the trailer with a latch and failed to proceed toward the dock at the correct angle. At least two witnesses agreed, however, that the trailer did not have a latch. Plaintiff then brought suit, alleging that the defendant retaliated against him for taking FMLA leave, among other things.

The defendant then moved for summary judgment, arguing that plaintiff was not protected under the FMLA because he requested paid time off and that none of the individuals involved in the decision to terminate plaintiff's employment were aware of his leave or medical condition. The court agreed and granted the defendant's motion, explaining that there was no evidence that any of the individuals who were involved in the decision to discharge plaintiff knew of his request for leave or his condition. The court also rejected the plaintiff's "cat's paw" theory, in which plaintiff argued that his supervisors imputed their knowledge of his FMLA leave to the defendant. The court found that there was no evidence that any of his supervisors harbored any hostility toward plaintiff because he took FMLA leave. To the contrary, the court explained that his supervisors were responsible for plaintiff's previous promotions. Moreover, the court noted that there was no evidence that his supervisors exerted any influence over the decision makers who ultimately discharged plaintiff.

Summarized Elsewhere:

Eriksson v. Deer River Healthcare Center, Inc., 2014 WL 1608260 (D. Minn. Apr. 18, 2013)

Sparks v. Sunshine Mills, Inc., 580 Fed. Appx. 759, 23 WH Cases2d 692 (11th Cir. Sept. 2014)

Casas v. School Dist. of Hillsborough County, 22 WH Cases2d 1689 (M.D. Fla. July 2, 2014)

Downs v. Mr. Burch Formal Wear, Inc., 2014 WL 4264849 (N.D. Ala. Aug. 27, 2014)

Fitzpatrick v. WMATA, 2014 WL 4230929 (D. Md. Aug. 26, 2014)

Ditman v. Alyeska Pipeline Serv. Co., 22 WH Cases2d 633 (D. Alaska Apr. 21, 2014)

Word v. AT&T, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)

Budhun v. Reading Hospital and Medical Center, 765 F.3d 245, 23 WH Cases2d 312 (3d Cir. Aug. 27, 2014)

O'Donnell v. Passport Health Commc'ns, Inc., 561 F. Appx. 212, 22 WH Cases2d 514 (3d Cir. 2014)

Lindner v. Donatelli Bros. of White Bear Lake, 2014 WL 3908292 (D. Minn., August 11, 2014)

Jones v. SEPTA and Alfred Outlaw, 2014 WL 3887747 (E.D. PA., August 6, 2014)

Wanamaker v. Town of Westport Board of Education, 11 F. Supp. 3d 51 (D. Conn. Mar. 27, 2014)

Housel v. Rochester Institute of Technology, 6 F. Supp. 3d 294 (W.D.N.Y. 2014)

Brown v. Northrop Grunmman Corp., 2014 WL 4175795 (E.D. N.Y., Aug. 19, 2014)

Perry v. Lancaster County, Nebraska, 2014 WL 2574523 (D. Neb. June 9, 2014)

Adams v. Anne Arundel Cnty. Pub. Sch., 158 WH Cases2d 198 (D. Md. 2014)

3. Pretext

Burcar v. South Washington County School District, 2014 WL 67954 (D. Minn. Jan. 8, 2014)

Plaintiff, an assistant principal, brought suit against his former employer for FMLA interference and retaliation, ADA and state disability discrimination, and state reprisal. Defendant had issued plaintiff performance warnings for failure to comply with policies and to follow directions, and defendant had investigated his performance on those grounds. Later that month, plaintiff took FMLA leave to receive treatment for depression. When defendant concluded its investigation months later, finding that plaintiff should be discharged, plaintiff challenged the determination in arbitration and lost.

Plaintiff argued that defendant's failure to restore him to the same position or equivalent position after his medical leave constituted FMLA interference. The district court disagreed, finding that defendant's reason for not reinstating plaintiff was insufficiently related to FMLA leave. Because the FMLA does not provide employees with blanket protection from termination, defendant succeeded in proving that it would have made the same decision to discharge plaintiff even if he had not exercised his FMLA rights, on the basis of insubordination and willful neglect of his duties. The court also rejected plaintiff's FMLA retaliation claim, finding that plaintiff did not dispute damaging findings from defendant's investigation and holding that he could not meet his ultimate burden of demonstrating that the reasons defendant provided for his discharge were pretextual.

Theiss v. Walgreen Co., 2014 WL 3908118 (N.D. Ohio Aug. 12, 2014)

Plaintiff worked as a loader at a distribution center for defendant. She sought intermittent FMLA leave for anxiety, which she attributed to how her co-workers and supervisors' treatment. Plaintiff submitted her FMLA certification, which defendant determined was incomplete. Plaintiff was provided 21 days to correct the issue and submit a complete and sufficient certification. Upon receipt of defendant's letter, plaintiff spoke to two of defendant's HR generalists. One told her that the generalist would obtain the required clarification needed from plaintiff's doctor. The other told her that defendant was simply waiting on corporate for approval of her leave. While plaintiff's FMLA request was pending, she filed an incident report with defendant and the local police department, alleging that a co-worker assaulted her. After an investigation, including the reviewing of surveillance video, interviewing plaintiff and several of her co-workers, and conferring with the police department, defendant determined that plaintiff's incident report was false. The local police department agreed. Defendant terminated plaintiff's employment as a result of the false incident report.

Plaintiff's subsequent lawsuit alleged FMLA retaliation and interference. On defendant's motion for summary judgment, the district court initially found that plaintiff had established a *prima facie* case of retaliation. It reasoned that even though plaintiff failed to provide the supplemental certification, she did put defendant on notice of the need for FMLA leave, and that by itself was sufficient to meet the burden to show that she engaged in protected activity. However, the court found that summary judgment for defendant was proper because defendant's

reason for her termination was not pretextual. The court held that defendant's investigation and the evidence it revealed supported defendant's honest belief that plaintiff had falsified the incident report against a co-worker, and plaintiff failed to provide any evidence to rebut the honest belief of defendant. The court also granted summary judgment in favor of defendant on plaintiff's interference claim, finding that defendant permitted plaintiff to use FMLA leave whenever she requested it, including when her FMLA leave request was pending. As a result, she had not been denied any benefit to which she was entitled, and her interference claim failed.

Aston v. Tapco Int'l Corp., 2014 WL 3385073 (E.D. Mich. July 10, 2014) reconsideration denied, No. 12-14467, 2014 WL 5342578 (E.D. Mich. Oct. 20, 2014)

Plaintiff a facilities maintenance manager, alleged his employer retaliated against him for taking FMLA leave and was likely going to take FMLA leave in the future. The employer moved for summary judgment, arguing that the plaintiff could not prove that the employer's reason for discharging him was pretextual. The court agreed, finding that the employer had a good faith belief in reasoning that plaintiff could not return to work because of his heart condition and that his physician was misrepresenting his condition so he could have returned to work, even though he could have harmed himself or others if he returned to work.

Roy v. Kimble Chase Life Science and Research Prods., LLC, 23 WH Cases2d 1329 (E.D. Tenn. Aug. 25, 2014)

The plaintiff worked for the defendant as a human resources generalist. She was diagnosed with a health condition during employment. As a result of the health condition, she asked for and was granted FMLA leave in each of the three years prior to her discharge. Shortly after plaintiff began her last leave, her supervisor recommended her discharge and plaintiff was ultimately terminated less than three months later, while still on FMLA leave. The employer alleged that plaintiff was selected for discharge as part of a reduction in force that resulted in the termination of two positions because of (i) her poor work performance, and (ii) she would have been unable to return to work at the time of her discharge, although she would have been able to continue to receive short term disability benefits.

Plaintiff brought suit, alleging that the defendant retaliated against her for her use of FMLA leave. The defendant moved for summary judgment, arguing that there was no causal connection between the employee's FMLA leave and her discharge and no genuine issue of material fact as to pretext. The district court denied the employer's motion. The court noted that plaintiff was recommended for termination just weeks after taking FMLA leave. The court further noted plaintiff's evidence challenging the employer's claims that she was discharged as a result of poor performance and disciplinary problems. Among other things, her performance evaluations contained numerous irregularities. Plaintiff also submitted evidence that she was disciplined for conduct that had never occurred, was never reported to her supervisor, or was factually disputed by other co-workers. Viewing this evidence, along with the temporal proximity between her discharge and exercise of FMLA rights, the Court denied the motion for summary judgment.

Banks v. Bosch Rexroth Corp., 15 F.Supp.3d 681 (E.D. Ky. 2014)

After her employment was terminated, an assembly worker sued her employer, as well as two of its human resources employees and her supervising production manager, for interference and retaliation under the FMLA. Plaintiff claimed she suffered from migraine headaches, causing her to leave work occasionally and sometimes move from her work station. Her treating physician provided a letter to the employer, recommending medication and occasional leave from work, and plaintiff was granted intermittent FMLA leave. The facts surrounding plaintiff's discharge were disputed by the parties, with defendants claiming the discharge was due to plaintiff's failure to attend Independent Medical Evaluations (IMEs) and communicate regarding her health issues.

On their motion for summary judgment, defendants argued, and the court agreed, that plaintiff could not demonstrate harm, because if defendants' calculations of her leave time were correct, plaintiff had used all her leave time, and if plaintiff's calculations were correct, her days off work were unexcused absences, and the employer could have let her go for excessive absenteeism. Accordingly, the court granted defendants' motion and dismissed the interference claim, holding that in addition to establishing a *prima facie* case, a plaintiff must also demonstrate prejudice caused by an FMLA violation. Plaintiff based her retaliation claim on temporal proximity, and while the district court found she had satisfied the burden for a *prima facie* case, defendants provided legitimate, non-retaliatory reasons for plaintiff's discharge. The burden shifted back to plaintiff to show these reasons were pretextual, and the court found that she failed to do so, and it dismissed the retaliation claim.

Montoya v. Hunter Douglas Window Fashions, Inc., 23 WH Cases2d 1249 (D. Col. Oct. 31, 2014)

Plaintiff, a supervisor, filed suit alleging, among other things, that she was discharged in retaliation for exercising her rights under the FMLA. Plaintiff informed the defendant that she would be absent from August 3 through August 13, 2012, and later requested that the defendant convert these absences into FMLA leave because she was seeing a doctor for stress related issues. The district court granted the defendant's motion for summary judgment, finding that plaintiff did not exercise her FMLA rights because she failed to complete and return the FMLA paperwork submitted to her by defendant's FMLA administrator. Thus, the court found that the defendant could not have retaliated against her for taking FMLA leave. The court also rejected the plaintiff's argument that the defendant retaliated against her for requesting FMLA leave. In addition, plaintiff also argued that she was discharged for simply requesting FMLA leave because the defendant terminated her employment five days after she requested FMLA leave. The court rejected plaintiff's argument, ruling that plaintiff's employment was terminated for poor performance and excessive abuse of the defendant's internet for personal reasons. While plaintiff was on leave, defendant's employees reported that plaintiff was spending inordinate amounts of time on the internet and on her cell phone, was often late for work or left early, and was not engaged in performing her job. Plaintiff's supervisor analyzed plaintiff's internet use and determined that over a two month period she had used the internet to visit websites in excess of 20,000 times. Moreover, plaintiff was previously placed on a performance improvement plan and

given a final written warning for similar performance related problems, including excessive internet use. Therefore, the court granted the defendant's motion for summary judgment.

Hoskins v. Board of Education of Lincoln County, 2014 WL 5796735 (E.D. Ky. Nov. 6, 2014)

Plaintiff was employed as a teacher beginning in 2009. She worked under contract that was valid only from year to year. Prior to the 2011-12 school year, the school superintendent sent a letter to plaintiff regarding her absenteeism during the previous year, but also acknowledged that her absences could be resolved with a physician's note or official leave request. In December 2011, the school superintendent sent letters to all employees with unauthorized absences, including plaintiff, and suggested that she investigate whether her absences qualified for FMLA leave. Shortly thereafter, plaintiff filed a request for FMLA leave and the defendant granted plaintiff's request in late December 2011. Plaintiff took FMLA leave as necessary throughout the remainder of the school year, notifying the school of her absences as soon as practicable. In May 2012, the teachers at the school were notified that their contracts would not be renewed for the following school year, a common practice at schools in the district because school budgets were not normally completed at the time the schools were required to notify teachers whether their contracts would be renewed. Thereafter, plaintiff was advised that there was not sufficient funding for the school and the school was required to discharge two teachers. Plaintiff was one of the teachers whose contract was not renewed.

Plaintiff filed suit, alleging that her contract was not renewed because she had taken FMLA leave. The district court granted the defendant's motion for summary judgment, finding that the defendant presented a legitimate, non-discriminatory reason to not renew plaintiff's contract. Plaintiff argued that one of her immediate supervisors had stated that plaintiff's contract was not renewed because of her absences. The court, however, rejected plaintiff's argument, ruling that it was undisputed that the school used identical, neutral criteria to determine the two teachers whose contracts were not renewed. Plaintiff was the third lowest rated teacher, the second lowest rated teacher retired and the lowest-rated teacher had tenure. The court also ruled that plaintiff failed to show that the defendant's justification was pretextual, reasoning that plaintiff did not present any evidence that the data and criteria used to evaluate the teachers was wrong or fabricated.

Einess v. Tresco, Inc., 2014 WL 4351428 (D. N.M. Aug. 26, 2014)

The plaintiff worked for the defendant until she resigned, citing difficult working conditions. Among other claims, plaintiff alleged that she was retaliated against for taking FMLA leave prior to her resignation. Plaintiff alleged that her employer retaliated against her by (i) calling her in to the office while on FMLA leave and then her supervisors failing to appear at the meeting time; (ii) assigning plaintiff training classes while she was on leave and giving unrealistic deadlines to complete the training; and (iii) passing her over for a \$.50 cent/hour raise and a \$600.00 bonus. The court dismissed plaintiff's claim of constructive discharge based on the foregoing, but noted such conduct might violate the FMLA. The defendant did not move to dismiss plaintiff's FMLA retaliation claim.

Davis-Young v. Protective Life Corp., 2014 WL 4264845 (N.D. Ala. Aug. 21, 2014)

The plaintiff held various positions with the defendant employer over a 13-year period prior to her discharge for alleged job performance issues. Following her discharge, she filed suit asserting numerous claims, including interference and retaliation under the FMLA. Plaintiff took FMLA leave three years prior to her discharge. She testified that she also requested substitution of FMLA leave for a single day absence approximately three months prior to her discharge, but could not recall ever returning the paperwork. Plaintiff also testified that she could not recall a time during her employment she was denied leave or an instance when a manager or HR representative ever said anything negative about her FMLA leave.

The employer filed a motion for summary judgment on the FMLA claims. The court granted the employer's motion, holding that plaintiff could not base an FMLA claim on her most recent request for FMLA leave because she did not return the paperwork. The court also denied plaintiff's FMLA retaliation claim for lack of any evidence tying her discharge to the exercise of any FMLA rights, noting that every request plaintiff made for leave was granted and no one spoke negatively about her taking FMLA leave.

Terry v. Promise Hospital of Ascension, Inc., 2014 WL 4161581 (M.D. La. Aug. 19, 2014)

The plaintiff was a Respiratory Therapist/Technician for the defendant. She was discharged following an investigation of improper administration of patient medication. Plaintiff was notified of the complaint and was suspended pending further investigation. While on suspension, plaintiff checked herself in to an in-patient facility for severe anxiety and depression. She alleged that her discharge following her in-patient hospitalization interfered with her right to take FMLA leave and was in retaliation for taking FMLA-qualifying leave. The court granted the defendant's motion for summary judgment on both claims. The court held that plaintiff had failed to present sufficient evidence that the hospital denied her any benefits to which she was entitled under the FMLA. The court noted that being on FMLA leave does not insulate a n employee from disciplinary actions resulting from the same conduct which prompted the investigation and her suspension. The court reasoned that an employer is entitled to terminate an employee for any lawful reason at any time, whether before, during or after an employee requests or takes leave pursuant to the FMLA, so long as the reason is not retaliatory or discriminatory. The court also dismissed the plaintiff's FMLA retaliation claim, noting that the investigation of misconduct began before any need for FMLA leave arose.

Ammons v. Cook County of Illinois, 2014 WL 4116956, (N.D. Ill. Aug. 20, 2014)

The plaintiff worked as a Sherriff Deputy. She suffered an on-the job spinal injury in 2003, and subsequently applied for and was approved to take 12 weeks of intermittent FMLA leave every year thereafter. None of her requests for FMLA leave were denied. In 2007 and 2009, plaintiff took a written exam for promotion. Although she passed the exam, she was not promoted. The department considers various factors, including exam results, and interview, and attendance, in determining whether to promote. Plaintiff's FMLA leave was credited as time

worked. Following her failure to receive a promotion in 2010, plaintiff filed suit in 2011 claiming FMLA interference and retaliation related to the 2008-2009 and 2010-2011 promotion awards. The court granted defendants' motion for summary judgment on both claims.

First, the court denied the plaintiff's FMLA interference claim, reasoning that plaintiff failed to dispute that defendants' granted all of plaintiff's very FMLA requests. Second, the court denied plaintiff's FMLA retaliation claim following an extensive review of the summary judgment evidence. The court explained that no reasonable juror could conclude that defendants intentionally miscalculated the promotion criteria in plaintiff's case because she took FMLA leave or otherwise made negative remarks to the interviewers about plaintiff's FMLA leave. The court then ruled that plaintiff's retaliation claim failed under the indirect method of proof as well. The evidence demonstrated that numerous candidates with prior FMLA leave were promoted. The court was not persuaded by plaintiff's argument that such persons were not similarly situated because they had taken less FMLA leave than plaintiff. Nor was the court persuaded that there were other persons similarly situated to plaintiff who were promoted, but did not take FMLA leave. Finally, the court refused to find the 2008-2009 claim actionable under a continuing violations theory, noting the theory's applicability had not been determined. But even assuming the theory applied, the court held that the plaintiff still failed to present sufficient evidence to meet her summary judgment burden.

Harman v. Western Baptist Hospital, 2014 WL 5439297 (W.D. Ky. Oct. 22, 2014)

Plaintiff worked as an Emergency Room Department (ED) Charge Analyst for Defendant reviewing charges for services in the ED. Defendant decided to change the way ED charges were processed and opened new positions to carry out the new process. Around the time existing employees were to be identified for the new positions, plaintiff notified Defendant that she needed to take a leave of absence for breast cancer treatment. When she returned to work, her job duties had been changed such that she was no longer responsible for reviewing charges. Instead, the employee plaintiff trained to perform her duties in her absence assumed those responsibilities. Eventually, plaintiff was informed her position was being phased out entirely.

The Court initially granted defendant's motion for summary judgment as to plaintiff's FMLA claims, but later altered its judgment under Rule 59(e). The Court found that when it granted defendant's summary judgment motion, it had not given due weight to the totality of the circumstances. These circumstances included the fact that plaintiff's job duties changed significantly immediately upon her return from leave, plaintiff lost her job several months after the reorganization took place, and that plaintiff's replacements did not meet the qualifications for the new positions. In fact, the replacements did not even apply for the open position and were instead recruited for it by defendant. In addition, defendant did not decide to change plaintiff's duties and later phase out her position until after her FMLA leave – even though defendant was aware of the change in the charge process six months before her leave. Therefore, the Court granted plaintiff's motion to alter the Court's previous judgment, denying defendant's summary judgment motion.

Smothers v. Solvay Chems., Inc., 2014 WL 3051210 (D. Wyo. July 3, 2014)

Plaintiff brought suit against his employer after he was discharged, claiming that he was retaliated against for taking intermittent FMLA for his own serious health condition. The employer argued that plaintiff's employment was terminated because of his safety violation. The employer was initially successful on its motion for summary judgment, but the Tenth Circuit remanded the FMLA claim back to the district court. The parties then filed motions in limine to exclude certain evidence from trial. The employer moved to exclude evidence of its four-step disciplinary process outlined in its handbook, arguing that introducing evidence of the process would imply that the employer had a legal duty to consider and apply the process, rather than use its discretion to immediately terminate an employee for safety violations - an issue the court previously decided in the employer's favor. The plaintiff, however, argued that evidence of the disciplinary process was relevant to establishing pretext. The court reserved ruling on the motion in limine until trial, holding that it would be inappropriate to allow evidence of the disciplinary process to show that the defendant violated the policy, because the policy specifically allowed for immediate discharge for safety violations. However, the court would allow evidence that similarly situated employees were treated more leniently than plaintiff under the disciplinary process in order to establish pretext.

Maycole v. Philadelphia Corporation for Aging, 2014 WL 1281121 (E.D. Pa. Mar. 31, 2013)

The employee, who had a long history of performance issues, made a request for intermittent FMLA leave to care for his mother, which was granted. Shortly thereafter, his employment was terminated. He sued his employer claiming that it interfered with his rights and retaliated against him in violation of the FMLA. The employer filed a motion for summary judgment, which the court granted.

For the interference claim, the court noted that the employee was provided with all of the FMLA leave he requested. Thus, his interference claim was that, by terminating his employment, he was denied the right to take future leave. The court rejected this claim, finding that "no reasonable jury could find that [the employer] illegitimately prevented [the employee] from taking FMLA leave by terminating his employment."

As for the retaliation claim, the court concluded that plaintiff failed to adduce any evidence of pretext. Plaintiff argued pretext based on the fact that the employer had placed him on probation for six months, but terminated him prior to the conclusion of that probationary period. The court rejected this argument because it ignores the employee's continued performance problems during the probationary period. The court also rejected the argument that minor inconsistencies regarding who made the decision to terminate plaintiff established pretext. Furthermore, the court also found that no pretext was established by the fact that employer had additional, nondiscriminatory reasons, not inconsistent with its stated reasons, for terminating the employee. Furthermore, evidence that the employee had improved in some areas of his performance failed to establish pretext when the employee did not show improvement in the areas for which he was terminated. For these reasons, the court granted summary judgment in favor of the employer on the FMLA claims.

Muhammad v. Seattle Police Department, 2014 WL 1338089 (W.D. Wa. Apr. 2, 2014)

Plaintiff was a police officer who had injured his shoulder in an on-duty car accident. After his light-duty assignment ran its course, plaintiff was granted medical leave but did not return on either of the dates defendant arranged for him to return. After receiving a warning that he would soon be charged with job abandonment, plaintiff submitted a certification by his health care provider requesting FMLA leave. Defendant denied plaintiff's request as well as a subsequent one two months later. Plaintiff was eventually terminated, and a Disciplinary Review Board concluded that the termination was for "just cause." Plaintiff's suit claimed FMLA interference and retaliation.

Second, the court rejected plaintiff's claim that defendant had interfered with plaintiff's FMLA rights because plaintiff was not eligible for protection under the statute. FMLA requires eligible employees to have worked at least 1,250 of service during the previous twelve-month period. During the twelve-month period preceding plaintiff's request for leave, he had only worked for 581.5 hours. The court noted that while an employer may offer more leave protection than what is provided under FMLA, a violation of the employer's own policy did not create an FMLA cause of action. The court granted summary judgment to defendant on all FMLA claims.

Taylor v. eCoast Sales Solutions, Ltd., 123 FEP Cases 1824 (D. N.H. 2014)

The employee worked as a sales representative for a company that generates sales leads for technology vendors. Following major foot surgery, the employee worked at home for a period of over three months. During this time frame the employee received effusive praise from her direct supervisor and was noted as the highest producer in any unit of the business. The following year, shortly after the company was notified of the employee's pregnancy, the employee began working for another supervisor. When the employee began experiencing complications related to her pregnancy, her physician ordered her off work for a week, and then restricted her to working at home. Eventually, the work-at-home restriction was continued indefinitely and the employee provided the documentation to the company. During this time period, the employee's immediate supervisor repeatedly told her that "she needed to be back in the office and [she] shouldn't be out on leave and working from home due to [her] pregnancy." When the employee later returned from maternity leave, she was assigned a completely unsuitable workspace and was given no sales goals or quotas. Within ten days after the employee's return from leave, the same supervisor who made the comments about her working from home, discharged her. The stated reason for the discharge was a quality assurance check showing that she had provided two invalid leads to a customer.

The employee filed a claim for FMLA retaliation, as well as for sex discrimination under Title VII and the New Hampshire Law Against Discrimination. In response to the company's motion for summary judgment, the district court noted that, as to the FMLA claim, the employee must show that: (1) she availed herself of a protected FMLA right; (2) she was adversely affected by an employment decision; and (3) there was causal connection between her protected conduct and the adverse employment action. The court found that, by resolving the disputed facts in the employee's favor, this standard was easily met. The fact that the same supervisor who made negative comments about the employee taking leave and working from home

discharged her within ten days of her return was sufficient to allow a jury to conclude that the protected leave motivated the decision. While the company would be permitted to put on evidence at trial of the alleged misconduct that it claimed was the real reason for the discharge, summary judgment was inappropriate given that the employee's testimony about her supervisor's comment should be considered admissible (albeit disputed) evidence rather than "unsupported allegations." As such, there was a genuine issue of material fact and summary judgment was denied.

Hawkins v. The Center for Spinal Surgery, 2014 WL 3735915 (M.D. Tenn July 29, 2014)

The employee worked as an Accounts Payable Coordinator for the employer for a period of approximately four years. During that time, the employee experienced several adverse actions that she attributed to race discrimination and retaliation, and she filed a lawsuit against the employer under Title VII of the Civil Rights Act of 1964 while still employed. After the lawsuit was filed, the employee was approved for FMLA leave due to the birth of a child. While the employee was still on FMLA leave, the employer notified her that her job was being eliminated and that the entire accounts payable function was being relocated to a facility in another state. The employee subsequently amended her existing lawsuit to include a claim for interference under the FMLA.

In response to cross-motions for summary judgment as to the FMLA claim, the district court noted that, as an employee in the midst of FMLA leave, the employee had no greater right to retain her job than another employee not on such a leave. However, the Court concluded that the employee submitted evidence that created a genuine factual issue over whether she would have been terminated regardless of the FMLA leave request. In particular, the Court relied upon the employer's changing explanations for the alleged job elimination, in which the chief nursing administrator signed written discovery responses stating that the employee's job was eliminated, but testified at her deposition that she had no personal knowledge of the decision and that the accounts payable function had not, in fact, been relocated following the employee's termination. These facts led the Court to conclude that a genuine dispute of material fact existed concerning whether the employer's termination of the employee was a pretext for FMLA interference. In addition, the employee's summary judgment motion was denied because a finder of fact would be entitled (but not compelled) to conclude from the evidence that the discharge was not pretextual, and that unlawful interference with FMLA rights did not occur.

Mathew v. North Shore-Long Island Jewish Health System, Inc., 582 Fed.Appx.70, 2014 WL 5858656 (2nd Cir. Nov. 13, 2014)

Plaintiff was discharged after defendant determined he had falsified time records. Plaintiff filed suit, claiming he had been discharged because he suffered from a hernia, in violation of the FMLA, among other claims. The district court granted summary judgment in favor of defendant on the FMLA claim and plaintiff appealed. The Court of Appeals affirmed, finding that plaintiff could not demonstrate defendant's stated reason was pretextual. As an initial matter, plaintiff admitted to submitting inaccurate time records in two different meetings. Even if plaintiff's admission was false, defendant was entitled to rely on this representation when

it made the discharge decision. Second, while plaintiff argued defendant selectively enforced its timekeeping policy against him because of his hernia, plaintiff did not identify any similarly situated employees who were treated more leniently than he was. Therefore, the Court determined summary judgment was appropriate.

Vaughan v. World Changers Church Int'l, Inc., 2014 WL 4978439 (N.D. Ga. Sept. 16, 2014)

Plaintiff worked as an accountant for defendant church. During her employment, she was involved in a car accident that demanded several periods of FMLA leave for recovery and follow-up medical appointments. Prior to her accident, plaintiff had generally-positive performance reviews, but with a few problems. After returning to work, plaintiff was presented with a disciplinary action form relating to timeliness problems for incidents that happened before her leave. Plaintiff maintained that the purported violations were inaccurate, but presented inconsistent testimony whether she provided defendant any information supporting that contention. She then made an erroneous bank deposit and was terminated. Plaintiff sued her former employer for FMLA interference and retaliation.

The court denied defendant's motion for summary judgment on both claims. It found that there was some evidence that defendant's reason for termination was pretextual, noting that a jury could find that defendant's "laundry list of infractions" was a bogus attempt to set plaintiff up for discharge after her accident. The court also pointed to evidence indicating that the employer was concerned about plaintiff potentially needing more FMLA leave.

Exter v. Wilkes-Barre Hosp. Co., LLC, 2014 WL 4384363 (M.D. Pa. Sept. 3, 2014)

Plaintiff, an administrative supervisor, started working for defendant in June 2007. Plaintiff's 2007 performance review identified several performance deficiencies, including needs improvement ratings in five categories. Thereafter, in February 2009, plaintiff requested intermittent FMLA leave for a depressive disorder. Between February and April 2009, plaintiff took four days of intermittent FMLA leave. Plaintiff was disciplined on three separate occasions between April 2009 and June 2009. The defendant's policy on progressive discipline provided that an employee would be discharged for three violations in a twelve month period. At the end of June 2009, plaintiff submitted paperwork to extend her FMLA leave up and until July 27. The defendant granted her request and, upon her return, terminated her employment because she had accrued three separate violations.

The court denied the defendant's motion for summary judgment, finding that the plaintiff provided adequate evidence that the defendant's reason for terminating her employment was pretextual. The court rejected the defendant's argument that it made the decision to terminate her employment before her request for extending FMLA leave, finding that a genuine issue of material fact existed in light of the fact that the defendant granted her FMLA leave and no evidence – outside of deposition testimony, which the court found should be resolved by a jury – was submitted indicating that the defendant made the decision to terminate her employment prior to her request for extended FMLA leave. The court also rejected the defendant's argument that no claim of pretext could be made because her 2007 performance review was consistent with her

disciplinary infractions in 2009. Finally, the court found that plaintiff provided sufficient evidence of pretext based on her allegations that her supervisor did not like the FMLA, treated her differently – and evaluated her more critically – after her request for FMLA leave, and that the defendant terminated her employment during her FMLA leave.

Summarized Elsewhere:

Queen v. Haywood Regional Medical Center Medical Care Plan, 2014 WL 4311030 (W.D.N.C. Aug. 29, 2014)

Williams v. Luminator Holding, LP, 2014 WL 174413 (E.D. Texas Jan. 10, 2014)

Doering v. Wal-Mart Stores, Inc., 2014 WL 3395745 (D. Minn. July 11, 2014)

Coleman v. Redmond Park Hosp., LLC, 23 WH Cases2d 1218 (11th Cir. 2014)

Wheat v. Fla. Parishes Juvenile Justice Comm’n, 2014 WL 2155239 (E.D. La. May 21, 2014)

Crowley v. Burlington Electric Department, 992 F. Supp. 2d 370 (D. Vt. 2014)

Rice v. Kellermeyer Co., 23 WH Cases2d 242 (N.D. Ohio 2014)

Montone v. Schuylkill Health Sys., 23 WH Cases2d 260 (M.D. Pa. 2014)

Word v. AT&T, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)

Budhun v. Reading Hospital and Medical Center, 765 F.3d 245, 23 WH Cases2d 312 (3d Cir. Aug. 27, 2014)

Quick v. Playtex Mfg., Inc., 2014 WL 1285821 (D. Del. Mar. 28, 2014)

Skotnicki v. Board of Trustees of the University of Alabama, 23 WH Cases2d 432 (N.D. Ala., August 8, 2014)

Buzulencia v. Ohio Bell Telephone Co., 2014 WL 3735134 (N.D. Ohio July 28, 2014)

Dial v. Noland Health Services, 2014 WH Cases2d 156 (N.D. Ala. Apr. 30, 2014)

Fuller v. AT&T, 2014 WL 66019, 21 WH Cases2d 1738 (W.D. Pa. Jan. 8, 2014)

Stroud v. Greystar Management Services, LP, 2014 WL 937366 (D. Md. Mar. 10, 2014)

Lundy v. Park Nicollet Clinic, 2014 WL 3573626 (D. Minn. July 21, 2014)

Brown v. Northrop Grunmman Corp., 2014 WL 4175795 (E.D. N.Y., Aug. 19, 2014)

Campbell v. Northway Health & Rehabilitation, LLC., 23 WH Cases2d 405 (N.D. Ala. Aug. 19, 2014)

Eren v. Mars, Inc., 2014 WL 2765684 (M.D. Tenn. June 18, 2014)

Baier v. Rohr-Mont Motors, Inc., 23 WH Cases2d 1390 (N.D. Ill. Nov. 17, 2014)

Ushman v. Horace Mann Service Corp., 2014 WL 4724474 (C.D. Ill. Sept. 23, 2014)

a. Timing

Callan v. City of Dover, F. Supp. 2d, 2014 WL 4243306 (D. Del. Aug. 26, 2014)

Plaintiff, the Information Technology Director, was treated for depression since the 1980’s when his wife was diagnosed with cancer. She died some years later. In the interim between her diagnosis and death, the Plaintiff took intermittent FMLA leave, FMLA leave and mental health leave. Following his wife’s death he began taking leave on a frequent, less predictable basis. Complaints were raised by two of his subordinates during their exit interviews, including micromanagement. He was asked to prepare a plan to improve the department, became stressed out and took more leave. He was reassigned at a significantly lesser salary. He subsequently had a motorcycle accident and was told that he would be given no additional assignments. Shortly thereafter he was provided with a number of options including

retirement. When he accepted none of the options, he was terminated in a reduction in force of one person.

Defendant moved for summary judgment as to plaintiff's FMLA claims as well as his related ADA and Section 1983 claims. The court ruled that plaintiff presented sufficient evidence for causation because he was reassigned six days after his attorney submitted a letter to the defendant regarding his FMLA rights. The court also found that plaintiff presented sufficient evidence to show that the defendant's reason for terminating his employment was pretextual, particularly in light of the lack of investigation and reasoning for his termination, i.e., that it was a "reduction in force," because only one employee was terminated as a result of the "reduction in force."

Daniels v. Milwaukee Bd. Of School Directors, 2014 WL 4209556 (E.D. Wis. Aug. 26, 2014)

The Plaintiff, a former teacher tasked with assessing and diagnosing children with suspected disabilities, alleges various forms of discrimination and retaliation under the FMLA and similar claims under Wisconsin law. The employer terminated her employment for misconduct. She did not appeal her termination. Emergency disciplinary action was also taken to relieve her of her duties while hearings were held because of "serious misconduct."

The Plaintiff claimed that an earlier performance review was made more negative because she filed for FMLA leave in May 2009. Moreover, plaintiff claimed that she was retaliated against when she was treated harshly and subjected to disciplinary actions up and until the time of her discharge. The court first ruled that her performance review related claims were beyond the two-year statute of limitations and time-barred. The court then ruled that plaintiff was able to only show suspicious timing between her protected activities and the disciplinary actions. Thus, because timing alone was insufficient, the court granted the employer's motion for summary judgment.

Ruark v. Arkansas Democrat-Gazette, Inc., 2014 WL 1809606 (E.D.Ark. 2014)

Plaintiff alleged that defendant interfered with his rights under the FMLA and terminated him in retaliation for requesting FMLA leave. Plaintiff was a manager in the circulation department of a newspaper. Plaintiff injured his knee while retrieving a newspaper during work in October 2010. Plaintiff alleged that over the next six months, he requested leave multiple times, was ridiculed for his injury and need for leave, and was eventually discharged as a result of his need for leave. Defendant filed a motion for summary judgment on all claims.

The court denied defendant's motion for summary judgment on the retaliation claim. The court explained that to establish a *prima facie* case of retaliation under the FMLA, the plaintiff must show that (1) he engaged in activity protected under the Act, (2) he suffered a materially adverse employment action, and (3) a causal connection existed between the employee's action and the adverse employment action. The court held that temporal proximity between the plaintiff's March 11, 2011 demand for FMLA leave and his March 18, 2011 termination was sufficient to establish a *prima facie* case of discrimination based on temporal proximity alone. Defendant presented a legitimate, non-retaliatory reason for termination, including insubordination and failure to perform his duties. However, the court explained that while

temporal proximity alone does not satisfy the plaintiff's burden to show that defendant's legitimate, non-retaliatory reason was pretext, plaintiff's allegations of remarks discouraging plaintiff from taking leave "carries by the narrowest of margins his burden of showing a genuine issue of material fact."

Ebersole v. Novo Nordisk, Inc., 758 F.3d 917, 22 WH Cases2d 1630 (8th Cir. 2014)

The employee was a sales representative who would make sales calls to physicians. In late January 2009, the employee took over one month of leave under the FMLA for arthritis treatment. Several months after she returned from leave, the employer discovered that the employee had been falsely recording sales calls in violation of company policy. In August 2009, the employee was discharged for call falsification. Others who broke the same rule were also discharged in 2009.

The employee sued the employer for retaliation under the FMLA, but the district court granted the employer's motion for summary judgment. The Eighth Circuit affirmed. The employee's supervisors had made comments about the employee's arthritis, but these comments were not sufficient for a jury to conclude that the supervisors acted to retaliate against the employee for taking FMLA leave. As for indirect evidence, under the *McDonnell-Douglas* framework the employee was unable to show pretext by relying on temporal proximity because seven months elapsed from her FMLA until her discharge. As for comparators, other employees were discharged for the same offense. Finally, the employee's violation could not be excused simply because a former supervisor had allowed her to falsely record certain sales calls. Accordingly, the employee could not rebut the employer's legitimate, nondiscriminatory reason for her termination, and the Eighth Circuit affirmed the decision granting summary judgment for the employer.

Malloy v. U.S. Postal Serv., 756 F.3d 1088, 22 WH Cases2d 1421 (8th Cir. 2014)

The employee was a postal worker who was granted FMLA leave for back pain. However, she also had four unexcused FMLA absences, two of which occurred during the 15-day period leading up to her discharge. Further, her two final absences occurred during the holiday season, which was the busiest of the year for the postal service. Eleven days after using her FMLA leave to take a day off, the employee was discharged. Though the employee was discharged for her absences, the employee's supervisor later asserted that her performance was poor.

The district court granted summary judgment for the employer, and the Eighth Circuit affirmed. The employee's non-FMLA absences were a legitimate reason for her discharge. The temporal proximity between her FMLA leave and her termination was also not persuasive, since the unexcused absences also occurred soon before her discharge. The employee pointed to others who did not exercise FMLA rights and were allegedly treated more favorably, but these were not proper comparators because they did not report to the same supervisors, and were not absent

during the holiday season. Even though the supervisor later stated that the employee's performance was poor, this was not the type of "shifting explanation" that would undermine the employer's legitimate reason for the action. Accordingly, summary judgment for the employer was appropriate.

Judge v. Landscape Forms, Inc., 23 WH Case2d 1517 (6th Cir. 2014)

Plaintiff worked in defendant's woodshop. After plaintiff injured his bicep, he took leave for his surgery and recovery. Although approved for his initial FMLA leave request, his return to work was pushed back several times because of a slow recovery. Eventually defendant told plaintiff it would be terminating his employment because it could not accommodate his restrictions and it could not leave his position indefinitely. Plaintiff filed suit for FMLA retaliation. The district court granted defendant summary judgment.

When the employee appealed summary judgment, the Sixth Circuit affirmed. The court considered two issues on appeal: 1) whether the employee met his burden of establishing the third element of the *prima facie* case – that there was a causal connection between the FMLA leave and his termination; and 2) whether the employee met his burden of establishing pretext. As to the first issue, the court found that temporal proximity supported a causal connection for the employee's *prima facie* case, noting that the proper measurement is from when the leave expires, not from when it is first requested. The employer, however, met its burden of articulating a legitimate, nondiscriminatory reason for the employee's termination. The court then found that the employee was unable to show that this reason was pretextual, stating that temporal proximity alone was insufficient to establish pretext.

Hartman v. Dow Chem. Co., 2014 WL 7338722 (E.D. Mich. Dec. 22, 2014)

Plaintiff, an administrative specialist, began her employment with defendant in June 2010. Plaintiff suffered from arthritis and, in the spring of 2013, notified the defendant that her pain had gotten worse and that she required surgery. In April 2013, plaintiff informed the defendant that her surgery was scheduled for May 28 and that she would be out for four to six weeks. In early May, plaintiff's coworker reported to her supervisor that it appeared that plaintiff was out of the office often and was not actually working. Plaintiff then went on medical leave beginning on May 28. Plaintiff thought she would be able to return to work in July, but her physician did not release her to return to work and instead decided to reevaluate plaintiff in August. Yet, plaintiff began working half days at the end of July and was released on August 19 without restrictions. While plaintiff was on medical leave, her job duties were assumed by another employee. That employee informed the defendant that she was repeatedly required to address incomplete tasks that were assigned to plaintiff. When plaintiff returned to work, defendant tracked plaintiff's time cards and the time when plaintiff was physically at work. Between August 15 and September 20, these records revealed a sixty hour discrepancy and that plaintiff had only logged into the defendant's network from home on only two days. Plaintiff explained that she often worked at home for about two hours each evening, and that she did not log onto the defendant's VPN when she worked from home. Defendant then determined that plaintiff could not have worked more than two hours each evening without logging onto the VPN

and subsequently terminated plaintiff's employment. Plaintiff then brought suit, alleging FMLA interference and retaliation claims.

The district court granted the defendant's motion for summary judgment as to her FMLA interference claim, finding that plaintiff was provided every FMLA benefit to which she was entitled. On the other hand, the court denied the defendant's motion for summary judgment as to her FMLA retaliation claims. The court rejected the plaintiff's argument that the defendant did not honestly believe that she committed time fraud, noting that the clear evidence demonstrated that it investigated her time discrepancy and made a reasonably informed decision to terminate her employment. However, the court found that the timing of the defendant's investigation, which occurred immediately after plaintiff returned from FMLA leave, along with an email sent after she returned from leave in which an employee asked if they "had enough now" to terminate plaintiff's employment, created a genuine issue of fact as to whether her discharge was motivated only by the time theft.

Summarized Elsewhere:

***Bloom v. Group Health Plan, Inc.*, 2014 WL 3955668 (D. Minn. Aug. 13, 2014)**

***Rumanek v. Ind. Sch. Mgmt., Inc.*, 2014 WL 104966 (D. Del. Jan. 10, 2014)**

***Hamilton v. Republic Airways Holdings*, 2014 WH Cases2d 162 (S.D. Ind. July 2, 2014)**

***Hamilton v. Ortho Clinical Diagnostics*, 2014 WL 2968497 (E.D. Ark. July 2, 2014)**

***Distefano v. Essentia Health*, 2014 WL 3101324 (D. Minn. July 8, 2014)**

***Schofield v. Maverik Country Store*, 2014 WL 2765223 (D. Utah June 18, 2014)**

***Freelain v. Village of Oak Park*, 2014 WL 148739 (N. D. Ill. 2014)**

***Young v. United Parcel Service*, 992 F. Supp. 2d 817 (M. D. Tenn. 2014)**

***Basch v. Knoll, Inc.*, 2014 WL 911865 (W.D. Mich. Mar. 10, 2014)**

***Housel v. Rochester Institute of Technology*, 6 F. Supp. 3d 294 (W.D.N.Y. 2014)**

***Young v. McCarthy-Bush Corp.*, 2014 WL 1224459 (N.D. Ga. Mar. 24, 2014)**

***Gongwer v. Samaritan Reg'l Health Sys.*, 2014 WL 6685216 (N.D. Ohio Nov. 24, 2014)**

***McBeth v. Shearer's Foods, Inc.*, 2014 WL 4385764 (W.D. Va. Sept. 4, 2014)**

b. Statements and Stray Remarks

***Goff v. Singing River Health System*, 2014 WL 991724 (S.D. Miss. March 13, 2014)**

Plaintiff worked for defendant as a surgery technician. Although otherwise an excellent employee, plaintiff accumulated several bad performance reviews related to her pattern of unexcused absences and late arrivals to work. Plaintiff was authorized to take intermittent FMLA leave related to care for her mother, but she often failed to alert her employer to her need for FMLA leave prior to her absence. Plaintiff was eventually terminated after accumulating 14 absences in one year, as required by defendant's attendance policy. She then brought suit for FMLA retaliation.

After defendant moved for summary judgment, plaintiff argued that defendant was collaterally estopped from arguing that it had a legitimate, nondiscriminatory reason for terminating her, because the Mississippi Department of Employment Security had already determined that defendant's reason for termination was "not true." The court found that the ALJ had not specifically addressed the FMLA questions at issue, and therefore there was no collateral

estoppel. The court found, however, that certain comments from employer representatives, regarding plaintiff's mother's health, were potentially probative of management's reason for termination and could be interpreted by the trier of fact as suggesting a pretextual or retaliatory reason for denying FMLA leave. Therefore, it denied summary judgment as to plaintiff's FMLA claim.

Gresham-Walls v. Brown, 2014 WL 6685478 (N.D. Ill. Nov. 25, 2014)

The employee was discharged just three weeks after completing a period of intermittent FMLA leave. Even though the employee had zero points under the employer's attendance policy, her supervisor drafted a memorandum detailing her concerns and requesting that the employee be transferred because of her frequent absences. The supervisor also requested an assistant as a result of the employee's frequent absences, and stated that she was concerned about giving the employee time-sensitive projects because her absences created a backlog. The supervisor admitted that she considered the employee's absences when evaluating her performance.

The employee filed claims for FMLA interference and retaliation, and the employer moved for summary judgment. The court concluded that there was a genuine issue of material of fact as to both claims. The employer pointed to the employee's negative employment history, including other supervisors who complained of performance issues. However, based on the evidence presented by the employee about her supervisor's actions, the employee created a genuine issue of fact because of her supervisor's attitude and actions based on her use of FMLA leave.

Summarized Elsewhere:

Massey v. Bellsouth Telecommunications, 2014 WL 6801301 (W.D. Ky. Dec. 2, 2014)

DiBlasi v. Liberty Mutual Group Inc., 2014 WL 1331056 (D. Mass. Apr. 3, 2014)

Young v. United Parcel Service, 992 F. Supp. 2d 817 (M. D. Tenn. 2014)

Vaughan v. World Changers Church Int'l, Inc., 2014 WL 4978439 (N.D. Ga. Sept. 16, 2014)

Hartman v. Dow Chem. Co., 2014 WL 7338722 (E.D. Mich. Dec. 22, 2014)

4. Comparative Treatment

Summarized Elsewhere:

Hopkins v. City of Columbus, 2014 WL 1121479 (S.D. Ohio, March 20, 2014)

Young v. United Parcel Service, 992 F. Supp. 2d 817 (M. D. Tenn. 2014)

Word v. AT&T, 576 Fed. Appx. 908, 23 WH Cases2d 709 (11th Cir. Aug. 13, 2014)

Crosby v. F.W. Webb, Co., 2014 WL 1268691, 22 WH Cases2d 725 (D. Maine March 26, 2014)

Ebersole v. Novo Nordisk, Inc., 758 F.3d 917, 22 WH Cases2d 1630 (8th Cir. 2014)

Malloy v. U.S. Postal Serv., 756 F.3d 1088, 22 WH Cases2d 1421 (8th Cir. 2014)

Johnson v. Bethesda, 2014 WL 6865484 (D. Minn. Dec. 3, 2014)

C. Mixed Motive

Kendall v. Walgreen Co., 22 WH Cases2d 1179 (W.D. Tex., Apr. 16, 2014)

The employee worked for the employer as a store manager. The employee allegedly made several complaints against her District Manager and Community Leader during her last year of employment. The employer investigated the complaints and concluded that the allegations were not corroborated. The employee continued to express frustration and obtained a written statement from another employee. The following week, the employee applied for 12 weeks of FMLA leave for her alleged depressive disorder and to care for her husband who was undergoing cancer treatment. The employee alleged that her new District Manager became angry with her and asked her if she would still take the leave if she was not paid. The District Manager also allegedly asked her “what is your problem? What is wrong with you?” The employee further alleged that after she went on leave, the employer cleaned her personal items out of a shared desk, copied her files off her office computer, deleted her name from the company website, blocked her from accessing company computers, and that the Community Leader told another employee that he was unsure if the employee would be returning after her leave. When her leave was over, the employee was told not to return until several weeks later, whereupon she was directed to report to the District Office to “talk about things.” The employee alleges that she was interrogated regarding the witness statement she obtained and terminated at the end of the meeting. The employer states that the employee was terminated for interfering with a workplace investigation, poor performance, and bad decision-making. The employer cited a Performance Improvement Plan from a year prior, two written warnings from the first half of the year of termination, and a “Needs Improvement” rating on her last review.

The employee sued for FMLA interference and retaliation. The court granted summary judgment on the interference claim, but denied summary judgment on the retaliation claim. The court first distinguished the requirements of interference and retaliation claims, stating that interference requires some denial of FMLA rights that prejudices the employee. The employer argued that the employee was granted the 12 weeks required by the FMLA, thus the employee was not denied any benefits under the FMLA. The employee argued that terminating her on her first day back did not qualify “reinstatement” under the Act. The court agreed with the employee on her interpretation of the Act but found that the basis for both of her claims was her allegation that she was terminated for taking FMLA leave. The court found the two claims identical and dismissed the interference claim as being duplicative of the retaliation claim. The court analyzed the retaliation claim under the mixed-motive framework of *Richardson*. The employee conceded that discrimination was not the sole reason for her discharge, and put forth adequate evidence that the exercise of her FMLA rights was a motivating factor in her termination. In response, the court noted that the record was devoid of any suggestion that the employee was being considered for termination due to performance problems prior to taking leave. The court ruled that by not offering any evidence that it would have fired the employee even if she had not taken FMLA leave, the employer did not meet its heightened burden of persuasion in the final step of the mixed-motive analysis.

Dalpiaz v. Carbon County, Utah, 760 F.3d 1126, 23 WH Cases2d 188 (10th Cir. 2014)

The employee, a benefits administrator for the employer, was injured in a motor vehicle accident. Seven weeks after the accident, the employer asked her to submit a request for leave under the FMLA. The employee failed to respond to the employer’s request until a third request, made by the employer’s attorney. Shortly thereafter, the employee returned to work on a

modified basis and the employer began receiving reports that the employee was engaging in physical activities that seemed to be inconsistent with her claims of injury. The employer then ordered her to report for an independent medical examination (IME). After she was told that she would need a referral, the employee sent an e-mail to the employer's attorney informing him of the need for a referral and asking him how she should proceed. The employer's attorney did not respond and the employer later discharged the employee for her failure to timely complete the FMLA forms, failure to schedule the IME, untruthfulness regarding the extent of her injuries, abuse of sick leave, and personal use of a digital camera belonging to the employer.

The employee filed suit alleging interference with her rights under the FMLA. The district court granted summary judgment in favor of the employer. On appeal, the court first noted that the employee continued to conflate two theories of recovery, interference and retaliation, in her briefs. The court agreed with the employer that the employee waived her retaliation claim in that she failed to include it in her complaint and did not object when the employer characterized her claim as one for interference during summary judgment proceedings. The court held that the employee's interference claim failed as a matter of law because the employer terminated her because it sincerely, even if mistakenly, believed she abused her sick leave and demonstrated evidence of untruthfulness. In addition, the employee was required to comply with legitimate directions given by her supervisors, and her request for FMLA leave did not shelter her from this obligation, even when her supervisor's instructions were related in some way to her use of FMLA leave.

Henson v. U.S. Foodservice, Inc., 588 Fed.Appx. 121, 23 WH Cases2d 1032 (3rd Cir. 2014)

Plaintiff requested and was granted FMLA leave on numerous occasions during his six years of employment, including intermittent leave in 2009 and 2010. Defendant never prevented plaintiff from taking leave and never subjected him to negative consequences for taking leave. Plaintiff alleged, however, that he heard a manager tell employees they were working more because of their "FMLA buddies" and encouraged them to call employees who were on FMLA leave and tell them to return to work. Plaintiff also claimed he heard the same manager say employees on FMLA leave were the reason employees were working overtime. In August 2010, plaintiff was discharged for insubordination after he failed to follow his supervisor's instructions. Plaintiff filed suit, alleging he was retaliated against for using FMLA leave. After the district court granted defendant's motion for summary judgment, plaintiff appealed.

Plaintiff first argued the district court erred in applying the *McDonnell Douglas* burden shifting framework because he submitted direct evidence which warranted applying the mixed-motive framework. The Court of Appeals agreed that the alleged comments were not direct evidence, as plaintiff failed to link the general comments to the decision to terminate his employment. Applying the burden shifting framework, the Court found plaintiff failed to establish a prima facie case of retaliation as he could not demonstrate a causal connection between his leave and termination. Further, plaintiff offered no evidence of pretext. Therefore,

the Court affirmed the grant of summary judgment.

Summarized Elsewhere:

Downs v. Winchester Med. Ctr., 2014 WL 4093696 (W.D. Va. Aug. 18, 2014)

Spears v. Louisiana Dep't. of Pub. Safety & Corr., 2 F. Supp. 3d 873 (M.D. La. 2014)

D. Pattern or Practice

Harris v. Rock Tenn CP, LLC, 2014 WL 547079 (N.D. Miss. Feb. 10, 2014)

Plaintiff, a long term employee, brought claims under the FMLA for retaliation and interference alleging that he did not get a sought after job because of his utilization of intermittent FMLA leave. Applying the *McDonnell Douglas* test, the court found a legitimate business reason for the employer's actions. In addition, the court found that the employer was within its rights to require further certification of status when plaintiff sought to make his FMLA status continuous rather than intermittent. Plaintiff was supplied the forms, but did not respond, despite several contacts by the employer and eventually plaintiff was discharged. Subsequent to the discharge, plaintiff alleged that the requests for additional information were, in fact, interferences with his rights under the FMLA. Plaintiff argued that since a similar form with information had been provided in the past it was not required here. The court, in granting summary judgment, disagreed.

Summarized Elsewhere:

Jones v. Elmwood Centers Inc., 2014 WL 1761567 (N.D. Ohio Apr. 30, 2014)

CHAPTER 11. ENFORCEMENT, REMEDIES, AND OTHER LITIGATION ISSUES

I. OVERVIEW

II. ENFORCEMENT ALTERNATIVES

A. Civil Actions

1. Who Can Bring a Civil Action
 - a. Secretary
 - b. Employees
 - c. Class Actions
2. Possible Defendants

***Roberts v. Leflore County Hospital Authority d/b/a Eastern Oklahoma Medical Center, Inc., et al.*, 2014 WL 1270422 (E.D. Okla. March 26, 2014)**

Plaintiff worked for a public county hospital owned and operated by Oklahoma. Plaintiff alleged in her complaint that she took a short-term FMLA leave approved by her defendant employer. When plaintiff returned, the defendant supervisors adversely changed her job and schedule, allegedly in response for her taking FMLA leave. Plaintiff quit and brought a claim of constructive discharge in violation of the FMLA against the hospital and her supervisors in their individual capacities.

The hospital moved to dismiss based on sovereign immunity. The court granted the hospital's motion based on *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012), which determined that the Self-Care Provision of the FMLA did not abrogate a state's Eleventh Amendment sovereign immunity. The individual supervisors also moved to dismiss. The court found that public employees may be individually liable under the FMLA if, in the performance of their duties, they act in their employer's interest with respect to other employees of their employer. Under this standard, the individual defendants clearly qualified as subject to plaintiff's alleged claim. Their motion to dismiss was denied.

Summarized Elsewhere:

***Page v. Arkansas State University*, 2014 WL 584792 (E.D. Ark. Feb. 14, 2014)**

***Popko v. Penn State Milton S. Hershey Medical Center*, 2014 WH Cases2d 163, 765 (W.D. Pa. Jul 14, 2014)**

***Housel v. Rochester Institute of Technology*, 6 F. Supp. 3d 294 (W.D.N.Y 2014)**

3. Jurisdiction

B. Arbitration

1. Introduction
2. Individual or Employer-Promulgated Arbitration Agreements and Plans
3. Arbitration Under a Collective Bargaining Agreement

III. REMEDIES

Lusk v. Virginia Panel Corp., 2014 WL 3900325 (W.D. Va. Aug. 22, 2014)

Plaintiff brought interference and retaliation claims under the FMLA following her termination. After trial, the jury upheld her interference claim, but found for the employer on the retaliation claim. The court held that the jury verdict was not inconsistent, i.e., that the jury could find that the employer's termination had interfered with plaintiff's FMLA rights but had not been retaliation. Noting that an award of pre-judgment interest was mandatory under the FMLA, the district court observed that while there was no consensus on what rate of interest should be applied, the majority trend was the IRS prime rate. The court then turned to the issue of liquidated damages, which it declined to award under what it termed the "unique" circumstances: the absence of any evidence of a systemic deprivation of FMLA rights and the company's history of taking affirmative steps to provide employees with FMLA paperwork even when FMLA was not being requested.

After addressing issues of legal relief, the district court turned to equitable relief. Noting that reinstatement was preferable over an award of front pay, the court ordered reinstatement as there was nothing particularly unique about the facts of the case to warrant a departure from that remedy. The court declined to grant declaratory relief or injunctive relief, holding that plaintiff had been made whole through the other relief that had been provided to her.

A. Damages

1. Denied or Lost Compensation
2. Actual Monetary Losses

Summarized Elsewhere:

Shetty v. Hampton University, 2014 WL 280448 (E.D. Va. Jan. 24, 2014)

3. Interest
4. Liquidated Damages

Summarized Elsewhere:

Lusk v. Virginia Panel Corporation, 2014 WL 3900325 (W.D. VA, August 11, 2014)

- a. Award

Smith v. AS America, Inc., 22 WH Cases2d 1850, 2014 WL 3375466 (W.D. Mo. July 7, 2014)

The employee filed an FMLA claim against the employer, but died while the case was pending. The employee's personal representative moved to intervene in the case. The employer agreed that the personal representative was a proper part, but argued that plaintiff's claim for liquidated damages extinguished upon his death and could not be maintained by the personal representative.

The court held that the claim for liquidated damages survived and could be maintained by the new plaintiff. Under the federal common law rule, the plaintiff's claim for liquidated damages would not survive if the liquidated damages award was punitive in nature. The court noted that the liquidated damages provisions in the FMLA and FLSA are identical, and have been interpreted by other courts as remedial, rather than punitive, because they are intended to provide compensation for the delay in payment of wages owed. Therefore, the court concluded that the liquidated damages award was not punitive, and could survive the employee's death.

Alexander v. Servisair, LLC, 23 WH Cases2d 1632 (5th Cir. 2014)

Plaintiff was discharged by defendant for failing call in for her absences, despite the fact that plaintiff alleged she gave proper notice that she was taking FMLA leave. The jury found defendant not liable for plaintiff's FMLA retaliation claim, but found that defendant interfered with plaintiff's rights under the FMLA, and awarded one dollar in damages. On plaintiff's motion, the district court increased the award to \$37,004, the undisputed amount of plaintiff's lost wages, and then doubled that amount to \$74,008 because the jury found that defendant acted in bad faith. The court also awarded plaintiff \$91,728.75 in attorney's fees.

Defendant appealed, arguing that the increase was unconstitutional, that plaintiff was not entitled to attorney's fees because she was not the prevailing party, and that the court erred in excluding defendant's proposed jury instructions. The Fifth Circuit found that the judgment constituted improper additur, noting that the only proper increase to a jury award occurs when there is no dispute as to damages, in which case the court may increase the award to the undisputed amount. The court agreed with defendant that the jury could have found that defendant's interference did not cause plaintiff's damages. Because the FMLA requires a causal link between the unlawful interference and the claimed damages, the amount of damages was in dispute and additur was improper.

The court, however, disagreed with defendant's other arguments. It found that even an award of nominal damages is sufficient to render plaintiff the prevailing party, but that remand was necessary to recalculate the fees in light of the reinstated award. The court found no error in the jury instructions because defendant could not show any erroneous statement of law in the instructions, or anything beyond the possibility of confusion. The court found that defendant could not show error by showing that instructions could have given more emphasis to a party's stronger arguments. The court affirmed on those counts.

Summarized Elsewhere:

***Bissonnette v. Highland Park Market, Inc.*, 2014 WL 815872 (Conn. Super. Ct. January 28, 2014)**

***Jackson v. City of Hot Springs*, 751 F.3d 855, 22 WH Cases2d 909 (8th Cir. 2014)**

b. Calculation

5. Other Damages

***James v. Diamond Products Ltd.*, 2014 WL 4285665 (N.D. Ohio Aug. 27, 2014)**

Plaintiff brought suit, claiming that she was discharged when she requested intermittent FMLA leave to care for her husband in violation of the FMLA and Ohio law. The court dismissed plaintiff's wrongful discharge claim under state law, explaining that her wrongful discharge failed as a matter of law because it was based on the employer's violation of the FMLA.

***Taylor v. Trees, Inc.*, 2014 WL 5781251 (E.D. Cal. Nov. 5, 2014)**

Plaintiff, a tree trimmer, sued his former employer under the FMLA. Plaintiff alleged he took FMLA leave for back problems. Upon the end of his leave, and with a doctor's note that listed he had some physical limitations, plaintiff claimed the employer would not allow him to return to work until he was "100%." On January 8, 2013, plaintiff obtained a full release to work with no restrictions from his doctor. Defendant discharged him, however, for exceeding his allotted FMLA leave without approval.

The court first held that partial summary judgment in favor of defendant was proper where Plaintiff sought emotional distress and punitive damages, because emotional distress and punitive damages are not available under the FMLA as a matter of law. The court also rejected plaintiff's argument that defendant's FMLA policy allowing 12 weeks of leave was illegal, reasoning that employers are not required to extend their FMLA policies to allow leave in excess of 12 weeks.

Summarized Elsewhere:

***Lusk v. Virginia Panel Corporation*, 2014 WL 3900325 (W.D. VA, August 11, 2014)**

B. Equitable Relief

Summarized Elsewhere:

***Evans v. Books-A-Million*, 762 F.3d 1288, 23 WH Cases2d 158 (11th Cir. 2014)**

1. Equitable Relief Available in Actions by the Secretary
2. Equitable Relief Available in All Actions
 - a. Reinstatement

Rogers v. Oregon, 2014 WH Cases2d 163 (D. Or. July 14, 2014)

Plaintiff brought FMLA, ADA, constitutional and state law claims against her employer and certain individual defendants in their official capacities. The individual officials argued the FMLA and ADA claims were precluded by sovereign immunity under the Eleventh Amendment. The court disagreed, however, and denied the defendant's motion to dismiss. The court noted that reinstatement is a form of injunctive relief, which is potentially available under *Ex parte Young*, 209 U.S. 123 (1908). The court also ruled that whether the defendant violated the FMLA was more appropriate for resolution at the summary judgment stage.

Summarized Elsewhere:

Lusk v. Virginia Panel Corporation, 2014 WL 3900325 (W.D. VA, August 11, 2014)

- b. Front Pay
- c. Other Equitable Relief

Summarized Elsewhere:

Oliver v. Williams Companies, Inc., 2014 WL 1344496 (N.D. Okla. Apr. 4, 2014)

- C. Attorneys' Fees

Summarized Elsewhere:

Cuff v. Trans State Holdings, Inc., 768 F.3d 605, 23 WH Cases2d 689 (7th Cir. 2014)

Alexander v. Servisair, LLC, 23 WH Cases2d 1632 (5th Cir. 2014)

- D. Tax Consequences

IV. OTHER LITIGATION ISSUES

Lusk v. Virginia Panel Corporation, 2014 WL 3900325 (W.D. VA, August 11, 2014)

Plaintiff brought an action against defendant alleging interference and retaliation under the FMLA. At trial, the jury returned a verdict in favor of Plaintiff on the interference claim and a verdict in favor of the defendant on the retaliation claim. Plaintiff sought \$47,354 in back pay, but the jury awarded her \$25,258.14. Plaintiff filed a motion for further relief, and defendant filed a motion for judgment as a matter of law. Defendant argued that judgment as a matter of law was warranted because the jury's verdict in favor of Plaintiff on the interference claim was inconsistent with its verdict in their favor on the retaliation claim. The court found nothing inherently inconsistent about finding that plaintiff had met her burden of proof on the interference claim, which does not have intent as an element, while also finding that plaintiff failed to meet her burden on the retaliation claim, which does have an intent element. Nonetheless, the district court found that the defendant failed to seek the proper remedy because "Federal Rule of Civil Procedure 50(b) does not provide a remedy for an inconsistent verdict." The proper remedy is not judgment as a matter of law for the losing party but rather a new trial.

Plaintiff sought prejudgment interest, liquidated damages, equitable relief in the form of reinstatement or front pay, declaratory relief, injunctive relief, attorney's fees and costs. The district court followed what it stated "appeared to be the prevailing trend among recent FMLA decisions" and ordered prejudgment interest at the IRS prime rate of 3.25% and compounded the interest annually. With respect to liquidated damages, the district court ruled that plaintiff failed to prove her termination was in bad faith or was done with discriminatory intent. The district court determined that there was nothing sufficiently unique about the facts to warrant abandoning the much preferred remedy of reinstatement. As for plaintiff's motion for declaratory relief, the court determined that there would be no "useful purpose" in issuing a declaratory judgment because it would effectively do "little more than simply affirm the jury's verdict." Finally, the court did not award Plaintiff injunctive relief because it determined Plaintiff had been made whole by the other various forms of relief she had been awarded.

A. Pleadings

Huffman v. Speedway LLC, 2014 WL 5817321(E.D.Mich. Nov. 10, 2014)

Plaintiff, a former shift leader at defendant's convenience store in Vassar, Michigan, sued her former employer alleging that her FMLA rights had been interfered with when her employer required her to use FMLA leave and discharged her when she refused to do so. The court granted summary judgment to the employer, dismissing the action, and plaintiff appealed. During the appeal, plaintiff filed a motion pursuant to Fed.R.Civ.P. 60(b), asking the lower court to reconsider its decision. The district court denied the motion.

Plaintiff asserted in her complaint that she had a number of pregnancy-related job limitations. The employer had concluded that the limitations could not be accommodated and advised plaintiff that she could not return to work until she was relieved of the restrictions set forth by her physician. The employer sent plaintiff paperwork for FMLA leave. Believing that her restrictions did not keep her from working, plaintiff refused to return the paperwork or otherwise request a leave of absence. As a result, the employer discharged her for job abandonment.

In her motion for reconsideration, plaintiff argued that while she alleged interference and retaliation claims in her complaint, the district court only addressed the interference claim in dismissing the entire action. The court, in denying the motion, noted that liberal pleading requirements do not limit a plaintiff's choice of theory when a general FMLA violation is alleged. However, once a plaintiff alleges a specific theory in her complaint, she cannot rely on that allegation to support other, unalleged FMLA theories. Because plaintiff alleged that she was discharged as a result of interference with her FMLA rights, and not because of she asserted her rights under the FMLA, the court concluded that it made no error of law in dismissing the entire action.

Twillie v. Erie School Dist., 575 Fed.Appx. 28, 2014 WL 3844129 (3d Cir. 2014)

Plaintiff, appearing *pro se*, filed claims against the defendant, which were ultimately dismissed by the district court. The district court granted plaintiff leave to amend, and plaintiff

then filed an amended complaint in narrative form asserting violations of Title VII and the ADA, in addition to general violations of “FMLA laws,” but did not provide any factual detail regarding the ways in which defendant violated her rights under the FMLA. The district court dismissed the amended complaint in its entirety, and plaintiff appealed.

The Third Circuit affirmed, finding that plaintiff’s allegations failed to state a claim for interference under the FMLA. In doing so, the court explained that the FMLA authorizes employers to require their employees to substitute accrued paid vacation leave, personal leave or family leave for leave provided under the FMLA. 29 U.S.C. § 2612(d)(2). The court then affirmed the district court’s dismissal of plaintiff’s interference claim, noting that plaintiff had produced numerous emails showing that she was permitted to take FMLA, including an instruction from her supervisor that she could alternatively use accrued vacation leave or FMLA leave in increments of her choosing.

Summarized Elsewhere:

***Bailey v. City of Daytona Beach Shores*, 560 Fed.Appx. 867, 22 WH Cases2d 358 (11th Cir., 2014)**

***Clark v. Northland Group, Inc.*, 2014 WL 3828218 (D. Minn. Aug. 4, 2014)**

***Whitaker v. Stamping*, 302 F.R.D. 138 (E.D. Mich. 2014)**

***McElroy v. Sands Casino*, 23 WH Cases2d 1514 (3d Cir. 2014)**

- B. Right to Jury Trial
- C. Protections Afforded
- D. Defenses
 - 1. Statute of Limitations

***Epps-Milton v. Genesee Intermediate School District*, 2014 WL 5817015 (E.D.Mich. Nov. 10, 2014)**

In May 2014, plaintiff filed suit against her former employer, a school district, and seven other employees alleging that, in November 2010, she was denied a restoration of her work hours after taking an FMLA reduced-work schedule to care for her son. Plaintiff also asserted she was denied the opportunity to take FMLA leave in November 2011 to deal with emotional distress she allegedly suffered by reason of workplace harassment.

On a motion to dismiss on the pleadings, the court dismissed the complaint based on the expiration of the statute of limitations. Noting that the statute was two years, or three years for a willful violation of the FMLA, the court concluded that the November 2010 incident was time-barred. With regard to the November 2011 incident, the court found it undisputed that the school district had calculated the plaintiff’s hours of work and determined that she was not qualified for FMLA leave, as she had worked less than 1,250 hours in the previous twelve months. As such, the court ruled that the alleged FMLA violation was not willful and subject to a two-year statute of limitations and consequently time-barred. In so doing, it rejected plaintiff’s assertion that the

statute of limitations should have been tolled because her “unsound mind” had prevented her from filing an FMLA claim earlier. The court noted that, during the FMLA limitations period, plaintiff had filed discrimination charges under Title VII and, therefore, “there is simply no reason to believe that an unsound mind rendered her incapable of filing charges related to the purported FMLA violation.”

Freberg v. Marquette General Health System, 2014 WL 1028891 (W.D. Mich. Mar. 17, 2014)

The employee, a plaintiff proceeding pro se, was granted FMLA leave. The employee claimed that the employer violated the FMLA by requesting multiple certifications, threatening to withdraw its approval of her leave, and seeking “intimate knowledge” regarding her need for medical leave. The court granted employer’s motion to dismiss under Rule 12(b)(6) because the employee failed to state a claim under the FMLA, and her claim was untimely. The employer’s requests for certification were lawful because they occurred when the employee’s leave changed from intermittent to continuous. Additionally, although the employee argued she failed to receive full reinstatement, her complaint did not state a claim for failure to reinstate. Moreover, the employee’s claims were time barred because she did not file her lawsuit until more than two years after any alleged violation, and failed to allege any willful violation.

Brown v. Johns Hopkins Hosp., 2014 WL 3898150 (D. Md. Aug. 7, 2014)

Plaintiff informed the employer on February 4, 2011 that the allegedly discriminatory and harassing actions of her co-worker and supervisor had caused her to seek medical attention for emotional stress and anxiety, and that she would soon file a charge of discrimination with the EEOC. The next day, she took FMLA leave from work and visited her physician, at which time her physician gave her a disability certificate which ordered her to stay home from work from February 8th through February 16th. Upon her release to return to work on February 16, 2011, the employer instructed her to sign an “Authorization for Release of Health Information” form and an “Authorization for Use and/or Disclosure of Health Information” form so that the hospital could confirm the medical treatment supporting her request for FMLA leave. However, plaintiff did not wish to sign the forms because they allowed her health information to be disseminated to her supervisor and her employer for unnamed purposes. In lieu of signing the forms, she gave her written consent for the employer to speak with her physician, but was told that such consent was insufficient and she was required to execute the release forms before she was permitted to return to work. About two weeks later, plaintiff received a letter stating she was on a leave of absence from March 1 to April 28, 2011, and that if her position was filled during that time she would have to reapply for her job. On May 5, 2011, the employer sent the plaintiff another letter stating that her period of leave had expired and that she was discharged effective April 29, 2011. Plaintiff subsequently filed suit on September 9, 2013 after receiving a right to sue from the EEOC, alleging that the hospital unlawfully interfered with her rights under the FMLA and unlawfully retaliated against her. The defendant moved to dismiss the plaintiff’s claims.

The district court granted the defendant’s motion and held that the plaintiff’s claims for unlawful interference with medical leave and retaliation in violation of the FMLA were subject to a two-year statute of limitations absent a showing of a “willful”

violation. The Court held that based upon the plaintiff's pleading, she only alleged that the employer allowed her to take the leave that she requested and had followed its standard protocol for an employee not returning from FMLA leave. As such, she did not state a plausible claim that the hospital willfully interfered with her rights under the FMLA.

Whitaker v. Stamping, 302 F.R.D. 138 (E.D. Mich. 2014)

Plaintiff suffered a fracture of his left knee in a motorcycle accident, took disability leave and was paid short-term disability for ten weeks. Plaintiff subsequently took five additional days off over the next four months, each day being covered by a medical certificate from his physician. A month later, plaintiff experienced increased pain in his knee. He called defendant to explain that he needed to take that day off for pain and the following day off to see his physician. He saw his physician on the following day and received a medical certificate to return to work. After returning to work following his appointment, plaintiff was informed that his employment had been terminated for excessive absenteeism. Two years after his discharge, plaintiff filed a lawsuit, alleging defendant interfered with his FMLA rights because it did not place him on FMLA leave. However, plaintiff did not attempt to serve the Summons on defendant until months later. Defendant moved to dismiss, arguing that plaintiff failed to properly serve the Summons on defendant before the statute of limitations expired.

The district court denied defendant's motion to dismiss. According to the Court, plaintiff requested an extension of time to serve the Summons under Fed. R. Civ. P. 4(m), which tolled the applicable statute of limitations from the end of the 4(m) period, to 120 days after the time when the plaintiff filed his Complaint. The Court further found that plaintiff properly pleaded a willful violation for interference with the FMLA by alleging that defendant failed to invoke FMLA for his time off despite having such a policy. In the Court's opinion, this allegation satisfied the plausibility standard of *Iqbal* because the Court could reasonably infer that a defendant-employer that has a FMLA policy but does not follow it for a FMLA-eligible injury has acted with knowledge that its conduct is prohibited by the FMLA. As a result, plaintiff was entitled to a three-year statute of limitations and his lawsuit was deemed timely provided that he re-served the Summons within ten days as ordered.

Crugher v. Prelesnik, 761 F.3d 610, 23 WH Cases2d 1 (6th 2014)

The employee was a Michigan Department of Corrections officer who suffered from multiple chronic medical conditions. The employee took as-needed medical leave pursuant to the self-care provision of the FMLA. In April, 2010, the employee was placed on an "interim rating," under which his performance was closely monitored for 180 days. This status was put in effect because the employee's "time and attendance issues" did not improve. In October 2010, the employee was placed on another interim rating. On this occasion, the employee was warned that "failure to correct these deficiencies will result in further disciplinary action up to and including dismissal." The following month, the employee experienced additional medical problems and was approved for intermittent FMLA leave from November 22, 2010, through

May 21, 2011. On November 23, 2010, the employee was notified that he would have to attend a "performance rating conference" because of non-compliance with the employer's handbook policies regarding use of leave. The employee was discharged on January 11, 2011. The employee sued the Warden, in his official and individual capacities, more than two years after the discharge.

The Sixth Circuit affirmed dismissal of the employee's complaint that he had been discharged because of his protected FMLA leave. The Court agreed with the district court's conclusion that the two-year statute of limitations contained in the FMLA is appropriate, even though the employee was pursuing prospective injunctive relief (reinstatement) against a state officer pursuant to *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). As the Court noted, under U.S. Supreme Court precedent, money damages are not available in a private action against a state official for violation of the self-care provisions of the FMLA. Moreover, because the equitable relief suits that are permitted are "derived from the FMLA itself," the statute's limitations rule applies rather than the most closely analogous state law, as suggested by the employee. As such, the employee's complaint was untimely. Given the Court's holding on this issue, it next was required to determine whether the employee could invoke the FMLA's three-year limitations period for willful violations. Again, the Court affirmed the district court's ruling that allowing an amendment of the employee's lawsuit to add such a willfulness claim would be futile. The Sixth Circuit opined that the facts demonstrated negligence by the corrections department officials "at best," and could not be relied upon to support a finding of willfulness.

Summarized Elsewhere:

***Ammons v. Cook County of Illinois*, 2014 WL 4116956, (N.D. Ill. Aug. 20, 2014)**

***Daniels v. Milwaukee Bd. Of School Directors*, 2014 WL 4209556 (E.D. Wis. Aug. 26, 2014)**

a. General

Summarized Elsewhere:

***Maves v. Board of Education of Prince George's County*, 2014 WL 3973930 (D. Md. Aug. 12, 2014)**

***Ruiz v. Edcouch-Elsa Indep. Sch. Dist.*, 2014 WL 1385877 (S.D. Tex. Apr. 9, 2014)**

b. Willful Violation

***Gongwer v. Samaritan Reg'l Health Sys.*, 2014 WL 6685216 (N.D. Ohio Nov. 24, 2014)**

The employee, a receptionist at a hospital, periodically went on FMLA leave throughout her employment. One day while the employee was working, her husband came to the hospital because he was allegedly suffering a panic attack. Her husband sat behind the employee while the employee worked. In the course of her duties and while her husband was behind her, the employee talked to patients about protected health information. After an investigation, the employee was discharged for violating HIPPA.

The employee filed a lawsuit under the FMLA, claiming interference and retaliation. Given the employer's long history of granting the employee's requests for FMLA leave, the court found that the two year statute of limitations applied because no willful violation had

occurred. Since her last period of FMLA leave was more than two years before, Plaintiff's claim was not timely. Moreover, the employee could not demonstrate that she was eligible for leave, since she could not dispute that she had not worked the requisite number of hours. As for her retaliation claim, the court held that the plaintiff could not establish a prima facie case. Plaintiff was granted all the leave she requested, and she could not show that she gave notice of any intent to take leave in the future, when she became eligible again. Even if the court applied the pretext analysis, the employee also could not dispute that the HIPPA violation was the cause of her discharge.

Summarized Elsewhere:

Schofield v. Maverik Country Store, 2014 WL 2765223 (D. Utah June 18, 2014)

2. Sovereign Immunity

Lightfoot v. Henry County School District, 2014 WL 5803575 (11th Cir. Nov. 10, 2014)

Plaintiff, a former English and drama teacher for the employer, filed suit alleging retaliation under the FMLA. She asserted that, after taking FMLA intermittent leave, defendant retaliated against her by moving her classroom to a distant location (making it more painful for her to walk), issuing discipline, and ultimately terminating her employment. The district court originally denied a motion for summary judgment on the FMLA claim. However, upon reconsideration of an Eleventh Amendment argument asserted by the employer, the court granted summary judgment. On appeal, the Eleventh Circuit reversed the decision of the district court on the Eleventh Amendment issue.

The employer asserted that it was an "arm of the state" and, therefore, immune from suit in federal court under the Eleventh Amendment to the U.S. Constitution. However, the appeals court noted that Eleventh Amendment protection does not extend to "counties, municipal corporations, or similar political subdivisions of the state." In addressing the issue, the appeals court highlighted a four-factor test to determine whether an entity is an "arm of the state": (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. In ruling against the employer, the appeals court commented that in applying this four-factor test, "the Supreme Court and the vast majority of appellate courts that have considered the issue have found that school districts and school boards are not entitled to Eleventh Amendment immunity."

Kiefner v. Sullivan, et al., 2014 WL 2197812 (N.D. Okla. May 27, 2014)

Plaintiff brought suit against his government agency-employer, the agency CEO (his direct supervisor), and the agency's general counsel for FMLA interference and retaliation. Plaintiff sued the individual defendants in both their official and individual capacities. Defendants removed the suit from state to federal court and then moved to dismiss all of plaintiffs' claims.

Defendants argued that the FMLA claims were barred based on Eleventh Amendment immunity. The court noted that state sovereign immunity can be abrogated by Congress or waived by a state that consents to suit. The court did not decide whether Congress had abrogated

the state's immunity through the FMLA because it *sua sponte* decided that the defendants' removal of the suit to federal court was a waiver of any immunity to which they might otherwise be entitled under the FMLA. Accordingly, the defendants' motion to dismiss was denied to the extent based on the Eleventh Amendment immunity argument.

The individual defendants also argued that they were not "employers" for the purposes of the FMLA. This interpretation issue had not been addressed previously by the Tenth Circuit Court of Appeals. Noting that other circuits were split on the issue, the court held that a state employee sued in their individual capacity may be deemed an "employer" under the FMLA if that individual "acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." Accordingly, the individual defendants' motion to dismiss was denied.

Seeney v. Pennsylvania Department of Corrections, 22 WH Cases2d 1666 (E.D.Pa. 2014)

The employee, a clerk typist, suffered from rheumatoid arthritis and was terminated for unacceptable attendance. She initially requested and received intermittent leave. A year later, she used more than twelve weeks of intermittent leave. For a second time, she requested intermittent leave. The employee was informed that her leave would be without benefits. Thereafter, she was terminated.

The employee filed suit alleging an FMLA interference claim. The employer argued that the employee's FMLA interference claim should be dismissed because the employee was not an eligible employee under the FMLA and that the employer was immune from suits for monetary damages under the self-care provision of the FMLA. The court denied the employer's motion as to the eligibility claim, finding the employee worked 1,500 hours in the twelve month period prior to her second request for intermittent leave. As to the sovereign immunity claim, the court granted summary judgment in favor of the employer after finding that the self-care provision is not a valid abrogation of the States' immunity and that the State had not waived its sovereign immunity by accepting federal funds.

Lee v. State, 844 N.W.2d 668 (Iowa 2014)

Plaintiff, a state employee, brought suit against the state for wrongful discharge and retaliation under the FMLA. After plaintiff took FMLA leave for anxiety, the employer terminated her from her employment. Plaintiff filed suit, and, after a trial, the jury awarded plaintiff damages for lost earnings and reinstatement.

On appeal, defendant argued that sovereign immunity precluded plaintiff's judgment for monetary damages against the state. Additionally, defendant sought a stay of the reinstatement order, promising to pay plaintiff's interim wages and benefits if the Supreme Court affirmed the district court's order of reinstatement. Subsequently, the Supreme Court upheld plaintiff's reinstatement. However, the employer then argued that sovereign immunity precluded plaintiff from collecting the interim damages that the employer previously promised. The Court held that the employer waived its sovereign immunity by requesting a stay. The Court noted that the employer made assurances that it would pay plaintiff interim wages and benefits in order to obtain a stay of reinstatement. The Court held that a representation made in a judicial proceeding for the purpose of inducing the Court to act satisfies the waiver requirements. As

such, the Court ordered the employer to reinstate plaintiff and awarded her wages and benefits from the date of the reinstatement order.

***Amoroso v. Bucks County Court of Common Pleas*, 2014 WL 3767000 (E.D. Pa. July 31, 2014)**

The employee was a former Domestic Hearing Officer for a county court. In her lawsuit against her former employer, the employee alleged that her employment was terminated in retaliation for exercising her right to take FMLA leave. The employer moved to dismiss, arguing that it was entitled to immunity under the Eleventh Amendment, and the court agreed. The employee argued that the *Ex parte Young* doctrine provided an exception to Eleventh Amendment immunity for claims seeking prospective relief. However, the court reasoned that this exception did not save the employee's claim, since it only applies to cases in which individual state officials are sued in their official capacity. Therefore, the Court granted the employer's motion to dismiss, but also granted the employee's request for leave to amend her Complaint to add an appropriate state official as a defendant.

***Cimerman v. Cook*, 561 F. Appx. 447, 22 WH Cases2d 505 (6th Cir. 2014)**

An employee, a former bailiff, sued his former employer, a judge, alleging that he violated the FMLA when he refused to allow her to return to work and terminated her employment. The employee sought monetary relief against the judge in his individual capacity, and equitable relief against the judge in his official capacity. The judge filed a motion to dismiss based on Eleventh Amendment immunity, which the district court granted. The employee appealed the order to the extent it dismissed his official capacity claims against the judge for equitable relief.

On appeal, the Sixth Circuit reversed the dismissal order, finding that "state officials may be sued in their official capacities for injunctive relief to remedy violations of the FMLA self-care provision." The court found that *Ex Parte Young* created an exception to the Eleventh Amendment immunity for official capacity suits against state officials to stop violations of federal law, which it applied to this case. It further noted that the fact that the court, which employed the judge, could not sue or be sued had no bearing on whether this claim could be maintained because these actions are not considered actions against the court. Indeed, other courts have allowed such actions to proceed against judges even though the court could not be sued. In reaching this decision, however, the Sixth Circuit declined to address several other arguments for dismissal, including whether the judge is an "employer" under the FMLA, whether plaintiff was an eligible employee, and whether the termination of plaintiff constituted a continuing violation of federal law for which prospective relief could be issued. It remanded the case to the district court to consider these questions.

Summarized Elsewhere:

***Rogers v. Oregon*, 2014 WH Cases2d 163 (D. Or. July 14, 2014)**

***Roberts v. Leflore County Hospital Authority d/b/a Eastern Oklahoma Medical Center, Inc., et al.*, 2014 WL 1270422 (E.D. Okla. March 26, 2014)**

***Arbogast v. Kansas*, 2014 WL 1304939 (D. Kan. Mar. 31, 2014)**

***Crugher v. Prelesnik*, 761 F.3d 610, 23 WH Cases2d 1 (6th Cir. 2014)**

3. Waiver

***Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 22 WH Cases2d 625 (11th Cir. 2014)**

Plaintiff sued her former employer, alleging interference and retaliation in violation of the FMLA. Plaintiff submitted a request for FMLA leave and her employer acknowledged the request on September 4, 2009. One week later plaintiff received an extremely poor performance review. Employer then offered her a choice: she could accept a one-time offer of 13 weeks of severance benefits in exchange for signing a Severance Agreement, under which she waived any FMLA claims, or she could agree to a performance-improvement plan, requiring her to meet various performance benchmarks or face termination. Plaintiff signed the Severance Agreement. She then sued, claiming that employer interfered with her FMLA rights and retaliated against her for exercising her FMLA rights. The district court granted summary judgment for employer and plaintiff appealed.

Defendant argued that plaintiff waived all FMLA claims when she signed the Severance Agreement. Plaintiff argued that she did not, and cited 29 C.F.R. § 825.220(d), which states that employees cannot waive “prospective” rights under the FMLA. She argued that because she had an outstanding request for FMLA leave when she signed the Severance Agreement, she had “prospective” FMLA rights. She also argued that her waiver was not knowing or voluntary. In considering the issue, the court stated that an employee may not waive “prospective” rights under the FMLA, but that an employee *can* release FMLA claims that concern past employer behavior. The court defined “prospective rights” under the FMLA as those allowing an employee to invoke FMLA protections at some unspecified time in the future. It further held that Section 825.220(d)’s prohibition of “prospective” waiver means only that an employee may not waive FMLA rights, in advance, for violations of the statute that have yet to occur. The court held that by signing the Severance Agreement, plaintiff settled claims “based on past employer conduct,” and thus the Agreement was valid. After examining the totality of circumstances in the creation of the agreement, the court found there was no genuine issue of material fact as to whether plaintiff’s waiver was knowing and voluntary, and that summary judgment in favor of employer was proper.

Summarized Elsewhere:

***Hettler v. Entergy Enterprises, Inc.*, 2014 WL 1508699 (S.D.N.Y. Mar. 28, 2014)**

4. Res Judicata and Collateral Estoppel

Summarized Elsewhere:

***Demyanovich v. Cadon Plating & Coating, L.L.C.*, 747 F.3d 419 (6th Cir. 2014)**

5. Equitable Estoppel as a Bar to Certain Defenses

Summarized Elsewhere:

***Luke v. Cplace Forest Park, SNF, LLC*, 2014 WL 5609537 (M.D. La. Nov. 4, 2014)**

***Ennis v. Donahoe*, 2014 WL 69877 (N.D. Okla. Jan. 9, 2014)**

***Holder v. Illinois Dept. of Corrections*, 751 F. 3d 486, 22 WH Cases2d 1071 (7th Cir. 2014)**

Freeburg v. Deere & Co., 2014 WL 1258029 (C.D. Ill. March 27, 2014)

Perteet v. Saginaw Transit Authority Reg. Servs., 2014 WL 4637232, (E.D. Mich. Sept. 16, 2014)