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CHAPTER 1.

HISTORY, STRUCTURE, AND ADMINISTRATION OF THE FMLA

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***Kauai v. Keybank Nat'l Assoc.*, No. C15-702-TSZ, 2016 WL 4096403 (W.D. Wash. Aug. 1, 2016)**

Plaintiff sued her employer for interference and retaliation under the FMLA. First, plaintiff argued that employer interfered with her FMLA rights by preventing her from taking leave to which she was entitled. Second, plaintiff argued that employer retaliated against her by firing her for taking leave. Employer filed a motion to dismiss both claims. In response, the

district court explained that FMLA "creates two related substantive rights: to be able to take leave and to be able to return to one's job after taking leave." Then, the court noted that plaintiff took more than 12 weeks of leave. And, employer terminated plaintiff only after she failed to respond to a series of letters and did not return from leave. Because she received all the leave to which she was entitled, plaintiff could not make a *prima facie* case for interference, the court explained. Employer simply did not deny plaintiff's request for FMLA leave. Likewise, plaintiff could not show "by a preponderance of the evidence" that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her." Employer warned plaintiff that she would be terminated if she did not return to work, the court added. Still, plaintiff did not return, and she was thus terminated. In the end, the court granted employer's motion and dismissed plaintiff's claims with prejudice.

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CHAPTER 2.

COVERAGE OF EMPLOYERS

***Venegas v. Aerotek, Inc.*, No. 14 C 9829, 2016 WL 4140828 (N.D. Ill. Aug. 2, 2016)**

Plaintiff Juana Venegas was hired under an at-will agreement to conduct a specific assignment for one of employer Aerotek, Inc.'s clients, Navistar Defense, LLC. Plaintiff understood that she was hired to fill a position with the client and that the client controlled and supervised plaintiff. After plaintiff had put in her request for FMLA paperwork, the client made the decision to end plaintiff's assignment, and, thereafter, employer terminated plaintiff.

Plaintiff filed suit against both employer and client for violations of the FMLA. After the client settled out of the suit, employer filed a motion for summary judgment; the court granted the motion as to all counts except for the FMLA violation claim. Employer filed a motion for reconsideration, and the court reversed its prior ruling citing the rule that "an employee is not entitled to any 'right, benefit, or position of employment . . . if she would have been fired regardless of whether she took [FMLA leave].'" Because plaintiff was hired for a specific assignment with the client and the client decided to terminate her employment, employer was not obligated to continue employment once that assignment or term had ended. Therefore, employer's summary judgment motion as to the FMLA claim was granted.

***Venegas v. Aerotek, Inc.*, No. 14 C 9829, 2016 WL 1106861 (N.D. Ill. Mar. 22, 2016)**

(Defendant's motion for reconsideration granted, 2016 WL 4140828 (N.D. Ill. Aug. 2, 2016)

Summary for Mar. 22, 2016 opinion:

Plaintiff Juana Venegas was recruited by defendant Aerotek, Inc. ("Aerotek") to work as a field services representative at third-party defendant Navistar Defense, LLC ("Navistar"). Plaintiff filed an FMLA interference claim, as well as an FMLA retaliation claim, against defendant employer. With regard to the FMLA interference claim, the District Court for the Northern District of Illinois denied defendant's motion for summary judgment in part, on the ground that there were genuine issues of material fact as to whether plaintiff was entitled to FMLA leave or whether plaintiff simply elected not to apply, when plaintiff was fired one day after defendant's request for certification and two days before she received the necessary paperwork. For the FMLA retaliation claim, the court granted defendant's motion for summary judgment in part, on the ground that a reasonable jury could not find that Aerotek had any discriminatory or retaliatory intent as Aerotek had no control over Navistar's decision to terminate plaintiff.

***Sanders v. Cajun Iron Workers, Inc.*, No. CV 15-5423, 2016 WL 4063868 (E.D. La. July 29, 2016)**

Plaintiff brought claims under the FMLA and several other anti-discrimination statutes against several defendants, including his prior employer, a separate entity controlled by the owners of his prior employer, a medical office that provided services to his prior employer, and a doctor who worked at the medical office. Plaintiff alleged that each of these entities constituted his "employer" within the meaning of the FMLA. Specifically, plaintiff alleged that his prior employer and the separate entity were a "single enterprise" within the meaning of the FMLA regulations, and that he could assert claims against the medical office and doctor because they acted "directly or indirectly, in the interest of a covered employer" pursuant to 29 C.F.R. § 825.104(a). Defendants moved to dismiss plaintiff's FMLA claims against every entity except his prior employer. The court found that plaintiff had failed to allege sufficient facts showing that employer and the second entity were a "single enterprise," but it gave plaintiff leave to amend his complaint. The court denied defendants' motion to dismiss the medical office and doctor, finding that plaintiff's allegations that the doctor and medical office were acting in the interest of plaintiff's employer sufficient to survive the motion to dismiss.

Summarized elsewhere:
***Pierce v. Landmark Mgmt. Grp., Inc.*, 880 N.W.2d 885 (Neb. 2016)**

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***Jackson v. Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman LLP*, 39 N.Y.S.3d 688 (N.Y. Civ. Ct. Sept. 23, 2016)**

Plaintiff, a chauffeur for a partner in a law firm, sued defendant law firm for violating the FMLA after he was terminated. On a motion for reconsideration of a motion for summary judgment, a trial court in New York state examined when an employee is exempt from the

FMLA. The court determined that the record showed plaintiff only performed minimal work for the law firm and was instead a personal chauffer for law firm partner. Consequently, plaintiff could not demonstrate he worked 1,250 hours for a qualified employer and he was exempt from FMLA coverage.

Summarized elsewhere:
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***Ross v. State*, No. 15-CV-3286 (JPO), 2016 WL 626561 (S.D.N.Y. Feb. 16, 2016)**

Plaintiff, a former professor, alleged FMLA interference and retaliation claims against his employer, a state university, and multiple individuals, in both their official and individual capacities. The District Court for the Southern District of New York dismissed plaintiff's claims because they were barred by the Eleventh Amendment, on sovereign immunity, and failed to state a claim for which relief could be granted.

Plaintiff went overseas when his mother passed away, but he did not apply for a leave of absence. Instead, plaintiff asked an associate to notify the university that he would not return to the United States because he was too grief stricken. Plaintiff claimed he was "mentally paralyzed."

The court dismissed plaintiff's claims against the State of New York and the university based on sovereign immunity. Plaintiff's claims were based on the self-care provision of the FMLA, and, therefore, were barred by the Eleventh Amendment. However, the court held the Eleventh Amendment did not preclude plaintiff from suing state officials acting in their official capacities for prospective, injunctive relief. The court concluded that plaintiff was not barred from seeking reinstatement against defendants in their official capacities, provided the official had the authority to provide the requested relief.

Notwithstanding, the court held plaintiff failed to state a claim for interference or retaliation under the FMLA. Plaintiff did not allege that he suffered from a serious health condition nor did he claim employer denied his request for leave. Plaintiff admitted he did not apply for a leave of absence or notify employer of his intention to be absent until he was already out of the country. Thus, the court dismissed plaintiff's interference claim. Plaintiff's retaliation claim also lacked sufficient facts to state a claim. Plaintiff did not allege that he exercised an FMLA-protected right. His allegations also failed to support an inference of discriminatory intent. Plaintiff's retaliation claim was dismissed.

Summarized elsewhere:
***Tirpak v. Del. Dep't of Tech. & Info.*, 648 F. App'x 263 (3d Cir. 2016)**

***Banner v. Dep't of Health & Soc. Servs. Div. for the Visually Impaired*, No. CV 14-691-LPS, 2016 WL 922058 (D. Del. Mar. 10, 2016)**

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***Kicklighter v. McIntosh Cty. Bd. of Comm'rs*, No. CV 214-088, 2016 WL 722157 (S.D. Ga. Feb. 19, 2016)**

Employee, the chief deputy clerk of the superior court, brought action against County Clerk Saundra Goodrich (County Clerk"), in her individual and official capacity, and County Board of Commissioners ("Board") alleging, among other causes of action, that defendants denied her right to leave under the FMLA and terminated her for attempting to take such leave. Defendants filed a motion for summary judgment on all claims.

Regarding plaintiff's FMLA claims as filed against the County Clerk in her official capacity, the court held that because plaintiff only filed a suit under the self-care provisions of the FMLA, the County Clerk is immune from such suits under the Eleventh Amendment as long as she acted as an "arm of the State" for the functions at issue. The Court also found that the County Clerk is immune from liability under plaintiff's FMLA claim of wrongful termination because superior court clerks are arms of the State when hiring/firing employees and in denying requests for FMLA leave. Plaintiff was also not an "eligible employee" under the FMLA since the County Clerk of the superior court is a separate agency from the County, and the County Clerk here did not employ 50 employees at the worksite or within 75 miles, as required under the FMLA. The court also held that the County Clerk was not an employer in her individual capacity, because public officials sued in their individual capacities are not employers under the FMLA and therefore, plaintiff's FMLA claims failed under this cause of action.

Additionally, the court held that the Board was likewise not an employer because plaintiff, as a deputy clerk of the superior court, is not a county employee, but rather an employee of the clerk of the superior court. Therefore, defendants' motion for summary judgment on the FMLA claims was thus granted, and reconsideration was subsequently denied.

B. State and Local Governments and Agencies

***Spurrier v. Bd. of Trs. of the Univ. of Ala.*, No. 2:16-CV-00151-RDP, 2016 WL 4137971 (N.D. Ala. Aug. 4, 2016)**

Plaintiff was a professor with the University of Alabama. She filed suit against the Board of Trustees of the University of Alabama ("the Board"), Donna J. Kerns ("Kerns"), plaintiff's supervisors, William D. Jordan, Jr. ("Jordan"), plaintiff's department head, and Ray L. Watts ("Watts") president of the University of Alabama.

The case was before the court on defendants' motion to dismiss under FRCP Rule 12(b)(1) urging that the court lacked subject matter jurisdiction over plaintiff's claims and FRCP 12(b)(6) urging that the complaint failed to state a legally cognizable claim. As to the Rule 12(b)(1) claim, defendants argued that the court did not have subject matter jurisdiction because of Eleventh Amendment immunity. In order to evaluate its jurisdiction, though, the court had to analyze whether plaintiff alleged viable claims under the FMLA. Thus, the court first examined defendants' FRCP 12(b)(6) motion to dismiss.

In September 2013, plaintiff requested FMLA leave for required shoulder surgery. Plaintiff requested leave beginning on September 6, 2013, the date of her surgery. She was then released to return to work by her doctor on September 30, 2013. Prior to her medical leave, plaintiff had received above average to outstanding employment evaluations from her supervisor. Plaintiff's supervisor also denied plaintiff's request to return to work. However, plaintiff's supervisor was overruled by a human resources representative. When plaintiff was reinstated, she was given an insurmountable workload that was impossible to complete. Plaintiff complained to human resources about her supervisor's harassment. After the complaint, plaintiff was presented with a termination memorandum.

Under the Eleventh Amendment, states are entitled to immunity from suit in federal court unless they waive their immunity or a superseding federal act abrogates it. The State of Alabama has not consented to suit in federal court. Furthermore, the exception to state sovereign immunity articulated in *Ex parte Young*, 209 U.S. 123 (1908) is limited to lawsuit seeking declaratory or injunctive relief. Thus, the court ruled that the claims against the Board could not proceed. Furthermore, the Eleventh Amendment bar remains in effect when a state official is sued for damages in his or her official capacity. This is because a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the state. Therefore, the suit against the individual defendants in their official capacities also cannot proceed. Lastly, a public official sued in her or her individual capacity is not an "employer" under the FMLA, and therefore, there is no federal subject matter jurisdiction over such a claim. *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999).

Summarized elsewhere:
***Kicklighter v. McIntosh Cty. Bd. of Comm'rs*, No. CV 214-088, 2016 WL 722157 (S.D. Ga. Feb. 19, 2016)**

***Coley v. State of Ohio Dep't of Rehab.*, No. 2:16-CV-258, 2016 WL 5122559 (S.D. Ohio Sept. 21, 2016)**

***Cortazzo v. City of Reading*, No. 5:14-cv-2513, 2016 WL 1022267 (E.D. Pa. Mar. 15, 2016)**

***Cooper v. Spartanburg Cty. Sch. Dist. No. 7*, No. 7:13-cv-00991-JMC, 2016 WL 3610608 (D.S.C. July 6, 2016)**

***Corbett v. Richmond Metro. Transp. Auth.*, No. 3:16cv470-HEH, 2016 WL 4492815 (E.D. Va. Aug. 25, 2016)**

IV. Integrated Employers

***Knidel v. T.N.Z., Inc.*, No. CV 14-40079-TSH, 2016 WL 5387625 (D. Mass. Sept. 26, 2016)**

Plaintiff worked for defendant employer as a cashier. Plaintiff claimed that he needed time off for the birth of his child and subsequently for the medical care of his wife after the birth of the child, but that employer did not notify him of his rights under the FMLA and limited the amount of time plaintiff could be off of work. Plaintiff, nevertheless, took a week off of work and defendant marked him as a voluntary quit. Plaintiff filed suit in the district court of Massachusetts through which he alleged that he was denied notice of his rights and employer interfered with his rights under the FMLA by limiting his time off from work. Plaintiff needed to establish that defendants constituted an integrated employer because the actual employer had less than fifteen employees. The court noted that the following factors were analyzed in determining integrated employer status: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) common ownership. The court further commented that "the ultimate issue is whether the larger entity 'controls enough facets of [the smaller entities] business and operations, such that it has not maintained its economic distinctness.'" The court found that a material issue of fact existed because, while defendants denied any of the factors existed, there was evidence that a manager of one company directed operations of another, that substantial administrative services for the smaller entity were being performed by the larger entity, including payroll, bookkeeping and human resources services, there is one common director, business records are kept at one location, despite separate corporate addresses, among many other indicia of integrated status. The court also denied defendants' motions on the substantive FMLA claims without much commentary.

***Bastille v. Me. Pub. Emp. Ret. Sys.*, No. 1:16-CV-31-NT, 2016 WL 4250256 (D. Me. Aug. 10, 2016)**

In *Bastille v. Maine Public Employee Retirement System*, the district court granted a motion to dismiss plaintiff's complaint alleging numerous claims against her state employer and the state retirement system. Plaintiff, a former customer service representative, had developed serious medical issues in early 2011, and in March of that year requested and was granted FMLA leave. However, plaintiff's condition did not improve and she was unable to return to work. She was eventually administratively terminated in December 2011. Plaintiff's FMLA claims, alleging interference and retaliation, were pled solely against the state retirement system. She contended that the retirement system, applying state disability retirement provisions, violated the FMLA by failing to credit her unpaid FMLA leave time as "service" time under Maine public retirement statutes. **[Author's note: the opinion does not specify whether she was seeking monetary, injunctive, or declaratory relief on this claim].**

The court dismissed the complaint for two reasons. First, the FMLA's mandates are limited to employers, and the complaint contained no allegation that the retirement system was plaintiff's employer, and brought no FMLA claim against her actual employer. Second, the court concluded that the claim was also barred by issue preclusion. Plaintiff had litigated her administrative claim regarding her disability retirement before the retirement system board. The court concluded that under the federal full faith and credit provision, 28 U.S.C. §1738, the court was required to treat that agency's adjudication as binding to the extent it would be so under

state law. The board had concluded that plaintiff's last day of service was in March and that she was not disabled at the time. The court considered these to be binding factual determinations because they would have been given that effect in Maine state courts.

***Hahn v. Office & Prof'l Emps. Int'l Union, Local 153*, No. 13-CV-946 (JGK), 2016 WL 4120517 (S.D.N.Y. July 22, 2016)**

Plaintiff brought suit under 29 U.S.C. § 2601, *et. seq*, through which he alleged that employer failed to provide him proper notice of his FMLA rights, interfered with his FMLA rights, and retaliated against him when it discharged him. Plaintiff, who worked for a local union with less than 50 employees, also claimed that the international union and local union were joint employers, and that the number of employees of each should be aggregated to establish a joint employer relationship. The court found that the joint employer test was the incorrect test because plaintiff did not perform work for both defendants, but that the integrated employer test should have been raised in an attempt to refute a claim that the number of employees in each legal entity should be aggregated. Since defendant failed to raise the integrated employer issue in its original brief, it could not do so later in a reply brief. The court also found that the issue of aggregated employees was moot because plaintiff failed on the merits. The court found that employer technically failed to provide the required notice of FMLA rights, but since defendant provided unlimited sick days, no economic harm occurred as a result of the failure. The court noted that a technical violation alone cannot sustain a claim of failure to provide notice. In order to state a claim of retaliatory intent, a plaintiff must show that "(1) he exercised rights protected under the FMLA; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent." The court found that plaintiff could not have been fired in retaliation for exercising FMLA rights because he merely called in sick. A plaintiff must specifically state a need for FMLA in order to exercise FMLA rights. Thus, plaintiff failed to prove the first prong of the test. Plaintiff also failed at the forth prong because he could not prove that employer considered his absences in making the decision to discharge as employer did not reference the absences, but repeatedly gave plaintiff the opportunity to retain employment if he underwent an analysis by a chemical dependency expert. The court also noted that the three-month gap between the last absence and the discharge defeat a claim of retaliatory intent. The court also noted that plaintiff could not rebut the legitimate reason for his discharge under the burden-shifting analysis, because he could not refute that a neighbor told employer plaintiff was operating a company vehicle while intoxicated and that employer based its actions on that report and plaintiff's refusal to be evaluated.

***Sanders v. State of Okla.ex. rel. Okla.Workers' Comp. Comm.*, No. CIV-15-0703-HE, 2016 WL 1737135 (W.D. Okla. May 2, 2016)**

Plaintiff sued her former employers, allegedly the Oklahoma Workers' Compensation Court of Existing Claims (a now-defunct state workers' compensation court) and a state commission that replaced the workers' compensation court ("Commission"), for retaliating against her for taking self-care and family-care FMLA leave. Plaintiff also named the executive director and two members of the commission as defendants. Plaintiff was hired to work for the workers' compensation court and then transitioned to serve in a shared pool of workers for both

entities during the reorganization. The Commission opted to terminate plaintiff. Plaintiff alleged, among other claims, that her termination was in retaliation for her use of FMLA leave.

First, the court ruled that the workers' compensation court could not be liable for retaliation because the workers' compensation court was not plaintiff's employer. The statute that created the commission stated that the workers' compensation court's personnel were transferred to the Commission. Plaintiff argued that, regardless of the statute, the workers' compensation court and the Commission were her "joint employers" because she worked in the shared pool prior to the reorganization. The court rejected this argument. The court explained that both the workers' compensation court and the Commission were state entities. The court suggested that it was "pointless" to debate joint employer theories as plaintiff could only recover from the state. Further, the court held that the statute was explicit that the workers' compensation court was no longer plaintiff's employer after the reorganization. Because the workers' compensation court was no longer plaintiff's employer at the time of the alleged retaliation, the court dismissed all claims against it. Second, in accordance with well-settled Supreme Court precedent, the court ruled that the Commission had state sovereign immunity against plaintiff's claim of retaliation for the use of self-care FMLA leave, but no sovereign immunity against the family-care claim. Thus, the court dismissed the claim against the Commission based on self-care leave, while allowing the claim based on family-care leave to move forward. Third, the court dismissed all FMLA retaliation claims against the individual Commission leaders holding that the complaint contained no factual allegations about the leaders' actions that could serve as bases for liability.

***Dodge v. JCJL Enters., Inc.*, No. 1:15-CV-00924-CL, 2016 WL 4211895 (D. Or. Aug. 9, 2016)**

A district court in Oregon denied former employer's motion for summary judgment regarding employee's FMLA claims. Defendant corporation owned a truck stop restaurant where plaintiff worked as a server. Plaintiff broke her ankle, required surgery, and took an agreed-upon medical leave. She was scheduled to return to work on November 5, 2013. When she returned, employer informed her that no positions were available and asked her to provide a second return-to-work release from her primary care physician. Mr. and Mrs. Stella owned 70% of JCJL and had majority interests in several other local businesses including two sports bars, a convenience store, and a catering business. Employer argued it was not an "employer" under the FMLA because the truck stop employed fewer than 50 employees during the relevant time period.

The court noted that the truck stop had 36 employees, but the issue turned on whether all five of the Stellas' businesses should be counted in the aggregate. The court applied an "integrated employer test" and analyzed four factors: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. The court determined that it could not find that the entities did not share interrelated operations during the relevant time period. Specifically, the court noted that the Stellas had oversight over all the businesses; one general manager oversaw all the businesses; the businesses had one central payroll system and shared employees; there were regular intra-business loans with no interest or advance notice; family members had shared management

duties; a single attorney drafted an identical employee handbook for all five businesses; and Mr. and Mrs. Stella alone constituted a quorum for voting in all of the entities.

***Kieffer v. CPR Restoration & Cleaning*, No. CV 15-3048, 2016 WL 4119842 (E.D. Pa. Aug. 3, 2016)**

Plaintiff was a supervisor for one of the defendant companies, each of which performed cleaning and restoration services to properties damaged by insurable claims. Plaintiff initially worked for one of the entities. That employment ended in November 2013, and plaintiff was hired by the second company. The two entities perform the services in different geographical locations and have separate corporate offices. Ultimately, plaintiff resigned over a dispute about whether the second employer would pay for relocation expenses. Each defendant has less than the fifty employees required for the FMLA to apply. Plaintiff filed suit through which he claimed that the two entities should be each treated as one so that the FMLA would apply. However, plaintiff failed to articulate whether he was pursuing a claim under the "joint employer" test, through which a plaintiff attempts to hold the non-legal employer liable, or the "integrated employer" test through which he can aggregate the number of employees to create liability for the legal employer. The court analyzed the case under each theory. The factors to consider for the integrated employer test are: "(1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control." The Third Circuit focuses on the "economic realities as opposed to corporate formalities." No one single factor controls. In order to determine common management, the court examines whether the entities: "(1) actually have the same people occupying officer or director positions with both companies; (2) repeatedly transfer management-level personnel between the companies; or (3) have officers and directors of one company occupying some sort of formal management position with respect to the second company." The court found that even though there was a common president for both entities, each individual entity had a person who was responsible for day-to-day operations of only one entity and no repeated transfer of management level personnel between entities occurred. The court also found that no interrelation between operations existed despite shared administration of payroll, accounting and technical matters because those are shared for efficiency sake. The court noted that each entity has its own federal tax ID, and bank accounts and that the entities did not share in the performance of services, did not jointly advertise, did not share equipment, did not submit joint proposals and had separate corporate addresses. The court found that no centralized control of labor relations existed because, despite the president's ultimate authority and sometimes input into labor decisions, the subordinates made their own labor decisions and did not have input into the other entity's labor matters. The court noted that the president's ownership of each entity was not enough to overcome the other factors and the economic realities did not support a finding of integrated employer status.

The court noted that plaintiff failed to establish a joint employer relationship because he failed to show that one entity exercised some control over the employees of the other entity or *vice versa*. In attempting to prove joint employer status, plaintiff only cited the evidence related to the integrated employer test, which failed to show that the entities shared his services, had input into the employment decisions made by the other entity or "ever acted in the interest of the other employer" with respect to plaintiff's employment. Thus, the court granted summary judgment to defendants.

***Pierce v. Landmark Mgmt. Grp., Inc.*, 880 N.W.2d 885 (Neb. 2016)**

Plaintiff, an employee of two companies owned by one owner, brought an action against her former employers claiming she was terminated in violation of the FMLA. The district court granted summary judgment for plaintiff on the issue of whether her employers were "integrated" and met the threshold number of employees to be covered by the FMLA. One of the companies had 38 employees, while the other company had 17 employees. If the companies were not integrated, then neither would be covered because of the FMLA's 50 employee requirement. But the court decided her employers were integrated for purposes of the FMLA for several reasons. First, plaintiff worked for both companies. Second, the companies had common management as the owner of both companies made the high-level management decisions for both companies. Third, there was significant interrelation between the companies. For example, the companies shared office space and at least some personnel. They also shared one "IT guy" and one payroll process. Fourth, the companies had shared work processes, including a centralized accounting and bookkeeping process. The owner's affidavit that the companies were separate and distinct was insufficient to create an issue of fact at the summary judgment stage and, in any event, contradicted his earlier deposition testimony. Accordingly, the court granted summary judgment solely on the issue of integration to determine that employee was covered by the FMLA.

V. Joint Employers

Summarized elsewhere:
***Sanders v. Cajun Iron Workers, Inc.*, No. CV 15-5423, 2016 WL 4063868 (E.D. La. July 29, 2016)**

***Kieffer v. CPR Restoration & Cleaning*, No. CV 15-3048, 2016 WL 4119842 (E.D. Pa. Aug. 3, 2016)**

A. Test

***Tibbs v. Ill. Admin. Office of Ill. Courts*, 149 F. Supp. 3d 1015 (C.D. Ill. 2016)**

A court employee brought action for violations of the FMLA after she was discharged. Defendant's motion for summary judgment was granted on alternative grounds. The court agreed with defendant's first argument that it was not defendant's employer for purposes of the FMLA. Defendant did not make decision the discharge plaintiff, did not supervise employee's day to day activities, did not control the rules and conditions of employment, and was not in control of her work assignments. It was the chief judge that was plaintiff's employer because he had the power to hire, fire and controlled plaintiff's working conditions. The court found that even in a joint employer situation, one employer could not be held liable for the actions of another employer.

The court also reasoned that if defendant were the proper employer, an employee is not entitled to return to her prior position if she would have been terminated regardless of whether she took FMLA leave. Plaintiff was terminated approximately two weeks after returning from FMLA leave. However, the court found that the timing was not suspicious because defendant had a legitimate and uncontested reason for waiting to take any action on her termination—defendant waited until plaintiff returned before engaging in the disciplinary process for conduct

that occurred immediately before she took FMLA leave. After she refused to participate in the disciplinary meetings after her return, her employment was terminated.

***Cisneros v. Firstmerit Corp. & LPL Fin., LLC*, No. 14-CV-14893, 2016 WL 465480 (E.D. Mich. Feb. 8, 2016)**

Updated: *Cisneros v. Firstmerit Corp.*, No. 14-CV-14893, 2016 WL 465480, at *1 (E.D. Mich. Feb. 8, 2016), *order vacated on reconsideration sub nom. Cisneros v. Firstmerit Corp.*, No. 14-CV-14893, 2016 WL 1640373 (E.D. Mich. Apr. 26, 2016), *reconsideration denied*, No. 14-CV-14893, 2016 WL 3267578 (E.D. Mich. June 15, 2016)

Summary for Feb. 8, 2016 opinion:

A financial advisor brought suit in the District Court for the District of Eastern Michigan for violations of FMLA against two companies she alleged were her joint employers. In her position with the financial services company, plaintiff was required to obtain two licenses through FINRA. The financial services company contracted with a broker-dealer to hold plaintiff's licenses. At summary judgment, the broker-dealer argued that it was not plaintiff's employer for purposes of the FMLA. The court disagreed with the broker-dealer's argument that it was not plaintiff's employer for purposes of the FMLA. The broker-dealer was her employer because it had the ability to closely monitor her work, impose restrictions limiting her from executing trades, and it had the ability to cease holding her licenses, which was a condition that would adversely affect plaintiff's employment status. If her licenses were not held by the broker-dealer, plaintiff would either be demoted or terminated. Since the broker-dealer had control over plaintiff's employment, it could be considered a joint-employer.

The court granted defendants' motion for summary judgment as to plaintiff's claim for retaliation in violation of the FMLA. To establish a causal connection between her taking FMLA leave and the adverse employment actions, which culminated in her termination, plaintiff had no evidence of a connection other than temporal proximity. The first alleged adverse employment action, being required to take only one of two incentive trips that she earned, did not occur until at least nine months after she returned from FMLA leave. A temporal proximity at least nine months is insufficient to demonstrate a causal nexus. Moreover, the court found that an investigation that led to her termination could not be considered part of her termination to form a single adverse employment action.

***Hughes v. Musselman Hotels Mgmt., LLC*, No. 3:16cv708-HEH, 2016 WL 6573960 (E.D. Va. Nov. 4, 2016)**

A plaintiff employee sued her employer and a third-party firm that provided human resources consulting services to employer for interference and retaliation under the FMLA. The district court in Virginia granted the third-party firm's motion to dismiss on the grounds that it was not an employer within the meaning of the FMLA. It applied a four-factor "economic reality" test and examined whether: (1) the third-party firm had the power to hire or fire employees; (2) it supervised or controlled schedules or conditions of employment; (3) it determined the rate and method of pay; or (4) maintained employment records. The court

determined that the third-party firm provided advice but did not have anything more than advisory authority over plaintiff's employment and had no contact with plaintiff.

Summarized elsewhere:
***Kieffer v. CPR Restoration & Cleaning*, No. CV 15-3048, 2016 WL 4119842 (E.D. Pa. Aug. 3, 2016)**

B. Consequences

C. Allocation of Responsibilities

VI. Successors in Interest

***Cortese v. Terrace of St. Cloud, LLC*, No. 6:15-cv-2009-Orl-40DAB, 2016 WL 1618069 (M.D. Fla. Apr. 22, 2016)**

Plaintiff, a Licensed Practical Nurse (LPN), brought this action against her former employer, a company that owned and operated nursing homes, alleging FMLA retaliation and interference. Defendant was the successor to Southern Oaks, which was the facility at which plaintiff worked. In the summer of 2012, two years after she began working for Southern Oaks, she used intermittent FMLA leave for various reasons. Plaintiff's immediate supervisor issued her a negative performance evaluation due to the leave she took and informed her that she would be terminated if she continued to use FMLA leave. Prior to taking over control of Southern Oaks, defendant interviewed its employees to determine who would be retained. The same day that defendant took over, it terminated plaintiff's employment.

Defendant moved to dismiss plaintiff's claims for failure to state claims upon which relief could be granted. The court denied its motion. Defendant first argued that plaintiff's FMLA interference claim was duplicative of her retaliation claim and should therefore be dismissed, but the court held that a duplication of a claim made elsewhere in a complaint is not a legal reason to dismiss a complaint. Defendant argued second that plaintiff failed to allege sufficient facts to state a claim for retaliation, arguing that plaintiff failed to show a causal connection between her protected FMLA activity and her termination. The court rejected this argument based on the temporal proximity between plaintiff's taking of her FMLA leave and her subsequent discharge.

Employer argued third that plaintiff failed to sufficiently allege her theory that it can be held liable for its predecessor's violation of the FMLA as its successor-in-interest. The court held that it was sufficient that plaintiff notified defendant of her theory of liability and the allegedly discriminatory conduct of Southern Oaks, for which she intended to hold defendant responsible.

Summarized elsewhere:
***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

A. Test

B. Consequences

VII. Individuals

***Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415 (2d Cir. 2016)**

Employee payroll administrator took leave to care for a family member, and subsequently extended leave to care for another family member. Employee was terminated on the grounds that she did not provide the proper FMLA paperwork and abandoned her position. Employee brought action against employer and individual supervisors, alleging interference and retaliation under the FMLA. The district court granted summary judgment for defendant, and, holding that the individual defendants were not "employers," ruled that leave was not withheld from employee, employee failed to submit proper medical certification for leave, and employee was not terminated in retaliation for exercising her leave rights. Plaintiff appealed.

In an issue of first impression for the Second Circuit, the court held (in line with the holdings of sister circuits) that the economic reality test used to analyze individual liability under the FLSA applied to the FMLA. Under this analysis, the court found that the director of human resources, an individual defendant here, could be found to be an "employer" under this test because there was evidence that she played an important role in the decision to terminate plaintiff, exercised control over plaintiff's schedule and conditions of employment, and controlled plaintiff's rights under the FMLA. Therefore, the court vacated the dismissal of plaintiff's FMLA claims against the H.R. director.

Regarding plaintiff's FMLA interference claim, the Second Circuit formally adopted a standard to analyze interference with FMLA rights. A plaintiff must establish: (1) that she is an eligible employee under the FMLA; (2) that defendant is an employer as defined by the FMLA; (3) that she was entitled to take leave under the FMLA; (4) that she gave notice to defendant of her intention to take leave; and (5) that she was denied benefits to which she was entitled under the FMLA. The Second Circuit found that plaintiff put forward sufficient evidence to raise questions of material fact regarding whether she took intermittent leave prior to her return to work and whether her intermittent leave was approved because a jury could find that plaintiff submitted sufficient certification that satisfied the statutory requirements. Additionally, under the FMLA, an employee seeking leave need not submit medical certification unless and until it is specifically requested by her employer—vague or misleading requests do not satisfy that standard. Because employer never directly responded to plaintiff's question as to what additional documents were needed and plaintiff provided some documentation, questions of material fact remained as to this claim. Therefore, the Second Circuit reversed the grant of summary judgment on plaintiff's FMLA interference claim.

Lastly, on plaintiff's claim of retaliation, the court also vacated summary judgment. First the court found that plaintiff satisfied the *McDonnell Douglas* standard by showing evidence of inconsistent and implausible employer explanations for the non-retalitory reasons for its actions. The court reasoned that because employer stated it terminated plaintiff for failure to return to work but it would not allow her to return to work until she had submitted new FMLA paperwork, a jury may find that plaintiff satisfied her burden. Additionally, there was a very close temporal proximity between plaintiff's leave and defendant's decision to terminate plaintiff—plaintiff had still not been permitted to return to work despite her requests to do so when she was terminated.

This fact also permitted the conclusion that defendants' fired plaintiff not for "abandoning" her position but also for attempting to take FMLA leave.

***Radeker v. Elbert Cty. Bd. of Comm'rs*, No. 14-CV-01238CMA-KMT, 2016 WL 1586391 (D. Colo. Apr. 19, 2016)**

Plaintiff filed an FMLA interference claim because her former employer terminated her during FMLA leave. After the court denied summary judgment for defendant employer, defendant brought a motion for reconsideration, asking the court to grant summary judgment on the issue of individual liability due to qualified immunity. The court denied the motion because the individual defendants' "argument that they do not have individual liability under the FMLA cannot legitimately be characterized as a claim of qualified or good faith immunity." Therefore, denial of summary judgment was proper to the extent the motion for summary judgment argued the individual defendants were entitled to qualified immunity on plaintiff's FMLA claim. Further, because the parties had not briefed the issue of whether the individual defendants had individual liability under the FMLA, without considering the issue of qualified immunity, the court refused to decide that issue.

***Elder v. Elliot Aviation, Inc.*, No. 4:15–cv–04123–SLD–JEH, 2016 WL 5213909 (C.D. Ill. Sept. 20, 2016)**

In *Elder v. Elliot Aviation, Inc.*, plaintiff, a 10-year employee of defendant, was granted intermittent FMLA leave in 2008 related to his stepson's autism. He alleged that he started taking FMLA leave and that, as a result, his supervisors started harassing him about missing work. He alleged that he complained, but the alleged harassment continued. Plaintiff later developed depression and defendant approved intermittent FMLA leave for that condition. In July 2013, plaintiff again complained that his supervisors were harassing him due to his use of FMLA leave. Defendant investigated and concluded that the harassment was, indeed, occurring. At the end of July 2013, plaintiff's physician prescribed a new medication to treat his depression. An adverse reaction to the medication on July 28, 2013 caused plaintiff to oversleep the next day and miss work. Defendant terminated his employment as a result. He sued defendant and his supervisors, alleging state tort claims and FMLA interference and retaliation. Defendant filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), asserting that the FMLA preempts plaintiff's state law tort claims for intentional infliction of emotional distress.

Noting that "there is no express preemption provision in the FMLA," the district court rejected defendant's preemption argument because the FMLA does not conflict with plaintiff's state emotional distress claims against his supervisors. Specifically, the court concluded that the FMLA claims against his supervisors are not cognizable because the supervisors did not take actions that resulted in the denial of FMLA benefits; nor did they impose any material adverse action against him. Thus, they are not "employers" under plaintiff's theory. Rather, according to the court, "the individual defendants are alleged to have created something that sounds more like a Title VII hostile work environment… The court cannot find any case law suggesting such a theory of retaliatory liability exists under the FMLA…" Consequently, the court concluded, because there was no cognizable claim against the individual defendants under the FMLA, the FMLA does not preempt plaintiff's state law tort claims against them.

***Mattison v. Md. Transit Admin.*, No. CV RDB-15-1627, 2016 WL 2898020 (D. Md. May 18, 2016)**

Plaintiff employee held various positions with defendant public employer. After being diagnosed with diverticulitis, plaintiff applied for and was granted FMLA leave. Plaintiff alleged that his supervisor began a consistent campaign of harassment and intimidation following his request for FMLA leave. Plaintiff subsequently sued his public employer and his supervisor in his individual capacity under the FMLA. One of the issues before the court was whether an individual claim against the supervisor under the FMLA existed. After acknowledging a significant split in the district and circuit courts, the district court held that the supervisor was immune from liability under the FMLA. The court reasoned that if a state enjoys sovereign immunity for claims brought under the FMLA, individual supervisors under the FMLA should also be protected by the same immunity. The court therefore granted defendant's motion to dismiss any individual claims under the FMLA against the individual supervisor in his individual capacity.

***Ross-Tiggett v. Reed Smith LLP*, No. CV 15-8083 (JBS-AMD), 2016 WL 4491633 (D.N.J. Aug. 25, 2016)**

Plaintiff, proceeding *pro se*, filed an FMLA retaliation claim and many other claims against her prior employer, several supervisors, a human resources employee, and a number of attorneys that worked in the same office. Plaintiff's FMLA claim, asserted against only the human resources employee, stemmed from her request for FMLA leave to take her child to a medical appointment. Employer asked for additional information regarding the appointment, but plaintiff failed to provide further information. In her complaint, plaintiff alleged that the FMLA request was never approved. The human resources employee moved to dismiss the claim, and the court granted the request, finding that while individuals may be held liable under the FMLA, the individual defendant in question had no involvement with the denial of plaintiff's request for FMLA leave.

***Bergman v. Kids by the Bunch Too, Ltd.*, No. 14-CV-5005 (DRH)(SIL), 2016 U.S. Dist. LEXIS 62596 (E.D.N.Y. May 10, 2016)**

In *Bergman v. Kids by the Bunch Too, Ltd.*, a U.S. magistrate judge issued a report and recommendation order granting plaintiff's motion for default judgment as to the corporate defendants on a number of employment claims, and as to named individual defendants on some of those claims. Plaintiff sought a variety of monetary damages, including lost wages under the FMLA. Although employers had not responded and a certificate of default had been entered, the court was required to determine whether plaintiff had pled viable and adequate claims under the statutes, taking all well-pled allegations as true.

With respect to the FMLA claims, the court first concluded that plaintiff, a former day care center director, had pled adequate facts to establish that the two individual defendants were employers within the meaning of the FMLA. Applying the economic realities test, the court concluded that plaintiff's allegations showed that one defendant made the decision to terminate her, and was involved with pay decisions; the other had the ability to set schedules and grant leave; and both had day to day operational control over the enterprise.

The court also found adequate factual allegations to establish FMLA retaliation and interference claims. Plaintiff pled sufficient facts to show an entitlement to leave. She established sufficient proof of the prohibited acts of retaliation and interference by alleging that she was discharged while on her FMLA leave.

***Washington-Walker v. Univ. of Okla. Bd. of Regents*, No. CIV-15-1158-M, 2016 WL 1453053 (W.D. Okla. Apr. 13, 2016)**

Plaintiff was employed by the University of Oklahoma. Upon termination, she filed a lawsuit, which contained a claim under the FMLA, against her direct manager and supervisor in their individual capacities. The manager and supervisor filed a motion to dismiss, claiming they did not have the requisite responsibility to be deemed "employers" under the FMLA. Relying on precedent in the Third, Fifth, and Eighth Circuits and citing to § 2611(4)(A)(ii)(I) of the FMLA, the court found that a public employee sued in his or her individual capacity may be an "employer" for the purposes of the FMLA if that individual "acts, directly or indirectly, in the interest of an employer to any the employees of such employer." In this case, the court found that since employee's manager and supervisor had authority over employee, and also had the power to fire and control conditions of employment, they could be deemed "employers" as defined by the FMLA. The court therefore denied the motion to dismiss on this claim.

***Jackson v. Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP*, 29 N.Y.S.3d 91 (N.Y. Civ. Ct. Jan. 12, 2016)**

Plaintff, the chauffer for a managing partner, brought action against the law firm for improper termination under the FMLA after he was hospitalized. Defendant moved for summary judgment on the ground that it was not plaintiff's employer, arguing that plaintiff was employed directly by the managing partner.

The court noted that the Second Circuit employs the FLSA "economic realities" test to determine whether an entity is an employer under the FMLA. The overarching consideration of this test is whether the entity possessed the power to control the worker in question. The firm paid part of plaintiff's salary and extended his health insurance, which alone would not make the firm plaintiff's employer. Until the record was clarified as to whether plaintiff performed work relating to the managing partner's responsibilities at the firm, and whether the work directly benefitted the firm, the court could not rule on summary judgment seeking dismissal on the ground that the firm was not plaintiff's employer under the FMLA.

Summarized elsewhere:
***Banner v. Dep't of Health & Soc. Servs. Div. for the Visually Impaired*, No. CV 14-691-LPS, 2016 WL 922058 (D. Del. Mar. 10, 2016)**

***Diby v. Kepco Inc.*, No. 16-CV-583(KAM)(LB), 2016 WL 5879595 (E.D.N.Y. Oct. 7, 2016)**

***McFadden v. Tulsa Co. Bd. of Cty. Comm'rs*, 2016 WL 6902182 (N.D. Okla. Nov. 23, 2016)**

***Cortazzo v. City of Reading*, No. 5:14-cv-2513, 2016 WL 1022267 (E.D. Pa. Mar. 15, 2016)**

***Farkas v. NRA Grp. LLC*, No. 1:15-CV-356, 2016 WL 3997432 (M.D. Pa. July 26, 2016)**

***Branham v. Delta Airlines*, No. 2:14-CV-429 TS, 2016 WL 1676829 (D. Utah Apr. 26, 2016)**

***Corbett v. Richmond Metro. Transp. Auth.*, No. 3:16cv470-HEH, 2016 WL 4492815 (E.D. Va. Aug. 25, 2016)**

CHAPTER 3.

ELIGIBILITY OF EMPLOYEES FOR LEAVE

I. Overview

II. Basic Eligibility Criteria

***Bere v. MGA Healthcare Staffing, Inc.*, No. C 16-01346 WHA, 2016 WL 3078871 (N.D. Cal. June 1, 2016)**

Plaintiff, a nurse's assistant, suffered an eye injury and commenced medical leave. While he was out on leave, plaintiff's duties were given to another employee and his position was eliminated so that he was terminated two days after returning to work. Plaintiff sued his employer, alleging retaliation under the FMLA, discrimination under the Fair Employment and Housing Act, the California Family Rights Act, and negligent infliction of emotional distress. The district court granted defendant's motion to dismiss, finding that plaintiff failed to state a claim under the FMLA because he did not establish his eligibility for FMLA leave by alleging facts showing that he had worked for defendants at least 1,250 hours during the previous 12 month period or that he had given notice of his intent to take FMLA leave. The court also dismissed plaintiff's other claims.

***Snider v. Wolfington Body Co.*, No. CV 16-02843, 2016 WL 6071359 (E.D. Pa. Oct. 17, 2016)**

Plaintiff brought suit against defendant alleging violations of Title VII, as amended by the Pregnancy Discrimination Act, the FMLA and Pennsylvania common law. When hired, plaintiff was in the early stages of her pregnancy. When plaintiff requested medical leave to give birth and care for her newborn, she was told that there was no maternity leave policy. Defendant did tell plaintiff that she would be allowed up to 10 days of leave. Plaintiff received a letter of termination on the day that she gave birth. When she took more than the allotted 10 days of leave to have and care for her child, her employment was terminated. Plaintiff contends that defendant subsequently refused to hire her because of her prior pregnancy and the chance that she might become pregnant again.

Regarding plaintiff's FMLA retaliation claim, both parties agreed plaintiff was not an eligible employee because she failed to work at least 1250 hours and she was not employed by defendants for at least 12 months. However, plaintiff argued that eligibility is not a prerequisite to bring a retaliation claim and even if it is, the doctrine of equitable estoppel preserves her ability to bring FMLA related claims. The court held that plaintiff was not eligible because her maternity leave would have occurred before she became FMLA eligible.

As for plaintiff's FMLA interference claim based on employer's noncompliance with the FMLA's notice requirements, plaintiff had to show that she suffered prejudice. The first prong of an interference claim requires an employee to show that she was "entitled to benefits under the FMLA." Plaintiff failed to show that she suffered a detriment. Plaintiff's argument was rejected by the court because it was not possible for her to become eligible before the birth of her child.

Summarized elsewhere:
***Wheeler v. Jackson Nat'l Life Ins. Co.*, No. 16-5163, 2016 WL 7241403 (6th Cir. Dec. 15, 2016)**

***Marcum v. Smithfield Farmland Corp.*, No. 6: 16-180-DCR, 2016 WL 6780311 (E.D. Ky. Nov. 15, 2016)**

***Tolbert v. Ean Servs., LLC*, No. 15-CV-735-GKF-TLW, 2016 WL 796096 (N.D. Okla. Feb. 26, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

***Colagiovanni v. Valenti Motors, Inc.*, No. HHD-CV13-6046276-S, 2016 WL 1728026 (Conn. Super. Ct. Apr. 12, 2016)**

III. Measuring 12 Months of Employment

Summarized elsewhere:
***Caporicci v. Chipotle Mexican Grill, Inc.*, No. 8:14-cv-2131-T-36EAJ, 2016 WL 3033502 (M.D. Fla. May 27, 2016)**

IV. Measuring 1,250 Hours of Service During the Previous 12 Months

***Craig v. UConn Health Ctr.*, No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)**

Plaintiff held various positions as an employee of the University of Connecticut Health Center. In the months leading up to the birth of her first child in September 2009, plaintiff worked fewer hours than she had in the past and took 10 sick days and 24 unpaid sick days. She then went out on qualifying maternity leave and exhausted her federal FMLA leave. Shortly after returning to work, plaintiff became pregnant again and gave birth to another child in December 2010. Prior to the second birth, plaintiff's employer informed her that she was ineligible for leave under the federal FMLA because she had not worked more than 1,250 hours during the year preceding the request, but explained that she was entitled to four more weeks of leave under Connecticut's FMLA. There was no evidence in the record indicating that plaintiff told anyone she was pregnant until October 2010. Then, starting on October 25, 2010, plaintiff stopped showing up to work. There was no evidence that plaintiff communicated to anyone that she would not return to work or why she was absent. Even so, defendant sent plaintiff a standard FMLA letter and the necessary medical forms it required for her to take Connecticut FMLA leave. Plaintiff did not submit the requested documentation by the deadline, and her employer

notified her that it was therefore considering her medical leave unauthorized. Thus, defendant discharged plaintiff.

Defendant filed a motion for summary judgment, which the court granted. The court held that at the time plaintiff had applied for her second maternity leave, she was ineligible for federal FMLA leave because she had not worked enough during the preceding 12 months. Additionally, because plaintiff had not pled a Connecticut FMLA claim, the court dismissed the case. The court also found that plaintiff's failure to advise claim failed for two reasons. First, the court held that the FMLA only provides a private cause of action to "eligible employees," and she was not an eligible employee because she had not worked enough hours. Second, the court held that even if she were an eligible employee, she failed to show that the FMLA requires employers to provide the type of notice and advice she sought, further commenting that the FMLA's notice requirements do not create an independent cause of action. The court stated that more individualized notice and assessment of an employee's eligibility and requirements is only triggered when an employer learns that an employee either seeks leave or has a condition that could qualify for FMLA leave, and plaintiff met neither of these factors.

***Caggiano v. Ill. Dep't of Corr.*, No. 14 C 3378, 2016 WL 362383 (N.D. Ill. Jan. 29, 2016)**

Plaintiff filed a one-count complaint against his former employer alleging FMLA interference. The district court denied defendant's motion for summary judgment because a factual dispute remained on the issue whether plaintiff was an FMLA eligible employee. In both 2011 and 2012, plaintiff was scheduled to work eight-hour periods with an unpaid 30-minute lunch break scheduled for each shift. After plaintiff missed three days of work in April 2012 to care for his mother, he sought FMLA protection. Defendant denied plaintiff's request for FMLA leave and ultimately terminated his employment for his unexcused absences. Defendant argued that its time-records showed plaintiff's hours worked were short of the requisite 1,250 hours worked in the previous 12-months to qualify for FMLA leave. Plaintiff countered that this calculation did not account for the 30-minute period during each shift that was supposed to be a lunch break. Plaintiff testified at his deposition that he was not able to take a lunch break because the overnight shift he worked was understaffed to the point that he was merely allowed time to quickly eat his food before continuing his work. When adding 30 minutes to each shift, plaintiff met the 1,250 hours requirement to be eligible for FMLA protection. The court held that although defendant could submit documents to show plaintiff took a 30-minute lunch break each shift, a factual issue remained to determine whether plaintiff's time during the supposed lunch breaks were spent predominantly for the benefit of plaintiff or defendant. Therefore, the court denied defendant's motion for summary judgment.

***Patterson v. Del. River Port Auth. of Pa. & N.J.*, No. CV 15-5405, 2016 WL 2744819 (E.D. Pa. May 9, 2016)**

Employee had used FMLA leave throughout his employment. In August 2012, he failed to show up for numerous shifts and failed to call in and report absences. In mid-August, employee faxed a letter indicating he had an illness, and would return in a few days "if his symptoms have resolved." Employer sent employee a notice of his FMLA rights, but soon after, confirmed that he had only worked 1239 hours in the previous 12 months.

Employee filed a lawsuit alleging FMLA interference and retaliation. He argued that employer's records about his hours worked were "likely" not accurate, but he offered no evidence refuting the records. Accordingly, the court granted summary judgment for employer.

***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

Plaintiff, an itinerant special education teacher, brought an action in the United States District Court for the Middle District of Pennsylvania against defendants, a school district management entity and several of its employees, seeking damages. The complaint set forth a number of claims, including interference and retaliation under the FMLA. Defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint. As to plaintiff's FMLA claims, the court denied defendants' motion on the grounds that the arguments defendants raised to challenge plaintiff's eligibility for FMLA leave required the court to consider factual matters outside of the pleadings, which would have been improper at that stage.

Plaintiff alleged she suffered from fibromyalgia, neuropathy, chronic fatigue syndrome, chronic muscle spasms, depression and anxiety, which caused chronic pain and fatigue, as well difficulty standing and walking for long periods, carrying objects, sleeping, and concentrating. She made defendants aware of her conditions in 2010. Between then and January 2014, plaintiff had been approved for intermittent leave under the FMLA, and had voluntarily used said leave on occasion. Plaintiff alleged, however, that the bulk of her use of FMLA leave was at the demand of defendants, who put her on multiple leaves related to their investigations of accusations related to drug use and endangering her children, as well as one other unexplained investigation. On January 21, 2014, defendants terminated plaintiff's intermittent FMLA leave claiming she no longer met the FMLA's "hours of service" requirement. Defendants then disciplined and subjected her to excessive and overly harsh monitoring and performance evaluations for her use of leave time that had previously been FMLA protected leave.

In denying defendants' motion to dismiss plaintiff's FMLA claims, the court stated that although defendants argued that they were entitled to recalculate plaintiff's FMLA leave when they terminated her leave in January 2014, there was no information before the court as to when the 12-month period for which plaintiff was eligible concluded. The court also stated that it would be required to consider what factors went into the calculation of the 1,250 hour requirement, which were not before the court by way of plaintiff's pleading.

Summarized elsewhere:
***Woldeselassie v. Am. Eagle Airlines, Inc.*, 647 F. App'x 21 (2d Cir. 2016)**

***Diby v. Kepco Inc.*, No. 16-CV-583(KAM)(LB), 2016 WL 5879595 (E.D.N.Y. Oct. 7, 2016)**

***Donahue v. Asia TV USA Ltd.*, No. 15 CIV. 6490 (NRB), 2016 WL 5173381 (S.D.N.Y. Sept. 21, 2016)**

***Johnson v. Wal-Mart Stores E., L.P.*, No. 3-15-0485, 2016 WL 4160971 (M.D. Tenn. Aug. 5, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

***Jackson v. Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman LLP*, 39 N.Y.S.3d 688 (N.Y. Civ. Ct. Sept. 23, 2016)**

V. Determining Whether the Employer Employs Fifty Employees within 75 Miles of the Employee's Worksite

***Donahoe-Bohne v. Brinkmann Instruments*, No. CV 16-2766, 2016 WL 3275437 (E.D. La. June 15, 2016)**

Employer moved to dismiss employee's claim that employer continually harassed and discriminated against her on account of her gender, age, and personal and family health issues and ultimately terminated her employment after she requested leave for her serious health condition and that of her husband. Employee began working for employer's predecessor as a sales rep in 1996, was promoted several times, and in 2014 was working as technical support specialist. Employee claimed that in November 2014 she began dealing with serious medical conditions, including chronic respiratory disease and laryngitis. She claimed that she tried to work to the best of her abilities, but that a manager ridiculed her and called her "squeaky" in front of customers, along with other inappropriate behavior not relevant to her FMLA-related claim. In January 2015, employee's husband had a slip and fall accident requiring two surgeries that month. Employee alleges she was willing to work intermittently during his six to eight-week recovery period. She stated that her manager instructed her to take paid time off instead.

Employee alleges that no manager ever informed her of her rights and responsibilities under the FMLA or the level of accommodation required by law. In February 2015, human resources informed her that her employment was being terminated because she lacked troubleshooting skills and that she had not been reliable over the past few months, directly referencing her personal and family health issues. Employer argued that she failed to establish that she was an eligible employee under the FMLA. Employee submitted an affidavit stating that she worked offsite and from home through telecommunication and that she reported to the Tampa, Florida corporate office, which had more than 50 employees. The court determined that employee provided sufficient evidence to support her claim that she was an eligible employee under the FMLA and denied employer's motion because a genuine issue of material fact existed with respect to her eligible employment status.

A. Determining the Number of Employees

***Casey v. City of Glencoe*, No. 4:14-CV-00595-HGD, 2016 WL 1270526 (N.D. Ala. Mar. 31, 2016)**

Summary judgment case, which was granted in favor of defendant City of Glencoe. Plaintiff Casey worked for defendant as a city clerk. During the tenure of plaintiff's employment, the City of Glencoe did not have 50 employees working at or within 75 miles of City Hall. Plaintiff had time off for family bereavement and hospitalizations, but never submitted written notice of the need for FMLA leave or medical certification. Plaintiff suffered

a stroke, but never requested her hospitalization be treated as FMLA. After returning to work, she requested two weeks off as vacation leave. She was advised by the Mayor that defendant couldn't grant extended leave because the assistant city clerk was already on leave. After plaintiff supported the Mayor's opponent in an election, she was told she should take administrative leave and that she would not be reappointed. She was not told she was fired or terminated, but could continue to do her job if she could do so without becoming overcome by emotion. Following this conversation, plaintiff left City Hall and did not return to work, but received full pay and benefits until the end of her term.

The court granted summary judgment because plaintiff failed to carry her burden that she was eligible for FMLA leave, and the evidence showed that defendant did not employ the requisite number of employees at the worksite. Therefore, there could not be a valid claim for FMLA interference or retaliation.

Summarized elsewhere:
***Strulson v. Chegg, Inc.*, No. 3:15-CV-00828-CRS, 2016 WL 3094050 (W.D. Ky. June 1, 2016)**

***Diby v. Kepco Inc.*, No. 16-CV-583(KAM)(LB), 2016 WL 5879595 (E.D.N.Y. Oct. 7, 2016)**

***Weissberg v. Chalfant Mfg. Co.*, No. 1:14-CV-1567, 2016 WL 541466 (N.D. Ohio Feb. 11, 2016)**

B. Measuring the Number of Miles

C. Determining the Employee's Worksite

***Knutson v. Air-Land Transp. Serv., Inc.*, No. C15-2076, 2016 WL 4649816 (N.D. Iowa Sept. 6, 2016)**

Plaintiff worked as a truck driver for defendant. Plaintiff took one extended leave of absence after his first year of employment, but defendant and plaintiff disagree as to whether the absence was an FMLA leave. Plaintiff subsequently had a series of non-FMLA protected intermittent absences, was progressively disciplined and then discharged for such absences. Plaintiff claims that defendant discharged him so as to prevent him from taking a second medical leave for possible upcoming heart surgery. Plaintiff claimed he worked at or reported to a facility with 50 or more employees in a 75-mile radius and, thus, would have been eligible for FMLA covered leave. Defendants asserted that plaintiff worked at a different facility without a sufficient number of employees to be covered by the FMLA. The court noted that "for an employee with no fixed worksite, like a truck driver, 'the worksite is the site to which they are assigned as their home base, ***from which their work is assigned***, or to which they report.'" The court found that plaintiff received his work instructions from the site with 50 or more employees within a 75-mile radius and, thus, was an eligible employee under the FMLA. However, the court granted defendant's motion for summary judgment with regard to the claim that defendant interfered with his entitlement to take FMLA leave by prematurely terminating him. The court found that there was no medical evidence that such a leave was actually needed, that plaintiff had already used 12-weeks of FMLA covered leave and that the attendance violations were a legitimate non-discriminatory reason for discharge. For similar reasons, the court found that

plaintiff could not establish a causal connection between the exercise of an FMLA right and his discharge. Plaintiff did not establish that an actual need for FMLA covered leave existed and the absences were a legitimate reason for discharge.

VI. Individuals Who Are Deemed To Be Eligible Employees Under the FMLA

***Burnette v. Rategenius Loan Servs.*, No. A-16-CV-577-SS, 2016 WL 3004671 (W.D. Tex. May 23, 2016)**

Plaintiff filed an application to proceed in forma pauperis when she submitted her complaint against her former employer. The District Court for the Western District of Texas referred the motion and the complaint to the magistrate judge for a determination on the merits under 28 U.S.C. §1915(e)(1). Plaintiff failed to make a claim for FMLA interference when he failed to demonstrate that he was entitled to FMLA leave. Plaintiff failed to establish that he was eligible for FMLA leave because he continued to perform his job remotely for four months while suffering from the same condition for which he requested FMLA leave.

Plaintiff further failed to plead any facts showing he was prejudiced by employer not apprising him of his FMLA rights. Plaintiff's own pleadings show that he would have been terminated regardless of any rights he did or did not have under the FMLA, and thus employer's failure to notify him of those rights could not have caused him any harm.

Summarized elsewhere:
***Kicklighter v. McIntosh Cty. Bd. of Comm'rs*, No. CV 214-088, 2016 WL 722157 (S.D. Ga. Feb. 19, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

VII. Exception for Certain Airline Employees

CHAPTER 4.

ENTITLEMENT OF EMPLOYEES TO LEAVE

I. Overview

***Keselyak v. Curators of the Univ. of Mo.*, No. 2:16-CV-04101-MDH, 2016 WL 4126568 (W.D. Mo. Aug. 2, 2016)**

Plaintiff, a tenured professor at the University of Missouri, fell down a flight of stairs at work and was diagnosed with a brain injury. Plaintiff sued her employer for interference and retaliation under the FMLA, after her employer suspended her salary because she would not apply for FMLA leave. Plaintiff claimed that she did not need to apply for FMLA leave because she had good cause for not working after her injury. The district court granted defendant's motion to dismiss, holding that defendant was immune under the 11th Amendment as an instrument of the State of Missouri and that plaintiff failed to state a claim under the FMLA

because she never applied for FMLA leave or tried to take FMLA benefits, and therefore could not show an entitlement to FMLA benefits.

***Lamonaca v. Tread Corp.*, 157 F. Supp. 3d 507 (W.D. Va. 2016)**

Plaintiff, who was defendant's human resources director, claimed that defendant interfered with her rights under the FMLA, and terminated her in retaliation for exercising, or attempting to exercise, her FMLA rights. The court denied defendant's motion for summary judgment, and a jury returned a verdict in favor of plaintiff on both her interference and retaliation claims. Thereafter, defendant moved for judgment as a matter of law, and plaintiff moved for liquidated damages. In its motion for judgment as a matter of law, defendant argued that plaintiff had failed to establish the first element of an FMLA interference claim, which is to show that she was entitled to take FMLA leave. Defendant argued that no reasonable jury could have found that plaintiff was entitled to take FMLA leave because (1) she resigned before requesting leave; (2) she did not provide sufficient notice of her need for FMLA leave; and (3) she did not have a serious health condition that prevented her from performing the essential functions of her job.

The court disagreed. Regarding defendant's contention that plaintiff resigned before requesting leave, the court concluded there was sufficient evidentiary basis for the jury's finding that plaintiff did *not* resign during a meeting with Barry Russell, the company's chief executive officer, but simply expressed that she was considering resigning. Regarding defendant's contention that plaintiff did not provide sufficient notice of her need for FMLA leave, the court considered the FMLA's requirements for an employee providing sufficient notice of a need for FMLA leave: "'When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA.' 29 C.F.R. § 825.303(b). Instead, an employee must merely provide 'sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.' *Id*." The court concluded there was sufficient evidentiary basis for the jury's finding that plaintiff *did* provide sufficient notice of her need for FMLA leave. She sent Russell and Kimberly Butler, the company's human resources assistant, a succession of emails regarding her suffering from a prolonged exposure to stress, which might cause her to need medical leave. She told them she'd made an appointment with her physician. She asked that the company provide her with the appropriate FMLA paperwork. The court said, "the mere fact that LaMonaca had not yet received medical treatement at the time she requested leave is not fatal to LaMonaca's claims."

In its contention that plaintiff did not have a serious health condition, defendant argued that plaintiff failed to establish that she was unable to work for more than three consecutive days. The court disagreed. The FMLA definition of a serious health condition includes, among other things, "[a] period of incapacity of more than three consecutive full calendar days." 29 C.F.R. § 825.115. However, according to the court, the testimony of Nina Sweeney, plaintiff's physician for seven years, that plaintiff was severely agitated due to her stress condition, that Sweeney had advised her to take a 30-day medical leave from work, and that plaintiff likely was unable to work for more than three days provided the jury with sufficient evidentiary basis for its finding that plaintiff had a serious health condition under the FMLA. Despite the fact that plaintiff sought other jobs while on FMLA leave, the court said that did not affect the fact that

she was unable to perform at her current job. Having found that defendant was not entitled to a new trial, the court granted plaintiff's request for liquidated damages.

II. Types of Leave

A. Birth and Care of a Newborn Child

B. Adoption or Foster Care Placement of a Child

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

Summarized elsewhere:
***Siddiqua v. N.Y. State Dep't of Health*, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)**

***Vick v. Brennan*, No. 14-CV-2193 (TSC), 2016 WL 1225857 (D.D.C. Mar. 28, 2016)**

1. Eligible Family Relationships

a. Spouse

b. Son or Daughter

Summarized elsewhere:
***Long v. Mayco, Inc.*, No. CIV-15-1019-M, 2016 WL 6783249 (W.D. Okla. Nov. 16, 2016)**

c. Parent

d. Certification of Family Relationship

2. "To Care for"

***Brown v. Rock-Tenn Servs., Inc.*, No. 1:14-CV-1196, 2016 WL 6808173 (W.D. Mich. Nov. 17, 2016)**

Plaintiff brought an action for violations of the FMLA against his former employer, a mill that produces paper and cardboard consumer packaging. Western District of Michigan denied defendant's motion for summary judgment as to the FMLA claims. Plaintiff had a certification for intermittent FMLA leave based on providing psychological support to his wife who had chronic conditions requiring treatment, including pancreatitis. Defendant argued that plaintiff was not eligible to use FMLA leave when he went to the doctor's office with his wife when she sustained an elbow injury because her condition was part of the FMLA certification. The court held that FMLA intermittent leave is not so narrow that it would conclusively exclude treatment, specifically when plaintiff's certification was based on providing psychological support.

Summarized elsewhere:
***Sanders v. Ill. Dep't of Corr.*, No. 15-CV-0147-SMY-PMF, 2016 WL 3387804 (S.D. Ill. June 20, 2016)**

***Schroers v. Genco I, Inc.*, No. 1:15-cv-01970-RLY-TAB, 2016 U.S. Dist. LEXIS 55120 (S.D. Ind. Apr. 26, 2016)**

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

***Sahlhoff v. Gurley-Leep Auto. Mgmt. Corp.*, No. 3:14-cv-1790 RLM-MGG, 2016 WL 5724440 (N.D. Ind. Sept. 29, 2016)**

Plaintiff filed a second amended complaint alleging defendants interfered with his right to unpaid medical leave and retaliated against him for asserting that right under the FMLA. Plaintiff worked for seven years as a car salesman for defendants. In March of 2012, he began to experience pain in and around his eye. The pain was so intense, that it often caused plaintiff to rest his head on his desk at work and made him struggle do his job. The pain also caused him to tell his supervisors that he could not work overtime. Whenever plaintiff explained his symptoms to his managers, or whenever his managers saw him in pain, they mocked and belittled him. Plaintiff had to leave work for medical examinations, which he sometimes delayed or would return to work immediately afterward. Plaintiff was eventually fired. Defendant said it was because plaintiff was not committed to the job. After he was terminated, plaintiff was ultimately diagnosed with a tumor that required removal of his right eye.

Regarding plaintiff's interference claim, defendants argued that a serious health condition must be diagnosed by the time an employee is terminated. The court however found that there was no requirement that a serious health condition be diagnosed by the time an employee is terminated. Also, the condition had to leave plaintiff unable to perform the functions of his job. An employee who must be absent from work to receive medical treatment for a serious health condition, is considered to be unable to perform the essential functions of the position during the absence for treatment. The court held that the definition of "unable to perform the essential functions of the position" does not require the health care provider to find that an employee is unable to work at all or is unable to perform any one of the essential job functions. Last, with regard to whether plaintiff provided sufficient notice to defendants of his intent to take FMLA leave, the court determined that he had provided sufficient information to show that he likely has an FMLA-qualifying condition.

***Elliot-Leach v. N.Y. City Dep't of Educ.*, No. 15 Civ. 5982 (ILG) (VMS), 2016 WL 4446147 (E.D.N.Y. Aug. 12, 2016)**

Plaintiff brought suit under 29 U.S.C. § 2615 to enforce FMLA rights to self care leave against the New York City Department of Education and a former supervisor. The district court granted defendants' motion to dismiss. Plaintiff argued that she had a right to self care leave. The court rejected plaintiff's argument, finding instead that plaintiff's doctor had ordered intermittent FMLA leave which defendants approved. Plaintiff's retaliation claim was also rejected by the court. Plaintiff failed to demonstrate a "causal inference" between her FMLA leave and termination. Plaintiff, a probationary employee, conceded that she was terminated for disciplinary reasons unrelated to the exercise of her FMLA rights.

Summarized elsewhere:
***Saldana v. Pub. Health Tr. of Miami-Dade Cty.*, No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)**

***Consedine v. Willimansett E. SNF*, No. 13-30193-MGM, 2016 WL 6774242 (D. Mass. Sept. 30, 2016)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-CV-00092-GZS, 2016 WL 3566202 (D. Me. June 27, 2016)**

***Diby v. Kepco Inc.*, No. 16-CV-583(KAM)(LB), 2016 WL 5879595 (E.D.N.Y. Oct. 7, 2016)**

***Jackson v. Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP*, 29 N.Y.S.3d 91 (N.Y. Civ. Ct. Jan. 12, 2016)**

E. Qualifying Exigency Due to a Call to Military Service

1. Covered Military Members

2. Qualify Exigency

a. Short Notice Deployment

b. Military Events and Related Activities

c. Childcare and School Activities

i. Leave to Arrange for Alternative Childcare

ii. Leave to Provide Childcare on an Urgent Basis

iii. Leave to Enroll in or Transfer to a New School or Daycare Facility

iv. Leave to Attend Meetings with School or Daycare Staff

d. Financial and Legal Arrangements

e. Counseling

f. Rest and Recuperation

g. Post-Deployment Activities

h. Additional Activities

3. Eligible Family Relationships

F. Care for a Covered Servicemember with a Serious Injury or Illness

1. Covered Servicemembers

2. Serious Illness or Injury

3. Eligible Family Relationships

4. Relationship to Leave to Care for a Family Member with a Serious Health Condition

III. Serious Health Condition

A. Overview

***Victoriana v. Internal Med. Clinic of Tangipahoa*, No. CV 15-2915, 2016 WL 5404653 (E.D. La. Sept. 28, 2016)**

A receptionist at a medical clinic brought interference and retaliation claims under the FMLA after defendant clinic denied her request for leave to undergo *in vitro* fertilization and ultimately terminated her employment for taking unapproved time off of work for the procedure. Plaintiff initially requested leave for the *in vitro* fertilization procedure in June. In response, her manager stated that other employees had scheduled time off in June and asked that plaintiff take time off in July instead. The manager also told plaintiff that he could not approve her leave; it had to be approved by the partner doctors. In preparation for the procedure, plaintiff requested, and was granted, time off for pre-operative blood tests and ultrasounds. When defendant subsequently denied her leave request for the *in vitro* fertilization procedure itself, plaintiff took unapproved time off of work, and defendant terminated her employment when she attempted to return. In moving for summary judgment, defendant argued that *in vitro* fertilization does not qualify as a "serious health condition" under the FMLA.

The court agreed, reasoning that *in vitro* fertilization is not "inpatient care" because it does not require an overnight medical stay, nor is it "continuing treatment," which requires incapacity for three consecutive days. Here, plaintiff went to the *in vitro* clinic on three separate dates, spending only a few hours at the clinic each visit. Thus, the court held that plaintiff could not establish that she had a right to FMLA leave to undergo *in vitro* fertilization, and granted defendant's motion for summary judgment on both the FMLA interference and retaliation claims.

Summarized elsewhere:
***Knott v. Grede II, LLC*, No. CV 14-00287-CG-M, 2016 WL 375148 (S.D. Ala. Jan. 28, 2016)**

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-CV-00092-GZS, 2016 WL 3566202 (D. Me. June 27, 2016)**

***Lamonaca v. Tread Corp.*, 157 F. Supp. 3d 507 (W.D. Va. 2016)**

B. Inpatient Care

Summarized elsewhere:
***Victoriana v. Internal Med. Clinic of Tangipahoa*, No. CV 15-2915, 2016 WL 5404653 (E.D. La. Sept. 28, 2016)**

***Gjokaj v. U.S. Steel Corp.*, No. CV 14-14151, 2016 WL 4437672 (E.D. Mich. Aug. 23, 2016)**

C. Continuing Treatment

***Gjokaj v. U.S. Steel Corp.*, No. CV 14-14151, 2016 WL 4437672 (E.D. Mich. Aug. 23, 2016)**

Plaintiff worked for defendant as an entry level steelworker. After sustaining an injury to his back, defendant sent to plaintiff for training as a mechanic. While there, he partially cut off his right middle finger on July 24. Defendant sent him to a hospital and ordered him to appear at work the next day, July 25 at 7:00 a.m., to be seen by its doctor. While plaintiff did appear at noon that day, his untimeliness resulted in defendant issuing him a five-day suspension. When he came in to see defendant's doctor that day, he also advised defendant's staff that his finger was completely cut off. Defendant's doctor treated plaintiff on July 25 and instructed plaintiff to meet him at 7:00 a.m. on July 26. Plaintiff again did not show up on time and came in to work at noon on July 26. He then told defendant's staff that his finger, in fact, was not cut off and that he was joking when he told them that the day before. In view of his failure to timely appear again and his misrepresentation of his medical condition, defendant gave him two more five-day suspensions, which it then converted to a discharge. Plaintiff sued defendant alleging that it ran afoul of FMLA's interference provisions when it failed to reinstate him after he suffered a serious health condition.

The court granted defendant's motion for summary judgment and dismissed plaintiff's FMLA claim, explaining that he met neither prong of the definition of serious health condition. That definition requires plaintiff to prove either that he was receiving inpatient care in a medical facility or continuing treatment by a healthcare provider. Plaintiff failed to meet the first prong of that definition because he did not receive inpatient care of any kind. He also did not satisfy the second prong because his absence from work between July 24 and July 29 was not due to medical treatment but rather the time in which he served his first five-day suspension. Because his inability to return to work after his injury was due to a suspension and not any type of medical care, he could not maintain an FMLA claim.

***Puckett v. Yates Servs., LLC*, No. 3-15-0083, 2016 WL 741938 (M.D. Tenn. Feb. 24, 2016)**

Plaintiff worked for defendant until her termination in December 2014, after her FMLA request was denied because she did not have a serious health condition since she was not treated by a healthcare provider within seven days of her first day of incapacity. She filed suit, alleging interference and retaliation claims under FMLA. Plaintiff did not receive inpatient care related to her alleged condition, but she asserted that the condition was related to a continuing treatment by a healthcare provider. Under federal regulations, continuing treatment could be established by "incapacity and treatment" or by showing a "chronic serious health condition," among other methods.

The court found that a scheduled appointment by plaintiff to see her doctor within seven days of her first day of incapacity, which was canceled because of her doctor's illness, was

sufficient to prove the need for "continuing treatment." However, the court did not find she had a "chronic serious health condition" because plaintiff's doctor specified that her condition would not prevent her from performing job functions. As for plaintiff's retaliation claim, the court found that if plaintiff successfully proved defendant wrongfully denied her FMLA leave, then a jury could find that her discharge was retaliation. Thus, the court denied defendant's motion for summary judgment.

Summarized elsewhere:
***Victoriana v. Internal Med. Clinic of Tangipahoa*, No. CV 15-2915, 2016 WL 5404653 (E.D. La. Sept. 28, 2016)**

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

***Saldana v. Pub. Health Tr. of Miami-Dade Cty.*, No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)**

Plaintiff brought an action in the District Court for the Southern District of Florida seeking damages from defendant for its alleged interference and retaliation under the FMLA, along with several other claims based on the disability-based discriminatory treatment she allegedly received. As to plaintiff's FMLA claims, the court denied defendant's motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6), in which defendant had argued that plaintiff had not plead the existence of a "serious health condition" as it is defined under 29 U.S.C. § 2611(11). Plaintiff had alleged in his complaint that he was diagnosed with and suffered from Lumbosacral Spondylosis without Myelopathy and also Sciatica, and further alleged that his physician sent FMLA documentation to plaintiff's supervisor stating that from April 1, 2014 through April 30, 2014, plaintiff would be incapacitated due to treatment for those diagnoses. The court determined that plaintiff's allegations were sufficient to meet the FMLA's statutory definitions as interpreted by the Department of Labor standards set forth at 29 C.F.R. § 825.115 in light of the fact that it could be reasonably inferred that during the time period in April 2014, plaintiff was in a regimen of continuing treatment under the supervision of his physician.

***Bertig v. Julia Ribaudo Healthcare Grp.*, No. 3:15CV2224, 2016 WL 3683439 (M.D. Pa. July 12, 2016)**

In *Bertig v. Julia Ribaudo Healthcare Group*, the district court denied a motion to dismiss plaintiff's FMLA interference and retaliation claims in which she contended that she had been denied intermittent leave and discharged from her position as a nurse's aide for requesting and taking FMLA leave. Defendant's motion argued that plaintiff failed to plead that she had a serious health condition because the complaint failed to plead that she was incapacitated for more than three days. The court concluded that plaintiff's allegations that she had "cancer" and "asthma" were sufficient to state a claim at the pleading stage because these conditions were listed as examples of serious health conditions in the regulations and legislative history. The court also rejected defendant's contention that plaintiff had to allege more than three days incapacitation because plaintiff alleged that she had conditions which if left untreated would have caused such incapacity.

The court also denied the motion as to plaintiff's FMLA retaliation claim, ruling that plaintiff had pled a sufficient causal nexus between her request for leave and her discharge. Plaintiff alleged that she needed intermittent leave during the period between 2012 and her termination in April 2014, establishing sufficient proximity to her separation. Plaintiff also established causation because she alleged that she was discharged due to absences from work that she contended should have qualified for leave.

a. Incapacity for More than Three Calendar Days

Summarized elsewhere:
***Smith v. Mayo Clinic*, No. 14-1833(DSD/JJK), 2016 WL 225672 (D. Minn. Jan. 19, 2016)**

b. Continuing Treatment

***Smith v. Mayo Clinic*, No. 14-1833(DSD/JJK), 2016 WL 225672 (D. Minn. Jan. 19, 2016)**

Plaintiff worked as a document control specialist at defendant, Mayo's Cancer Clinical Research Office. In July 2013, plaintiff suffered severe pain and missed work as a result. She asked employer's human resources representative to start the process of an FMLA leave request. However, she was fired three days later, having surpassed the maximum number of violations allowed by the attendance policy. At her request, defendant completed an internal review and overturned her termination on the grounds that the human resources representative failed to investigate whether she qualified for FMLA leave. Plaintiff was offered back pay and reinstatement. Plaintiff declined because defendant refused to transfer her to a different position, as she requested. Plaintiff sued defendant alleging violations of her FMLA rights. Defendant moved for summary judgment on the grounds that plaintiff had been fired for repeated tardiness and absences in violation of employer's attendance policy. An individual qualifies for FMLA leave if she can demonstrate a serious health condition that requires inpatient hospital care or continuing treatment. Here, plaintiff had consulted with doctors on three occasions over the course of four days. She reported feeling better at her last hospital visit and also failed to demonstrate that the condition continued after those four days. The court concluded that her behavior "evinces the kind of short-term illness that is not covered by the FMLA." The district court granted summary judgment as to plaintiff's FMLA claim.

Summarized elsewhere:
***Guernsey v. City of Lafayette*, No. 4:13-CV-00086, 2016 U.S. Dist. LEXIS 107327 (N.D. Ind. Aug. 12, 2016)**

c. Treatment by a Health Care Provider

***Burnett v. Gallia Cty., Ohio*, No. 2:14-CV-2544, 2016 WL 4750107 (S.D. Ohio Sept. 12, 2016)**

Former secretary for the County Prosecutor's Office brought FMLA claims against her former employer. The Southern District of Ohio denied, in part, defendant's motion for summary judgment as to plaintiff's FMLA claims. Defendants contended that plaintiff failed to show that she had a serious health condition because she characterized her condition as a "hypertensive crisis" in her complaint, and a nurse practitioner testified in her deposition that plaintiff's underlying conditions of depression and anxiety caused the hypertension. Defendants

had an opportunity to question the nurse practitioner about the depression and anxiety, but failed to do so.

Defendant also argued that the nurse practitioner was not a health care provider. The nurse practitioner could prescribe medication and worked under the direction of a physician. Defendant contracted with the nurse practitioner to provide discounted services to its employees for acute illness and diagnostic testing. If the nurse practitioner was prohibited by state law to provide services for acute illness, defendant would then find itself in violation of the FMLA prohibition against employer avoiding its responsibilities under the law. Thus, the court found the nurse practitioner was a health care provider under the FMLA.

Defendant argued that it had a legitimate reason for terminating plaintiff due to her role in a backlog of cases, but defendant failed to address case law that allows a plaintiff to show that legitimate nondiscriminatory reason for termination was pretextual. She only needed to show that her termination was based only in part on an absence covered by FMLA. However, through affidavits and corroborating testimony, plaintiff demonstrated that she may not have been responsible for the backlog. Her former supervisor was intentionally declining cases, and as a secretary, it was not her responsibility to sign off on court documents, which would have reduced any back log. Plaintiff offered sufficient evidence from which a reasonable jury could conclude that the reason for her termination was pretextual.

***White v. Ag Supply Co. of Wenatchee*, No. 2:15-CV-0089-TOR, 2016 WL 737925 (E.D. Wash. Feb. 23, 2016)**

Plaintiff, a sales supervisor, worked for a hardware store at which employees were required to work an alternating schedule among three shifts. Plaintiff lived with his mother who suffered from dementia, and several months prior to plaintiff's resignation, plaintiff hired a part-time caretaker for his mother and had noticed her condition was deteriorating. A social worker advised plaintiff that his mother would require 24-hour care, and the same day, plaintiff notified employer of his concerns regarding his mother's care and the following day, plaintiff asked employer if he could have a more consistent work schedule so he could develop a plan of care for his mother. Four days later, plaintiff submitted a letter from the social worker requesting a more consistent work schedule so he could care for his mother. When employer indicated that his schedule would not be immediately fixed, plaintiff submitted his two-week notice of resignation. One week later, plaintiff's mother visited her doctor for the first time in three years, and her doctor determined that she suffered from severe dementia and required 24-hour care. Later that month, she was admitted to a convalescent center where she remained under the care of a doctor.

The district court held that because a social worker is not a "health care provider" under the FMLA, and plaintiff's mother had not been under the continuing supervision of a health care provider at the time plaintiff requested FMLA leave, plaintiff was not entitled to FMLA leave at the time of his request. Additionally, employer had a policy that required employees to provide 30 days' notice of foreseeable leave. Even if plaintiff had been entitled to leave when he requested it, he was required to give 30 days' notice of the need for leave because it was foreseeable, because plaintiff's mother had been suffering from dementia for three years, plaintiff had noticed his mother's condition deteriorating and had hired a part-time caregiver for

his mother eight months prior to his request. Because plaintiff gave only 5 days' notice of the need for leave, his claim also failed for lack of notice.

2. Pregnancy or Prenatal Care

Summarized elsewhere:
***White v. City of Sylvester*, No. 1:14-CV-00076 (LJA), 2016 WL 1270236 (M.D. Ga. Mar. 31, 2016)**

3. Chronic Serious Health Condition

***Smith v. AS Am., Inc.*, 829 F.3d 616 (8th Cir. 2016)**

A manufacturing employee alleged that employer interfered with his FMLA rights by denying his request for intermittent FMLA leave and terminating his employment. Following a bench trial, the district court found that employer interfered with employee's FMLA rights and awarded actual and liquidated damages and attorney's fees. Employer appealed the liability decision and the award of liquidated damages and attorney's fees. Plaintiff appealed the district court's limiting of damages based on after-acquired evidence. The Eighth Circuit Court of Appeals affirmed the district court's decision, except that it reversed the limitation of plaintiff's damages based on the after-acquired evidence doctrine.

Among other things, on appeal, employer asserted that plaintiff was terminated for excessive absenteeism. According to company rules, employees are fired when they reach eight absences in a 12-month period under employer's no-fault attendance policy. Employer claimed that employee's two visits to an urgent care facility for back pain did not support the existence of a chronic condition. But the district court held that plaintiff's absences met the objective regulatory tests for both a chronic condition, and a period of incapacity and treatment. The appellate court affirmed.

Plaintiff appealed the district court's application of the after-acquired evidence doctrine to limit his damages. During a deposition, employer had learned that, several months after plaintiff's termination, he had been arrested and jailed. Employer offered evidence that demonstrated to the court that plaintiff had been jailed for more than a week. Employer asserted that if plaintiff had still been employed, the jail time would have caused plaintiff to miss work for a total of six days. Combined with other of plaintiff's absences in the same 12-month period, the jail time absences would have been sufficient for employer to invoke its no-fault attendance policy and terminate plaintiff for excessive absenteeism (more than eight absences in a 12-month period).

Based on this after-acquired evidence, the district court limited plaintiff's damages. But the appellate court disagreed. Reviewing employer's evidence demonstrating that plaintiff had been jailed for more than a week (a surety bond), the appellate court held that employer could not prove the bond was issued on the same day that plaintiff was released from jail. The appellate court vacated the judgment of the district on employer's after-acquired evidence defense and remanded the case for further proceedings.

***Justice v. Renasant Bank*, No. 1:15-CV-00136, 2016 WL 6635638 (N.D. Miss. Nov. 8, 2016)**

Plaintiff, a lending officer, sued her employer, a bank, for interfering with her FMLA rights by not offering her FMLA leave due to her migraine headaches. In granting summary judgment for defendant, the district court in Mississippi determined that plaintiff had not established the *prima facie* elements of an interference claim. First, she had not shown her migraines were a "chronic serious health condition" because she did not produce evidence that she visited a health care provider at least twice a year for treatment. Instead her ex-husband testified he had treated her three to five times over the last five years. Second, she had not established that she gave defendant notice that she may need FMLA leave. Plaintiff had called in sick on occasion when she had a migraine, but this was not sufficient to notify defendant she may need leave.

***Jallow v. Kraft Foods Glob., Inc.*, No. 15-CV-249-WMC, 2016 WL 3893181 (W.D. Wis. July 14, 2016)**

Plaintiff worked for employer from 2001 through 2013. During his employment, plaintiff requested and received FMLA leave on several occasions. In the first four months of 2013, plaintiff missed 35 days of work, including 30 days in the last month of his employment. Except for three days, plaintiff did not request FMLA leave for any of the other absences. In March 2013, employer issued a written warning regarding plaintiff's poor attendance. Starting on April 22, 2013, plaintiff was absent from work for the entire week. Plaintiff testified that he had a cold that week. In calling in his absence, plaintiff called two times after the start of his shift, which resulted in those absences being deemed "AWOL/Unexcused." Given employer's attendance policy, which provided that two unexcused absences were grounds for termination, employer terminated plaintiff.

Plaintiff sued asserting claims for FMLA interference and retaliation. Plaintiff argued that his cold was attributed to his HIV condition. Plaintiff argued that employer was aware of his HIV diagnosis because employer previously had received certain medical records, and one of those records made reference to the fact that plaintiff had been diagnosed with HIV in 2005. Employer moved for summary judgment arguing, among other reasons, that plaintiff was not entitled to take leave under the FMLA. The court granted summary judgment in favor of employer.

The court found that plaintiff's HIV status alone did not qualify as a serious health condition. Plaintiff did not present any evidence of at least biannual periodic doctor visits because of his HIV status or that he experienced episodic incapacity because of his HIV status. Rather, employer presented medical records that provided that plaintiff's HIV condition was "under excellent control," "undetectable," and "stable." Plaintiff argued that a cold in conjunction with HIV is a compounded chronic serious health condition. The court acknowledged that perhaps that could be sufficient, but plaintiff failed to present evidence that he fell into this category (i.e., he suffered a complication from the cold like pneumonia). In reaching this decision, the court made clear that it was not deciding in a broader sense whether HIV could or could constitute a chronic serious health condition. Rather, the court made clear that its decision was based solely on the fact that plaintiff did not come forward with medical documentation or other evidence to support his claims.

Summarized elsewhere:
***Landry v. Howell*, No. 5:14-CV-00167 (LJA), 2016 WL 5387629 (M.D. Ga. Sept. 26, 2016)**

Jude v. Hitachi Auto. Sys. Am., Inc., No. 5:15-CV-57-KKC, 2016 WL 3976651 (E.D. Ky. July 22, 2016)

Lasher v. Medina Hosp., No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)

Soles v. Zartman Constr., Inc., No. 4:14-CV-01791, 2016 WL 3458395 (M.D. Pa. June 24, 2016)

Rader v. Upper Cumberland Human Res. Agency, No. 2:14-0110, 2016 WL 1118211 (M.D. Tenn. Mar. 22, 2016)

Ogden v. Pub. Util. Dist. No. 2 of Grant Cty., No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)

4. Permanent or Long-Term Incapacity

***Wheeler v. Jackson Nat'l Life Ins. Co.*, No. 16-5163, 2016 WL 7241403 (6th Cir. Dec. 15, 2016)**

Plaintiff appealed the grant of summary judgment to employer, and the denial of summary judgment to plaintiff on his claims under the FMLA. Throughout his time at the company, plaintiff struggled with health impairments arising from narcolepsy, bipolar disorder, anxiety, emotional deregulation, and depression. Employer granted plaintiff a number of leaves both under the FMLA and, when his FMLA leave was exhausted, through paid or unpaid leaves of absence. Eventually, employer created a floater position for plaintiff as an accommodation for his medical conditions. Later on, plaintiff's new supervisor noted that plaintiff had not used his identification badge to enter the premises and had not logged into the company's telephone system as being present on 34 of 58 working days. A review by human resources showed that even on the days when plaintiff was at work, he was not fulfilling his job requirements. Employer opted not to terminate plaintiff but to cover plaintiff's absences with FMLA hours currently available to him and require plaintiff to apply for a general leave of absence, so employer could follow up with plaintiff's doctors regarding his ability to fulfill the floater job functions going forward. Employer determined that plaintiff's conditions were lifelong, and a leave of absence would not enable plaintiff to return to work and capably perform his job in a reasonable time. Employer told plaintiff he was being terminated.

Plaintiff filed an action against employer, alleging he had not exhausted his FMLA leave because, on days when he was absent from the office, he actually had been working remotely. He said the remote arrangement had been approved by management. But plaintiff produced no evidence to demonstrate he was approved for anything beyond remote email access. The district court ruled that plaintiff had indeed exhausted his FMLA leave and was not fulfilling the responsibilities of his job, regardless of whether or not he had been working from home. Given the fact that plaintiff proffered no evidence of work performed at home (e.g., work-related emails, testimony from supervisors, or work product), the district court granted employer's motion for summary judgment on plaintiff's FMLA interference claim. Plaintiff appealed,

insisting he was capable of doing his job and employer's stated reasons for terminating him were pretextual. Employer asked the court of appeals to adopt the honest-belief rule. The court of appeals ruled that no discussion of honest belief was necessary because employer prevailed without recourse to the rule, and affirmed the lower court's judgment.

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

5. Multiple Treatments

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

D. Particular Types of Treatment and Conditions

1. Cosmetic Treatments

2. Treatment for Substance Abuse

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

3. "Minor" Illnesses

***Jude v. Hitachi Auto. Sys. Am., Inc.*, No. 5:15-CV-57-KKC, 2016 WL 3976651 (E.D. Ky. July 22, 2016)**

Plaintiff alleged that his employer terminated him in violation of the FMLA for missing work due to an upper respiratory infection. Defendant claimed the medical evidence showed that plaintiff's illness was not serious enough to qualify for FMLA leave, and that he was terminated for excessive absenteeism and tardiness. The district court granted defendant's motion for summary judgment, finding that plaintiff failed to show he was covered under the FMLA for a "serious health condition." Plaintiff's evidence consisted of a facially vague form stating that his absences were due to "sinus congestion and wheezing," which do not meet the criteria of a debilitating long-term condition required for coverage under the FMLA.

4. Mental Illness

***Long v. Mayco, Inc.*, No. CIV-15-1019-M, 2016 WL 6783249 (W.D. Okla. Nov. 16, 2016)**

Plaintiff filed an action alleging FMLA interference and FMLA retaliation; the court found that defendant was not entitled to summary judgment on either of the claims. Upon his employment with defendant, plaintiff explained to defendant that his son had ADHD and would need time off to take care of his son's medical issues. Plaintiff's son could not properly attend school since he was repeatedly sent home due to his symptoms from ADHD; he was being

treated by several medical professionals; and he had been placed on several medications to treat his ADHD. Defendant never provided plaintiff information regarding FMLA benefits; plaintiff never saw any FMLA posters or signs and did not know what "FMLA" meant. Plaintiff was terminated after having been tardy and absent 58 times; some of these absences were attributed to his need to pick his son up from school due to behavior resulting from ADHD, to take his son to counseling sessions, and to take his son to medical treatments.

The court found that plaintiff had presented sufficient evidence to create a genuine issue of material fact as to whether plaintiff's son's ADHD was a serious health condition as defined in the FMLA; it also found that there was a genuine issue of disputed fact as to whether plaintiff was entitled to FMLA leave and as to whether plaintiff gave defendant proper notice for using leave under the FMLA.

CHAPTER 5.

LENGTH AND SCHEDULING OF LEAVE

I. Overview

II. Length of Leave

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

A. General

***Smith v. Touro Infirmary*, No. 15-30851, 2016 WL 1084245 (5th Cir. Mar. 18, 2016)**

Plaintiff, a respiratory therapist at defendant medical infirmary appealed the district court's dismissal of her FMLA retaliation claim, and the Fifth Circuit Court of Appeals affirmed the dismissal. Plaintiff ran out of FMLA leave but did not return to work. Employer contacted plaintiff on several occasions to determine when plaintiff would return to work, but plaintiff failed to respond to any of employer's inquiries. Plaintiff overstated the amount of FMLA leave she had remaining and employer understated the amount of leave plaintiff had remaining. Nonetheless, plaintiff exhausted all available FMLA leave and failed to respond to employer's calls and written requests for plaintiff to contact employer regarding plaintiff's plans to return to work. Because plaintiff was not terminated until after her FMLA leave expired, plaintiff could not establish that she was terminated for taking FMLA leave.

Summarized elsewhere:
***Vick v. Brennan*, No. 14-CV-2193 (TSC), 2016 WL 1225857 (D.D.C. Mar. 28, 2016)**

B. Measuring the 12-Month Period

***Scraggs v. NGK Spark Plugs (U.S.A.) Inc.*, No. 2:15-CV-11357, 2016 WL 3676739 (S.D. W. Va. July 7, 2016)**

An employee claimed that her employer wrongfully terminated her in violation of the FMLA. Employer argued it was entitled to summary judgment on plaintiff's FMLA interference claim. The United States District Court for the Southern District of West Virginia granted summary judgment to employer.

While employed, plaintiff routinely took leaves of absence for both her and her spouse's medical conditions. She also took intermittent, unscheduled FLMA leave. Plaintiff claims employer interfered with her FMLA rights in three ways: (1) by terminating her while she had leave remaining, (2) failing to substitute her paid vacation leave for FMLA leave, and (3) failing to responsively answer her questions about her FMLA rights and responsibilities.

The court rejected each of plaintiff's claims. First, employer elected the rolling method of calculating the leave period. Looking back 12 months from the date of the most recently requested leave, plaintiff conceded that employer properly allotted her 12 weeks or 480 hours. Next, the court rejected plaintiff's argument that employer interfered with her FMLA rights by failing to substitute her paid vacation time for FMLA time to cover two absences. The court stated, "This Court rejects this argument out of hand." The court explained that under the FMLA, employees cannot substitute paid vacation time for FMLA time if they do not have FMLA time remaining. Finally, the court rejected plaintiff's claim that employer's human resources specialist failed to responsively answer her questions. Specifically, the court held that employers are only required to answer questions and are not required to provide information about things regarding which an employee does not inquire.

Summarized elsewhere:
***Bunch v. Cty. of Lake*, No. 15 C 6603, 2016 WL 1011513 (N.D. Ill. Mar. 14, 2016)**

***Patrick v. Cowen*, No. 3:14-CV-782 RLM, 2016 WL 1460333 (N.D. Ind. Apr. 13, 2016)**

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

***Brady v. Bath Iron Works Corp.*, No. 2:16-CV-4-NT, 2016 WL 3029948 (D. Me. May 25, 2016)**

Plaintiff was a carpenter who worked for defendant for 26 yx`ears and brought an action against his former employer. The district court denied defendant's motion to dismiss. Defendant

argued that plaintiff failed to allege that he was terminated in retaliation for taking FMLA leave. Plaintiff received approval for intermittent FMLA leave for depression and anxiety that was partially related to work. The court determined that plaintiff plausibly alleged that he engaged in protected activity when he claimed that he used his leave to exit the work site, load his car with scrap wood, and socialize with a coworker offsite.

The court also found that plaintiff properly alleged a causal connection between taking FMLA leave and being terminated when he alleged that his employer conducted surveillance on him during his initial use of FMLA leave, barred him from accessing the work site the morning he was supposed to return, and suspended him before hearing back from his primary care physician about whether his use of leave was consistent with treating his medical condition.

Summarized elsewhere:
***Ross v. Youth Consultation Serv., Inc.*, No. 2:14-2229 (KSH) (CLW), 2016 WL 7476352 (D.N.J. Dec. 29, 2016)**

F. Measuring Military Caregiver Leave

III. Intermittent Leaves and Reduced Leave Schedules

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

Summarized elsewhere:
***Jaskiewicz v. St. Mary's of Mich.*, No. 15-CV-10265, 2016 WL 465481 (E.D. Mich. Feb. 8, 2016)**

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

Summarized elsewhere:
***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

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

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

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

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

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

***Romano v. Bd. of Educ. for Bloom Twp. High Sch. Dist. #206*, No. 14-CV-9095, 2016 WL 2344581 (N.D. Ill. May 4, 2016)**

Plaintiff filed suit against his employer, Board of Education for Bloom Township High School District #206 ("Board") and four of its board members in their official and individual capacities. Plaintiff alleged that he requested FMLA leave to care for his terminally ill father and that defendants violated his FMLA rights by demoting him from foreman to HVAC/Electrician and involuntarily inducting him into a union upon his return from FMLA leave. Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The district court granted the motion to dismiss plaintiff's FMLA claim with prejudice as to the board members in their official capacities. The court noted that an official capacity suit cannot lie against an officer as an individual, but rather only the entity. As a result, the court found that because plaintiff also sued employer, the claims against the board members in their official capacities were duplicative.

The court also granted defendants' motion to dismiss for failure to state a claim against the board member defendants in their individual capacities without prejudice. The court analyzed this issued under FMLA special rules § 2618(a)(1)(A) (which applies to educational agencies). The court found that the FMLA special rules here did not apply to board member defendants in their individual capacities, because, although the Board was found to be a "local educational agency" and therefore subject to these rules, an "eligible employee" is defined under the special rules as one working in an "instructional capacity." Because plaintiff was not employed as a teacher or in another instructional capacity, he was not an "eligible employee"

making § 2618 inapplicable. In analyzing plaintiff's claims under the other sections of the FMLA, the court held that plaintiff failed to plead (1) with particularity each specific defendant's actions and responsibility in relation to his claim of FMLA violations and (2) that the individual defendants "exercised sufficient control over Plaintiff's ability to take protected leave to qualify as employers under the FMLA." Therefore, the court granted defendant's motion to dismiss plaintiff's FMLA claim against the four individual defendants.

A. Coverage

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

B. Duration of Leaves in Covered Schools

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

C. Leaves Near the End of an Academic Term

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

CHAPTER 6.

NOTICE AND INFORMATION REQUIREMENTS

I. Overview

II. Employer's Posting and Other General Information Requirements

***Eriksen v. Wal-Mart Assocs., Inc.*, No. CV 14-155-BLG-SPW-CSO, 2016 WL 697091 (D. Mont. Feb. 19, 2016)**

An overnight stocker claimed that a retail store wrongfully terminated her in violation of the FMLA. The company argued it was entitled to summary judgment on plaintiff's claims. The District Court for the District of Montana granted summary judgment in part and denied it in part.

After plaintiff was injured on the job, she sought medical attention and requested FMLA leave. Ultimately, employer denied plaintiff's leave based on her alleged failure to submit the required documentation. Prior to the denial, employee failed to show up for several shifts, and employee received written coaching consistent with employer's attendance policy. Shortly thereafter, employer terminated plaintiff.

Employee alleged that employer failed to comply with the notice requirements of the FMLA. The court found that regardless of whether employer fully complied, employee was not prejudiced by any lack of notice, and accordingly the court awarded summary judgment to employer.

Employee next argued that employer interfered with her right to take FMLA leave by its actions in denying it. The court found that there were genuine issues of fact such as whether plaintiff timely submitted the proper documentation, whether employer timely provided the requested documentation and permitted plaintiff sufficient time to complete it, and whether plaintiff was prejudiced by the denial, among other issues.

A. Posting Requirements

Summarized elsewhere:
***Grant v. Hosp. Auth. of Miller Cty.*, No. 1:15-CV-15 (WLS), 2016 WL 5791546 (M.D. Ga. Sept. 30, 2016)**

***Long v. Mayco, Inc.*, No. CIV-15-1019-M, 2016 WL 6783249 (W.D. Okla. Nov. 16, 2016)**

B. Other General Written Notice

Summarized elsewhere:
***Grant v. Hosp. Auth. of Miller Cty.*, No. 1:15-CV-15 (WLS), 2016 WL 5791546 (M.D. Ga. Sept. 30, 2016)**

***Velcko v. Saker Shoprites, Inc*., No. 15-cv-1217 (PGS)(LHG), 2016 WL 4728106 (D.N.J. Sept. 9, 2016)**

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

***Calderone v. TARC*, 640 F. App'x 363 (5th Cir. 2016)**

Plaintiff claimed her former employer interfered with her rights under the FMLA by failing to provide her with notice of her entitlement to leave following a car accident. The Fifth Circuit Court of Appeals affirmed summary judgment in favor of employer. Following plaintiff's car accident, employer accommodated her request to work from home for a brief period, and then allowed her to return to work on a reduced schedule. Plaintiff returned to work full-time after a few months, she then resigned more than six months later. Plaintiff admitted she was aware of her FMLA rights, but did not want to take leave. The court dismissed plaintiff's claim because she did not suffer any harm as a result of employer's failure to provide notice.

***Knight v. Barry Callebaut USA Serv. Co.*, No. CV 15-6450, 2016 WL 7338759 (E.D. Pa. Dec. 19, 2016)**

Plaintiff worked as an overnight Production Supervisor for employer, a chocolate manufacturer. He was diagnosed with Crohn's disease, which caused him to endure hospitalizations to treat bowel obstructions and afflicted him with bouts of vomiting. Plaintiff

believed that defendant's policy, which provided that employees must not "enter the plant with any contagious rashes, foodborne illness or medical condition that may lead to food contamination (for example, diarrhea or vomiting)" prohibited him from being on the plant floor if he experienced symptoms such as a need to vomit. When such an episode occurred, he would take a break outside the plant. His breaks could last from 10 minutes to one hour and were required from zero to three times per shift. Plaintiff alleged that he told his supervisor and the human resources manager about his episodes. After plaintiff's first hospital stay, the human resources manager emailed plaintiff paperwork which she claimed related to the FMLA. However, the paperwork did not relate to the FMLA. It related to a third-party provider for short term disability, and above the authorization for medical records was the specific warning "Not for FMLA Requests." On plaintiff's last day of work, he began calling management at 3:00 a.m. to let them know he needed to go to the emergency room ("ER"), but he was unable to reach anyone. He vomited more than 10 times during that shift. Since he was unable to reach anyone, he sent an email to his supervisor and the human resources manager at 7:34 a.m. advising them he was having episodes and needed to go to the ER. When he was discharged from the hospital, he called the human resources manager and was told not to report to work till Monday at 9:00 a.m. At this time, he met with his supervisor and the human resources manager, and was terminated for theft of time and failure to be on the plant floor for extended times during his defined work hours.

Plaintiff filed an action against employer for interference and retaliation in violation of the FMLA. Employer filed a motion for summary judgment. Plaintiff 's interference claim was based on his allegation that although employer classified his hospital stays as FMLA leave, it did not inform him of his right to intermittent FMLA leave and prejudiced him as a result. Had he known he could take intermittent FMLA leave, he could have planned his leave and not felt obligated to stay at work when he was suffering from episodes. The court agreed. The court stated, "When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave with five business days…" 29 C.F.R. § 825.300(b)(1). Had employer told plaintiff, after his first hospitalization, of his right to take intermittent, job-protected leave, plaintiff could have made informed decisions about leave that could have prevented all those breaks that ultimately led to his termination.

To establish a claim for retaliation, an employee must demonstrate (1) that he invoked his FMLA rights, (2) he suffered an adverse employment action, and (3) the adverse employment action was causally connected to plaintiff's exercise of his FMLA rights. The court said the fact that employer classified plaintiff's leave for hospitalization as FMLA leave was sufficient to set forth a *prima facie* case that his FMLA rights had been invoked. His termination was clearly an adverse employment action. The temporal proximity between his return from leave and his termination was suggestive of a causal connection. Moreover, employer's inconsistent testimony about who made the decision to terminate him and its inconsistent notes about the timeline were suggestive of pretext. The court denied employer's motion for summary judgment on both of plaintiff's claims.

Summarized elsewhere:
***Razo v. Timec Co.*, No. 15-cv-03414-MEJ, 2016 WL 6576625 (N.D. Cal. Nov. 7, 2016)**

***Drumm v. Triangle Tech, Inc.*, No. 4:15-CV-00854, 2016 WL 1384886 (M.D. Pa. Apr. 7, 2016)**

III. Notice by Employee of Need for Leave

***Perry v. Am. Red Cross Blood Servs.*, No. 15-5645, 2016 WL 3077644 (6th Cir. June 1, 2016)**

Plaintiff, an apheresis specialist, claimed her employer, the Red Cross, interfered with and retaliated against her in violation of the FMLA by terminating her employment for "excess absences," arguing those absences were protected by the FMLA. Specifically, plaintiff was terminated under employer's progressive disciplinary policy for absenteeism, after accumulating a number of absences for illnesses and other reasons. Plaintiff previously was granted FMLA intermittent leave for several health conditions and continuous leave for an injury and surgery.

The district court granted summary judgment to employer, finding that plaintiff failed to establish that employer interfered with her FMLA rights because she was granted FMLA leave and she failed to report the absences upon which her termination was based as required by employer policy. The court further found that employee failed to establish that employer retaliated against her for taking that FMLA leave, for similar reasons.

The Sixth Circuit Court of Appeals upheld summary judgment for employer on both FMLA claims. The court found that plaintiff's absences were unrelated to her heart condition, for which she received intermittent FMLA leave. Plaintiff also contended that the court erred in relying on the fact that she did not comply with her employer's call-in policy, arguing that once her employer was on notice that FMLA might apply, it had the obligation to seek further information about her leave. The court did not find this argument persuasive, stating that FMLA regulations allow employers to condition FMLA leave on compliance with usual notice and procedural requirements, absent unusual circumstances. And, plaintiff did not prove any evidence of unusual circumstances excusing her from following employer's policy.

***McLaren v. Wheaton Coll.*, No. 14 C 9689, 2016 WL 3671448 (N.D. Ill. July 11, 2016)**

Plaintiff, a custodian, brought suit against defendant, her former employer, for retaliation claiming defendant interfered with her exercise of FMLA rights and terminated in retaliation for taking FMLA leave. Defendant filed a motion for summary judgment regarding both of plaintiff's claims and plaintiff filed a motion for summary regarding her interference claim. As for plaintiff's retaliation claim, defendant argued that plaintiff exhausted her FMLA leave and failed to give defendant notice of her need for FMLA leave at the start of the new FMLA year and therefore her final absences were not protected. The District Court for the Northern District of Illinois denied defendant's motion for summary judgment holding that plaintiff's request to defendant for information on how to reactivate her FMLA qualification could reasonably be considered notice. The court denied both motions for summary judgment on the issue of FMLA interference holding that there was a factual dispute as to whether plaintiff gave proper notice under the FMLA.

***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

Plaintiff, a regional sales manager, brought this action against his former employer, a global oil field services provider, alleging FMLA claims sounding in inference, violation of the notice requirements, and retaliation. In September 2014, after 10 years on the job, plaintiff broke his ankle and underwent surgery. Thereafter, he was required to wear a cast and instructed not to drive for a period of six weeks. Employer accommodated these restrictions by allowing him to work from home. A few weeks prior to plaintiff's discharge, he learned that the break had not healed and that he required a second surgery, and asked his employer about short term disability. Four days before his second surgery, defendant informed plaintiff that he would be terminated from his employment if he did not return to work, and subsequently discharged him.

Defendant filed a motion for summary judgment as to each claim, which the court granted in part and denied in part. With respect to plaintiff's FMLA interference claim, the court denied defendant's motion, holding that plaintiff's inquiry about short term disability creates an issue of material fact as to whether he gave proper notice of or requested FMLA leave. With respect to plaintiff's FMLA notice violation claim, the court granted defendant's motion, holding that: (1) plaintiff's communications that, while he may have preferred to work from home, he would have no choice but to seek leave if he was not permitted to do so, may have triggered defendant's obligation to inform plaintiff of his FMLA rights; but (2) because plaintiff was aware that his employer provided FMLA leave and received a copy of the handbook, he could not show he was prejudiced by defendant's failure to inform him of his rights. With respect to plaintiff's FMLA retaliation claim, the court denied defendant's motion, holding that the gap of only eleven days between plaintiff's notification and his termination was sufficient to establish the third prong of a *prima facie* case: that plaintiff was treated less favorably than an employee who had not requested leave under the FMLA or that the adverse decision was made because he sought protection under the FMLA.

The parties each filed motions to reconsider, which the court denied.

***Germanowski v. Harris*, No. CV 15-30070-MGM, 2016 WL 696097 (D. Mass. Feb. 19, 2016)**

Plaintiff, a recording clerk in the local government's registry office, had worked there for over a decade when she was diagnosed with an anxiety disorder. The elected Register of the office was defendant Patricia Harris. Harris was witness to several episodes related to plaintiff's anxiety condition, including a nervous breakdown while at work. Occasionally, when such incidents occurred, Harris would suggest to plaintiff that she return home and rest for a few days before returning to work. After plaintiff falsely accused Harris of having an affair, Harris left two voicemails instructing plaintiff not to report back to work. Believing that her job was in jeopardy, plaintiff saw her psychiatrist, who wrote a letter recommending that plaintiff take a leave of absence from work to seek treatment. It was unclear whether anyone other than plaintiff knew about the psychiatrist's recommendation when, the next day, plaintiff was terminated via voicemail. Plaintiff sued Harris and the Commonwealth of Massachusetts for interference with her exercise of her FMLA rights for self-care, and violation of state laws. The district court granted defendants' motion to dismiss plaintiff's FMLA claim, finding that the complaint contained no allegations that plaintiff had communicated to Harris of her intent to take FMLA leave when she was terminated.

The court also dismissed plaintiff's claims for monetary damages on the basis of Eleventh Amendment immunity because Harris was a state officer acting in her official capacity when she terminated plaintiff, but declined to dismiss plaintiff's claim that she was entitled to reinstatement of her position.

***Soles v. Zartman Constr., Inc.*, No. 4:14-CV-01791, 2016 WL 3458395 (M.D. Pa. June 24, 2016)**

Plaintiff brought an interference and retaliation claim under the FMLA alleging that he was unlawfully discharged either for requesting statutory leave or for taking leave that should have been classified as leave under the FMLA. Defendant, a construction company, filed a motion for summary judgment. Defendant argued that plaintiff did not qualify for leave because plaintiff's medical condition was not a "serious health condition" as contemplated by the FMLA. Plaintiff was diagnosed with a severe form of eczema. Next, defendant argued that it was not aware of plaintiff's medical condition or plaintiff's need to take any medical-related leave. Lastly, defendant argued that plaintiff failed to establish a *prima facie* case of retaliation because plaintiff failed to demonstrate that defendant's reasons for terminating him were pretextual.

The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care providers." A serious health condition involving continuing treatment by a health care provides includes conditions required multiple treatments when there is a "period of absence to receive multiple treatments…for a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment." The court found that there was an issue of material fact as to whether eczema qualifies as a "serious medical condition" under the FMLA. Plaintiff produced evidence that he sought treatment from a physician on 12 separate occasions for his condition. Further, plaintiff's medical records indicated that he communicated with physicians about his diagnosis since 1982. Therefore, defendant's first argument for summary judgment fails.

To request leave under the FMLA, an employee must, "provide at least verbal notice sufficient to make the employer aware that he needs FMLA-qualifying leave…and need not expressly assert rights under the FMLA or even mention the FMLA." The issue of whether defendant had notice of plaintiff's need for FMLA leave was aggressively disputed by the parties. Thus, there is a genuine issue of material fact precluding summary judgment. Lastly, defendant's reason for terminating plaintiff was not clearly articulated in the record. Accordingly, there is a genuine dispute of material fact regarding the reasons for plaintiff's termination which precludes summary judgment.

***Colagiovanni v. Valenti Motors, Inc.*, No. HHD-CV13-6046276-S, 2016 WL 1728026 (Conn. Super. Ct. Apr. 12, 2016)**

Plaintiff sued his employer for violating the FMLA. He claimed that employer preemptively fired him after he gave notice that he would need leave in the future when he was eligible under the FMLA. Put differently, employer allegedly terminated plaintiff before he became eligible under the FMLA to avoid having to grant him leave. In response, employer

sought to dismiss the claim. It argued that plaintiff was not employed for at least 12 months. Nor did he have at least 1,250 hours of service. Therefore, plaintiff was not even eligible for the FMLA. Plaintiff did not disagree. Rather, he argued that an employer's preemptive termination to avoid having to grant leave violated the FMLA. But the district court did not agree. First, the court found that plaintiff did not give employer adequate notice, as required by the FMLA. That plaintiff told management personnel that he had a back injury that would require surgery was not enough. He never referenced an intention to use leave pursuant to the FMLA. So "the court cannot conclude, even in the light most favorable to the plaintiff, a trier of fact could conclude that the 'defendant reasonably understood that the plaintiff would be taking FMLA leave' sometime more than four months in the future." Besides, the court added, plaintiff was not eligible for the FMLA when he "theoretically" requested leave. The Second Circuit made it clear that an employee is not eligible for FMLA protections until he meets the 12-month tenure or 1,250-hour service requirements. The FMLA does not protect pre-eligible employees. The court dismissed plaintiff's case.

Summarized elsewhere:
***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-CV-00092-GZS, 2016 WL 3566202 (D. Me. June 27, 2016)**

***Scott v. Valley Elec. Contractors, Inc.*, No. 15-CV-14281, 2016 WL 7100250 (E.D. Mich. Dec. 6, 2016)**

***Keselyak v. Curators of the Univ. of Mo.*, No. 2:16-CV-04101-MDH, 2016 WL 4126568 (W.D. Mo. Aug. 2, 2016)**

***Lamonaca v. Tread Corp.*, 157 F. Supp. 3d 507 (W.D. Va. 2016)**

A. Timing of the Notice and Leave

***Thomas v. D.C.*, No. 14-CV-00335 (APM), 2016 WL 3919822 (D.D.C. July 18, 2016)**

Plaintiff was formerly employed by defendant as a fingerprint specialist. She filed a lawsuit against her former employer alleging that she was unlawfully denied leave under the FMLA and retaliated against for seeking FMLA leave. Defendant filed a motion for summary judgment seeking to dismiss these claims. The District Court for the District of Columbia denied defendant's motion on the grounds that there were disputed issues of material fact. Defendant contended that plaintiff could not prove her claim that it unlawfully denied her FMLA leave because: (1) she could not prove that she was unable to perform the functions of her job during the time frame for which she was seeking leave; and (2) she did not give proper notice of her foreseeable need for FMLA leave. As to the first issue, the court concluded that plaintiff's doctor's medical certification form created a disputed issue of material fact because it stated both that plaintiff needed continuous leave and that she could work between her medical treatments. As to the second issue, the court concluded there were disputed issues of material fact both as to when she knew she needed FMLA leave and communications she had with defendant as to her need for leave. Finally, the court also concluded that disputed issues of material fact precluded summary judgment on plaintiff's retaliation claim, including the facts that defendant placed plaintiff on "AWOL" status the day after she first submitted FMLA paperwork that needed to be

redone, and defendant made the decision to terminate her before she had the opportunity to resubmit complete FMLA paperwork.

***Brown v. Lester E. Cox Med. Ctrs.*, No. 6:14-CV-03529-MDH, 2016 WL 297738 (W.D. Mo. Jan. 22, 2016)**

Plaintiff, a hospital Patient Care Assistant, brought suit against her former employer alleging that her employment was terminated in violation of the FMLA after defendant terminated her for accumulating too many absences in a 12-month period. Defendant moved for summary judgment, which the district court denied. The court concluded that plaintiff had set forth sufficient facts that she had adequately and timely notified her employer of, first, her migraines, which are a "serious health condition" under the FMLA, and second, her need to take time off due to the migraines. The court explained that viewing the evidence in the light most favorable to plaintiff, a reasonable juror could conclude that plaintiff's statements to defendant regarding her headaches were sufficient to put defendant on notice of plaintiff's condition (and FMLA eligibility) and to trigger defendant's obligation to further investigate the circumstances surrounding plaintiff's absences prior to terminating plaintiff. The court's conclusion was bolstered by the fact that defendant's practice was to remove absences from the cumulative total triggering termination when it was apparent employee could have or should have requested FMLA leave even though employee failed to do so.

***Poff v. Prime Care Med., Inc.*, No. 1:13-CV-03066, 2016 WL 3254108 (M.D. Pa. June 14, 2016)**

After a nonjury trial, the court found in favor of plaintiff on her claim that the medical center employer violated the FMLA by terminating her employment after she requested medical leave for a serious health condition. The court awarded plaintiff $103,606.88. Defendant sought to have the court amend its findings of fact and judgment pursuant to Federal Rule of Civil Procedure 52(b) and 59(a)(2). Neither rule, however, allows a party another opportunity to prove its case. Defendant argued that plaintiff did not provide timely notice of her need for FMLA leave. Rejecting this argument, the court refused to amend its findings because plaintiff complied with the collective bargaining agreement by telling her supervisor she was will and needed to leave work. Further, on the same day she left work early, she contacted human resources to request FMLA forms. The court denied defendant's motions, confirming its own findings that this was sufficient to put defendant on notice that the FMLA may apply.

Summarized elsewhere:
***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

1. Foreseeable Leave

***Alejandro v. ST Micro Elecs., Inc.*, No. 15-CV-01385-LHK, 2016 WL 1394385 (N.D. Cal. Apr. 8, 2016)**

Plaintiff sued defendant, his former employer, for interfering with his FMLA rights, among other things. In response, defendant argued that plaintiff never sought FMLA leave and filed a motion for summary judgment. The district court granted the motion. That plaintiff failed to seek or request FMLA leave precluded his FMLA claim. In addition, defendant was

justified in terminating plaintiff for job abandonment. Company policy, which plaintiff admitted knowing, required employees to give prior notice of absences. It also limited the number of no-call/no-show absences.

Although expressly mentioning the FMLA is not necessary, an employee must notify an employer that employee intends to take leave under the FMLA. Specifically, employee must give at least 30 days advance notice of foreseeable leave. For leave that is unforeseeable, the FMLA requires notice that is practicable under the facts and circumstances. Without exception, employer cannot deny leave for a medical emergency based on the lack of advance notice. In the end, the critical question is whether the notice is sufficient to reasonably apprise employer that employee requests leave based on a serious health condition that prevents employee from performing their job functions. Even a generalized notice might suffice, if an employee who suffers from a chronic illness has previously informed employer about the illness. Likewise, calling in sick during an absence and later providing forms describing a serious health condition is sufficient notice. In contrast, merely calling in sick for cold or flu symptoms is insufficient notice under the FMLA.

Plaintiff, however, did not give the required notice under the FMLA. And he never told defendant that his illness might prevent him from giving notice. Instead, contrary to company policy and the FMLA, plaintiff missed four consecutive workdays for a mental health illness without giving advance notice. Again, plaintiff knew that two no-call/no-shows in a row or in a rolling 12 month period was cause of termination. Plaintiff also knew that he was to contact his supervisor directly if his illness caused him to miss work. Meanwhile, plaintiff's supervisor knew about plaintiff's illness. He encouraged plaintiff to review the company's leave of absence programs with the human resources department. Yet, plaintiff never sought leave for his illness during the four-day period that he was absent. He failed to communicate with defendant entirely. So, because plaintiff never sought FMLA leave—even after his supervisor encouraged him to take a formal leave of absence—the court held that defendant did not deny plaintiff leave in violation of the FMLA. It was lawful for defendant to terminate plaintiff for exceeding the number of call-ins and no-call/no-shows.

a. Need for Leave Foreseeable for 30 or More Days

Summarized elsewhere:
***Craig v. UConn Health Ctr.*, No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)**

***Saldana v. Pub. Health Tr. of Miami-Dade Cty.*, No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)**

***Strulson v. Chegg, Inc.*, No. 3:15-CV-00828-CRS, 2016 WL 3094050 (W.D. Ky. June 1, 2016)**

***White v. Ag Supply Co. of Wenatchee*, No. 2:15-CV-0089-TOR, 2016 WL 737925 (E.D. Wash. Feb. 23, 2016)**

b. Need for Leave Foreseeable for Less Than 30 Days

2. Unforeseeable Leave

***Mehmeti v. Jofaz Transp., Inc.*, 649 F. App'x 112 (2d Cir. 2016)**

Plaintiff alleged that his previous employer violated the FMLA when it fired him from his job as a bus driver. The district court granted summary judgment as to employer finding that there was no evidence in the record that plaintiff suffered from a serious health condition or that he was unable to perform the functions of his job.

On appeal, the Second Circuit Court affirmed the district court's ruling but on an alternative ground. For plaintiff to prevail on a claim of interference with his FMLA rights, he must establish: (1) that he is an eligible employee under the FMLA; (2) that defendant is an employer as defined by the FMLA; (3) that he was entitled to take leave under the FMLA; (4) that he gave notice to defendant of his intention to take leave; and (5) that he was denied benefits to which he was entitled under the FMLA. The circuit court found that plaintiff failed to satisfy the fourth factor of this test because he did not give employer sufficient notice of his intention to take leave. Although the Second Circuit Court recognizes that if an employee's need for FMLA leave is unforeseeable, employee must only inform employer as soon as practicable considering all facts and circumstances of a situation, the court held that plaintiff here failed to meet this standard. In this case, plaintiff waited two-and-one-half hours after parking his bus before notifying employer of his medical condition, during which time he filled the tank of the bus with gas and called his son to ask for a ride to the doctor. Plaintiff did not explain why it was practicable for him to perform these other actions but not practicable to apprise employer of the situation during that period of time. Therefore, the circuit court affirmed the district court's judgment on an alternative ground, holding that plaintiff could not prevail on his FMLA interference claim due to his failure to give employer proper notice of his intention to take leave.

***Garner v. St. Clair Cty., Ill.*, No. 15-cv-00535-JPG-DGW, 2016 U.S. Dist. LEXIS 166646 (S.D. Ill. Dec. 2, 2016)**

St. Clair County discharged plaintiff from its Small Claims Division. The reason given for discharge was employee's failure to give notice of her intent not to return to work after a previously approved doctor's appointment. According to plaintiff, her doctor prescribed her medication that caused her to fall asleep and, as a result, she was not able to return to work that day. She provided a doctor's note to her supervisor the next day and requested FMLA paperwork from the payroll clerk. She was notified later that day that she was being discharged. She then brought suit for interference with the exercise of her FMLA rights by defendant.

Defendant argued the discharge was based on plaintiff's failure to call in after the appointment to give notice that she would not be in for the rest of the day. Employer indicated that its decision to discharge plaintiff was further influenced by a history of excessive absences. In denying the parties cross-motions for summary judgment, the court found a genuine issue of material fact as to whether plaintiff provided sufficient notice to employer.

***Wallace v. Carpenter Tech. Corp.*, No. 5:15-CV-462, 2016 WL 891398 (E.D. Pa. Mar. 9, 2016)**

Plaintiff, an active member of the military, filed FMLA interference and retaliation claims against his former employer. Plaintiff alleged that defendants' management exhibited hostility toward his needs for FMLA leave to care for his son's epilepsy and ultimately terminated him in retaliation for his taking FMLA leave.

Plaintiff filed a motion for partial summary judgment, arguing that the *undisputed facts* showed that he sought and was formally approved for intermittent FMLA leave related to his son's epilepsy; that, as of March 2013 when he was terminated, he had not exhausted his FMLA leave; that he could not always call out in advance of leave due to the nature of his son's FMLA-qualifying condition; that defendant terminated him due to his failure to call out in advance of FMLA leave; and that the FMLA mandates that when leave is unforeseeable, an "employee must provide notice to the employer as soon as practicable" but may be excused from complying with employer's usual leave policy. Defendant responded that it terminated plaintiff for violating its "Report-Off Procedure" and failing to report to work for reasons unrelated to any FMLA leave. The court denied plaintiff's motion for partial summary judgment because there were genuine issues of material fact about (1) whether employer terminated plaintiff for taking FMLA leave or for failing to comply with employer's "Report-Off Procedure," and (2) whether employer's "Report-Off Procedure," which defendant argued had provisions for early-monrning or emergency call-in,was in conflict with the FMLA. These genuine issues of material fact, the court explained, precluded a favorable ruling on plaintiff's motion.

Summarized elsewhere:
***Alejandro v. ST Micro Elecs., Inc.*, No. 15-CV-01385-LHK, 2016 WL 1394385 (N.D. Cal. Apr. 8, 2016)**

3. Military Family Leave

B. Manner of Providing Notice

***Alfred v. Harris Cty. Hosp. Dist.*, No. 16-20058, 2016 U.S. App. LEXIS 21530 (5th Cir. Dec. 2, 2016)**

A senior manager initially brought suit against defendant alleging she was demoted in retaliation for taking FMLA leave to have surgery in July of 2014. After employer raised the issue of sovereign immunity on the basis of FMLA self-care leave, plaintiff sought leave to amend her complaint to add a family-care retaliation claim for having taken FMLA leave to care for her mother in August of 2014. The district court denied the request for leave to amend and dismissed the self-care claim on the ground of sovereign immunity. Plaintiff requested reconsideration of her motion to amend. The district court denied her request and dismissed her retaliation claims for damages and reinstatement with prejudice.

On appeal, the Fifth Circuit affirmed the district court's dismissal of her claims against employer. Regarding plaintiff's motion to amend her complaint, the court determined that the undisputed facts showed plaintiff's demotion occurred upon her return from self-care leave. Despite plaintiff's argument that her employer had advance notice of her need for family care

leave prior to her demotion, the court found that the general discussion of her mother's illness between plaintiff and her supervisor in May of 2014 was insufficient to establish notice of the future need for FMLA leave. Instead, the court determined that the first notice given by plaintiff of the need for family-care leave occurred while the parties were discussing plaintiff's performance-related removal from management. Thus, the court affirmed the dismissal of plaintiff's complaint.

***Reif v. Shamrock Foods Co.*, No. EDCV 15-636-VAP (SPx), 2016 WL 1171543 (C.D. Cal. Mar. 9, 2016)**

Plaintiff worked as an account executive for defendant. In December 2012, defendant met with plaintiff to discuss his failure to meet certain sales goals. He was then placed on a Performance Improvement Plan which lowered his sales quota from $116,000 to $65,000. When plaintiff failed to reach that goal, defendant decided to terminate his employment on February 25, 2013. It prepared his final check the next day. On February 26, 2013, plaintiff contacted his supervisor to advise him that he needed to take FMLA leave to care for his stepdaughter, who had multiple sclerosis. Plaintiff did not, however, contact defendant's human resources department nor did he provide a medical certification as required by defendant's policy. On March 1, 2013, defendant informed plaintiff that he was terminated. Plaintiff then sued defendant, arguing that his termination violated the interference provisions of the FMLA.

The court granted defendant's Motion for Summary Judgment on plaintiff's FMLA claim. Under Ninth Circuit law, an employee may state an interference claim if he or she was subjected to "negative consequences" for taking FMLA leave. Defendant argued that plaintiff's interference theory should fail because (1) plaintiff did not did not properly assert his right to take FMLA leave, or (2) his termination was not causally linked to taking FMLA leave. The court rejected defendant's first argument, explaining that an employee invokes his or her FMLA rights by advising employer the reasons for taking leave and the duration of leave in a manner that allows employer to determine whether the leave qualifies under the FMLA. Because plaintiff informed his supervisor about his need to care for his stepdaughter's multiple sclerosis, this was sufficient to assert his rights under FMLA. The fact that he did not comply with company policy for taking leave was irrelevant because that was not a requirement to properly request leave under FMLA. (It should be noted that the court did not discuss the impact of 29 CFR § 825.302(d), which provides that an employer may require an employee to comply with employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.) However, summary judgment was proper because the undisputed evidence showed that defendant's decision to terminate plaintiff was made before he requested FMLA leave. For this reason, it agreed with defendant's second argument that there was no causal connection between plaintiff's request for leave and his discharge.

***Helton v. Wesley Health Sys., LLC*, No. 2:15-CV-20-KS-MTP, 2016 WL 913271 (S.D. Miss. Mar. 9, 2016)**

Plaintiff, a respiratory therapist employed by defendant, alleged interference with her FMLA rights when defendant discharged her. Plaintiff suffered a panic attack and did not report for her scheduled shifts for three days. Plaintiff also began applying for FMLA leave when

defendant notified her that she had been terminated for failing to provide notice. Plaintiff claimed that she notified her supervisors.

Defendant filed a motion for summary judgment. The court opined that there was a genuine dispute of material fact because defendant knew that plaintiff was in the process of applying for FMLA leave during her period of absence, and various affidavits showed that plaintiff's supervisors knew plaintiff's intention to take time off work. Thus, defendant's motion was denied.

***Rader v. Upper Cumberland Human Res. Agency*, No. 2:14-0110, 2016 WL 1118211 (M.D. Tenn. Mar. 22, 2016)**

(FMLA and ADA case where both parties filed cross motions for summary judgment)

Plaintiff was hired by defendant as assistant kitchen manager. The kitchen was responsible for preparing meals for delivery to senior citizens and homebound persons as part of the Meals on Wheels program. Plaintiff experienced pain and discomfort while in the bathroom and left work after notifying a coworker and leaving voice mail messages for his supervisor's director, whose office was in a different location. Defendant had a policy where permission was required from a supervisor before an employee could leave work. When plaintiff left work, he walked to a coffee shop and had a cup of coffee with his uncle, who drove him home. Defendant fired him that day for violating company rules by walking off the job.

After learning of his firing, plaintiff saw a nurse practitioner who diagnosed him with colitis. Plaintiff provided a note to defendant, but did not get his job back. Subsequently the nurse practitioner completed a Certification of Health Care Provider which indicated plaintiff had been incapacitated from the day he left work, but his condition was stable although it could be episodic. Two years later, he was evaluated by a gastroenterologist who opined that his colitis was not a serious condition that would prevent him from performing the functions of his job.

On the FMLA interference and retaliation claims, the court found there were jury question regarding (1) whether plaintiff's condition was chronic (which, under the regulations, is defined as period of incapacity for a condition that may be episodic for an extended period of time, requiring periodic visits to a health care provider), (2) whether notice was properly given by plaintiff, and (3) whether defendant retaliated by firing plaintiff the same day without hearing his side of the story.

***Alexander v. Kellogg USA, Inc.*, No. 2:15-cv-02158-STA-tmp, 2016 WL 1058110 (W.D. Tenn. Mar. 14, 2016)**

Plaintiff worked as a production operator for defendant. Defendant maintained an attendance policy which provided for various forms of discipline based on points an employee accumulates for unexcused absences. It also maintained a policy for employees taking intermittent leave under the FMLA. Under that policy, an employee certified for intermittent leave must report any intermitted leave of absence to CIGNA, which administered FMLA leaves for defendant. Defendant certified plaintiff for intermittent leave from October 24, 2013 to April 14, 2014. On November 20, 2013, plaintiff took but did not report his intermittent leave absence to CIGNA. Plaintiff again missed work on December 9, 10, and 11, 2013. Instead of

contacting CIGNA, he notified his supervisor of his need to take intermittent leave. As a result of these unexcused absences, defendant terminated plaintiff. Plaintiff thereafter filed suit against defendant alleging claims of interference and retaliation under the FMLA.

The court granted defendant's Motion for Summary Judgment on plaintiff's interference theory, holding that plaintiff failed to establish a *prima facie* case. This was because plaintiff did not, as set forth in 29 CFR § 825.302(d), comply with his employer's usual notice and procedural requirements, absent unusual circumstances. On each of those dates, plaintiff did not follow defendant's intermittent leave policy by contacting CIGNA for absences relating to intermittent leave. In particular, that policy did not allow him to call his supervisor to excuse his absences on December 9, 10 and 11. Even if plaintiff could make out a *prima facie* case, he could not demonstrate that defendant's reason for terminating him were a pretext for unlawful discrimination. Plaintiff offered no evidence showing that defendant's reason for terminating him had no basis in fact, did not motivate its challenged conduct, or was insufficient to challenge that conduct. Because he could not, his interference theory could not proceed.

The court also ruled that plaintiff could not make out a *prima facie* case on his retaliation claim. The court first explained that plaintiff did not engage in protected conduct because plaintiff's unexcused absences could not form the basis of seeking protected FMLA leave. Plaintiff's retaliation claim also failed due to the lack of causation between any putative protected conduct and his termination. In particular, the court rejected plaintiff's argument that he could establish retaliatory conduct based on the temporal proximity between the above-referenced leaves and his termination. That was because those leaves were unexcused and because defendant had granted his request for intermittent leave on December 16, 2013, just days after his improper December 11, 2013 absence. Also unavailing was plaintiff's contention that he was treated differently from other employees who had more attendance policy points than him but who were also not terminated. This was because that contention was based on a hearsay and otherwise inadmissible statement of plaintiff's union steward. Even if plaintiff was able to establish a *prima facie* case, he was not able to prove pretext for the same reasons that applied to his interference theory. In addition, despite the fact that his attempts to take leave and his discharge was temporally proximate, that alone could not show pretext, especially when plaintiff's *prima facie* case for retaliation is weak.

Summarized elsewhere:
***Landry v. Howell*, No. 5:14-CV-00167 (LJA), 2016 WL 5387629 (M.D. Ga. Sept. 26, 2016)**

Brown v. Lester E. Cox Med. Ctrs., No. 6:14-CV-03529-MDH, 2016 WL 297738 (W.D. Mo. Jan. 22, 2016)

Lasher v. Medina Hosp., No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)

Long v. Mayco, Inc., No. CIV-15-1019-M, 2016 WL 6783249 (W.D. Okla. Nov. 16, 2016)

Hopkins v. MWR Mgmt. Co., No. 15 CVS 697, 2016 WL 2840305 (N.C. Super. Ct. May 13, 2016)

C. Content of Notice

***De Oliveira v. Cairo-Durham Cent. Sch. Dist.*, No. 14-3710-CV, 2016 WL 703968 (2d Cir. Feb. 23, 2016)**

Plaintiff, an elementary school teacher formerly employed by a school district, filed suit against the school district based on her dismissal due to inferior seniority status, as part of budget driven layoffs. The District Court for the Northern District of New York granted summary judgment to defendant. The Second Circuit Court of Appeals held that the court erred in dismissing plaintiff's failure-to-provide-notice interference claim under the FMLA. Specifically, the court held: that although defendant's policy did not diminish plaintiff's restoration rights upon her return the policy nonetheless served as a "basis for restoration." Thus, defendants had a duty under 29 C.F.R § 825.604 to inform plaintiff in writing about the policy before she took FMLA leave. Having failed to do so, it violated the notice requirements of §§ 825.300(c)(1)(vi) and 825.604.

***Avila v. Childers*, No. 3:15-CV-136/MCR/EMT, 2016 WL 5868100 (N.D. Fla. Sept. 30, 2016)**

Plaintiff, a Tax Deed Specialist, sued her employer, a County Clerk of Court, and employer sought summary judgment. Employee argued that employer interfered with her FMLA rights when it discharged her after she took sick leave. A federal district court granted employer's motion for summary judgment finding that employee did not provide employer sufficient notice that she was entitled to FMLA leave when she faxed a doctor's notice that did not reference her depression. Because employee did not give employer reason to believe that she was entitled to FMLA leave, the court found that employer was not required to inquire as to the reasons for the leave nor was it required to reinstate her. Finally, because employee did not request FMLA leave, the court dismissed the claim that she was discharged in retaliation for taking such leave.

***Finch v. Morgan Stanley & Co.*, No. 15-81323-CIV, 2016 WL 4248248 (S.D. Fla. Aug. 11, 2016)**

Plaintiff, a financial advisor, asserted claims against her employer for interference and retaliation under the FMLA. Plaintiff had left work upon finding out that her disabled daughter was sexually assaulted at school. She informed her branch manager of the incident. Plaintiff claims she was constructively discharged around two years later. Defendant argued that plaintiff failed to state a claim upon which relief could be granted. The District Court for the Southern District of Florida agreed. First, the court noted that plaintiff could only state an interference claim if she gave proper notice, and that she did not allege that she gave proper notice. The court stated that plaintiff must satisfy two notice criteria: timing and content. For an employee's unforeseeable need for FMLA leave, she has to give notice as early as practicable, must provide "sufficient information for [her] employer to reasonably determine whether the FMLA may apply to the leave request," and give notice of the probable duration of the condition requiring leave. The court found that plaintiff failed to allege that she put employer on notice that her absence was due to a potentially FMLA-qualifying reason, and that she did not allege she gave the required notice of the probable duration of the condition requiring leave. Thus, the court agreed that plaintiff failed to adequately state an FMLA interference claim, but it noted plaintiff

would be given an opportunity to amend the claim. Second, plaintiff failed to state a retaliation claim. To state a claim of retaliation, a plaintiff must first allege that she engaged in statutorily protected activity. Because the complaint did not adequately allege that plaintiff ever requested or sought FMLA leave from her employer, she failed to allege that she engaged in protected activity under the FMLA. Again, the court noted plaintiff would be given an opportunity to amend.

***Guernsey v. City of Lafayette*, No. 4:13-CV-00086, 2016 U.S. Dist. LEXIS 107327 (N.D. Ind. Aug. 12, 2016)**

Plaintiff brought suit under 29 U.S.C. § 2601, *et seq.*, and other statutes, through which he alleged that he was discharged for a one-day absence that qualified for leave under the FMLA. The case was before the court on cross motions for summary judgment. The issue before the court was whether plaintiff was undergoing continuing treatment for a serious health condition. Defendant argued that the claim must fail because plaintiff failed to present medical evidence that he was suffering from the condition on the day in question. The court cited the Code of Federal Regulations and existing case law, and noted that a person need not seek medical treatment each time the person is absent for a recurring health condition. Defendant then argued that plaintiff failed to provide sufficient notice that the absence was due to an FMLA qualifying condition. The court noted that the standard was whether employee provided sufficient notice that the absence was "likely" due to an FMLA-qualifying event. In this case, plaintiff said that his "back was bothering him," and his doctor's notes merely said that he was "ill," "seen" by a doctor, and should be "excused." Plaintiff refused to provide further clarifying information. Given the lack of information plaintiff provided, the court found that plaintiff failed to put employer on notice that the absence was likely due to an FMLA-qualifying event. The court granted summary judgment to defendant and denied summary judgment to plaintiff.

***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 1366442 (E.D. Mich. Apr. 6, 2016)**

A police officer who was terminated for insubordination based on a refusal to work mandatory overtime alleged that his termination violated the FMLA and other state and federal laws. Addressing his interference claim on a motion for summary judgment, the court found that the officer provided sufficient notice of a potential FMLA-qualifying condition. Although two notes were overly vague and listed only a restriction, one doctor's note listed specific conditions and stated that the officer was receiving continuing treatment. The court rejected employer's arguments that the officer did not complete the FMLA forms, noting that employer failed to provide the forms. The court also concluded that the officer was denied FMLA benefits because he was terminated for his refusal to work mandatory overtime, which appeared to be directly linked with FMLA leave.

Turning to the FMLA retaliation claim, the court concluded that the refusal to work overtime equated to a right to work a reduced schedule under the FMLA. Thus, the officer was engaged in protected activity. As with the interference claim, the court found that employer had sufficient notice of the need for leave. Finally, the court found that there was adverse action (termination), causation and evidence of pretext based on the officer's refusal of direct orders to work overtime. Thus, the court denied summary judgment on the retaliation claim.

***Raimondi v. Wyo. Cty.*, No. 3:14CV1918, 2016 WL 2989067 (M.D. Pa. May 24, 2016)**

A director of a 911 center who was terminated upon her return from leave to care for her parents alleged that her employer interfered with her FMLA rights. Granting employee's motion for summary judgment, the court rejected employer's argument that employee was not entitled to leave because she never expressly requested leave. The court found that employee informed employer prior to traveling out-of-state to care for her parents that she needed time off to be with her sick father and prepare her parents' home for their return from the nursing home. The court noted that employer never afforded employee the opportunity to cure any deficiency with her notice because it never asked for clarification or a medical certification. The court also rejected employer's argument that its leave donation policy supplanted the FMLA. After concluding that employees' father suffered from a serious health condition, the court found that employee was denied benefits because she was not returned to her position and there was no documented evidence that she was terminated for poor job performance.

***Branham v. Delta Airlines*, No. 2:14-CV-429 TS, 2016 WL 1676829 (D. Utah Apr. 26, 2016)**

Former employee worked as a flight attendant and brought an action against former airline employer alleging that she was terminated in violation of the FMLA for taking time off to care for her sick mother and asserting her manager is individually liable. The District Court for the District of Utah granted employer's summary judgment motion. The court found that plaintiff's FMLA interference claim failed because plaintiff would have been terminated even if her absence was considered FMLA leave, because plaintiff failed to comply with employer's absence notification policy. The FMLA does not relieve an employee of the duty of complying with an employer's absence policy. Plaintiff would have been held accountable for this failure regardless of whether the absence was FMLA qualifying.

Plaintiff also argues that defendant failed to properly notify her that FMLA coverage may apply. The court found that plaintiff failed to provide employer with sufficient information to reasonably apprise that she might qualify for FMLA benefits. When plaintiff merely stated that her mother was sick and that she was unfit to fly, the information did not sufficiently convey to employer that that plaintiff or her mother had a serious health condition to which FMLA leave would apply.

The Tenth Circuit has not specifically addressed individual liability under the FMLA. However, other courts have addressed the issue and concluded that individuals may be held liable as employers under the statute. However, plaintiff's supervisor could not be considered an employer under the FMLA because she held no corporate role beyond a managerial position and played no part in the decision-making process as to plaintiff's FMLA requests.

Summarized elsewhere:
***Lopez v. City of W. Miami*, No. 15-14645, 2016 WL 6068822 (11th Cir. Oct. 17, 2016)**

***Sahlhoff v. Gurley-Leep Auto. Mgmt. Corp.*, No. 3:14-cv-1790 RLM-MGG, 2016 WL 5724440 (N.D. Ind. Sept. 29, 2016)**

***Rentz v. William Beaumont Hosp.*, No. 15-11931, 2016 WL 3753554 (E.D. Mich. July 14, 2016)**

***Justice v. Renasant Bank*, No. 1:15-CV-00136, 2016 WL 6635638 (N.D. Miss. Nov. 8, 2016)**

***Denson v. Atl. Cty. Dep't of Pub. Safety*, No. 13-5315 (JS), 2016 WL 5415060 (D.N.J. Sept. 27, 2016)**

***Rivera v. Crowell & Moring, L.L.P.*, No. 14-CV-2774 (KBF), 2016 WL 796843 (S.D.N.Y. Feb. 18, 2016)**

***Perez v. U.S. Cotton, LLC*, No. 1:15 CV 226, 2016 WL 541469 (N.D. Ohio Feb. 11, 2016)**

***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

***Caldwell v. KHOU-TV & Gannett Co.*, No. CV H-15-0308, 2016 WL 3181167 (S.D. Tex. June 3, 2016)**

D. Change of Circumstances

***Ocasio v. Oriental Bank*, No. 15-01309 (DRD), 2016 WL 3945172 (D.P.R. July 19, 2016)**

District court granted summary judgment to employer on bank compliance clerk's FMLA interference, retaliation, and reinstatement claims. Plaintiff received FMLA leave for the purpose of caring for her injured child and was to return to work on a specified date. The day plaintiff was to return to work, she learned she required surgery for her own medical condition. Plaintiff had the surgery and did not inform employer of her need for additional leave. Plaintiff presented to work one week after her scheduled return date and was terminated pursuant to employer's policy of automatic termination of any employee who fails to present at work for three consecutive days without notice.

No evidence in the record suggested that employer interfered with plaintiff's right to FMLA leave to care for her child. Nor did the record indicate that plaintiff notified employer of her need for additional leave. The record was devoid of any evidence to contradict employer's position that plaintiff was terminated pursuant to the automatic termination policy. Plaintiff waived any right to reinstatement by failing to return to work at the conclusion of her authorized leave.

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

***Crane v. AHC of Glendale, LLC*, No. 2:14-CV-2415 JWS, 2016 WL 5363748 (D. Ariz. Sept. 26, 2016)**

Plaintiff employee was a certified physical therapist assistant. She was involved in an incident at work and pursued a workers' compensation claim. Approximately nine months later, her workers' compensation claim was closed based on an independent medical exam that concluded she did not show signs of permanent impairment or the need for work restrictions related to the workplace incident. Based on the results of the medical exam, her employer ceased all accommodations at that time and advised plaintiff that she needed to provide a doctor's clearance to work without restrictions. Plaintiff responded with a doctor's note imposing

multiple work restrictions. She was not returned to the schedule and her insurance was terminated. Plaintiff filed suit alleging that her employer violated the FMLA because she was eligible for and entitled to take leave under the FMLA and employer did not advise her of her rights and terminated her employment without allowing her to take FMLA leave. Employer moved for summary judgment arguing that plaintiff's FMLA leave claim must fail because (i) she did not request FMLA leave, and (ii) it provided leave to plaintiff until such time as she was able to provide a doctor's clearance. The court agreed with employer on both points and granted summary judgment. The court also rejected plaintiff's alternative argument that she was forced to take FMLA leave that she did not need, reasoning that such an allegation was directly contrary to the basis for her FMLA claim that she was denied leave.

***Stallworth v. Loyola Univ. Chi.*, No. 14 C 7084, 2016 WL 3671426 (N.D. Ill. July 11, 2016)**

Plaintiff, Lamont Stallworth, a full, tenured university professor at Loyola University Chicago, brought suit for interference under the FMLA, *inter alia*, against his employer following his termination after 33 years of employment. The district court granted defendant's motion to dismiss plaintiff's FMLA claim for failure to state a claim. The court stated that interference claims require a plaintiff to show: (1) eligibility for FMLA protections; (2) employer coverage under the FMLA; (3) FMLA leave entitlement; (4) that plaintiff provided sufficient notice of intent to take leave; and (5) that plaintiff's employer denied FMLA benefits to which plaintiff was entitled. The court found that plaintiff failed to allege that he actually requested FMLA leave and that his employer had denied his request. Without a leave request, the court held that defendant was not sufficiently on notice of plaintiff's right to FMLA leave and therefore could not have interfered with that right.

***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

Plaintiff, a registered nurse, brought this action in the United States District Court for the Northern District of Ohio against defendants, employer hospital and its supporting foundation, seeking damages stemming from alleged interference and retaliation under the FMLA, in addition to disability discrimination under state law. Defendants filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56, which the court granted. With regard to FMLA retaliation, the court found that plaintiff had not proven pretext under the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As to FMLA interference, the court found that plaintiff had not established even a *prima facie* case.

Plaintiff, who suffers from severe and chronic migraines, worked the night shift on the obstetrical floor of the hospital, from 7:00 p.m. to 7:30 a.m., and among other things was responsible for monitoring the mothers' vital signs and contractions along with the babies' fetal heart rates. After becoming FMLA eligible and submitting the proper paperwork, plaintiff's request for intermittent FMLA leave was approved, and she was granted all the FMLA leave she requested. On her September 21-22, 2014 shift, plaintiff began experiencing a severe migraine, told a coworker "[t]his isn't a good night to get a headache," and then removed herself to an unused patient room across the hall from the room to which she was assigned in order to keep an eye on a fetal heart monitor away from bright lights. Eventually a nurse found her "sleeping on the bed." The nurse knew she was sleeping because plaintiff reportedly stated, "I must have

fallen asleep." Thereafter, defendant told plaintiff that sleeping on duty was a major infraction and terminated her immediately.

The court held that plaintiff's FMLA retaliation claim failed because the Sixth Circuit had adopted the "honest belief rule," which required that plaintiff in this case put forth evidence that demonstrates defendants did not "honestly believe" the facts before them at the time they terminated plaintiff, and that because she did not present any such evidence, she could not prove pretext. As to plaintiff's FMLA interference claim, the court found that she did not satisfy the fourth prong of establishing a *prima facie* case—notice of her intent to take leave—because telling a coworker you have a headache is insufficient.

The case is currently on appeal in the Sixth Circuit Court of Appeals.

***Acker v. Gen. Motors LLC*, No. 4:15-CV-706-A, 2016 WL 3661466 (N.D. Tex. July 1, 2016)**

Plaintiff sued defendant, his employer, for interference and retaliation claims under the FMLA. Subsequently, the district court granted defendant's motion for summary judgment. That plaintiff failed to comply with defendant's FMLA notice policy, along with his failure to establish a *prima facie* case of retaliation, precluded plaintiff's FMLA claims.

Under the FMLA, an employer can deny leave based on the failure to comply with the usual and customary notice and procedural requirements for requesting leave. The FMLA includes as an example, that an employer may require an employee to call a designated number to request FMLA leave. In such a case, an employee must comply with the call-in policy to be entitled to FMLA leave. Moreover, an employer can terminate an employee for failing to comply with an FMLA notice policy—such as not calling in requests for FMLA leave—even if the unreported absences were protected by the FMLA.

In plaintiff's case, defendant had an FMLA notice policy. Employees had to call in requests for FMLA leave to both an absence call-in line and a benefits-and-services line. When advance notice was not possible, employees were to report absences to the absence call-in line at least 30 minutes prior to a shift starting. Also, they had to notify the benefits-and-services center by the end of their normally scheduled shift. Though plaintiff knew about these requirements, he did not call the absence call-in line or benefits-and-services line. Nor did plaintiff report his absences before the deadline. According to the court, requiring FMLA-leave requests to be made by calling two phone numbers is not outside the scope of allowable requirements for requesting FMLA leave. A call-in deadline requiring notice 30 minutes prior to a shift starting is also lawful. And plaintiff's failure to comply with defendant's policy was not justified by his inability to speak to a live person or any confusion he experienced by the options menu of the call-in line. So, because plaintiff was not entitled to FMLA leave, he could not prove that defendant interfered with his use of FMLA leave. Likewise, plaintiff could not make *prima facie* case of retaliation. As the court explained, requesting an FMLA recertification from an employee is not retaliation when the frequency and duration of the leave requested changed.

Summarized elsewhere:
***Law v. Kinross Gold U.S.A., Inc.*, 615 F. App'x 645 (9th Cir. 2016)**

***Craig v. UConn Health Ctr.*, No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)**

***Levaine v. Tower Auto. Operations USA I LLC*, No. 15-CV-11084, 2016 WL 2894482 (E.D. Mich. May 18, 2016)**

***Cruz v. Wyckoff Heights Med. Ctr.*, No. 13 CIV. 8355 (ER), 2016 WL 5339540 (S.D.N.Y. Sept. 23, 2016)**

***Ross v. State*, No. 15-CV-3286 (JPO), 2016 WL 626561 (S.D.N.Y. Feb. 16, 2016)**

***Ocasio v. Oriental Bank*, No. 15-01309 (DRD), 2016 WL 3945172 (D.P.R. July 19, 2016)**

***Rice v. Charter Commc'ns, Inc.*, No. 6:15-2492-HMH-JDA, 2016 WL6804331 (D.S.C. Nov. 17, 2016)**

IV. Employer Response to Employee Notice

Summarized elsewhere:
***Munter v. Lifecare Med. Ctr.*, No. CV 14-4575 (MJD/LIB), 2016 WL 2858793 (D. Minn. May 16, 2016)**

***Mozingo v. Oil States Energy, Inc.*, No. 3:14-CV-924-CWR-LRA, 2016 WL 617837 (S.D. Miss. Feb. 16, 2016)**

***Brown v. Lester E. Cox Med. Ctrs.*, No. 6:14-CV-03529-MDH, 2016 WL 297738 (W.D. Mo. Jan. 22, 2016)**

A. Notice of Eligibility for FMLA Leave

***Baer v. Wabash Ctr., Inc.*, No. 4:15-CV-00094-JEM, 2016 WL 1610590 (N.D. Ind. Apr. 21, 2016)**

In *Baer v. Wabash Center, Inc.*, the district court denied employer's motion to dismiss a count of plaintiff's complaint alleging an interference claim under the FMLA. The issue in the motion was whether plaintiff had adequately pled the last element of her interference claim, that she was denied benefits. Plaintiff entered an in-patient rehabilitation facility, apparently without advance notice to employer, and contacted employer's human resources administrator to request FMLA leave. Employer required plaintiff to pick up the forms in person, notwithstanding her in-patient status. Employer contended that doing so was not inappropriate because the regulations were silent as to how the forms were to be delivered. However, the court noted the regulations required employer, when leave has already commenced, to mail the appropriate forms to employee's address. Additionally, employer argued that plaintiff could not show interference with her rights because she was not prevented from taking leave. The court concluded, however, following other district courts applying 29 C.F.R. §825.220(b), that the issue in the case was whether employer's policy discouraged employees from pursuing leave. The court concluded plaintiff's complaint adequately stated a claim.

Summarized elsewhere:
***Craig v. UConn Health Ctr.*, No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)**

***Barren v. Ne. Ill. Reg'l Commuter R.R. Corp.*, No. 13 CV 4390, 2016 WL 861183 (N.D. Ill. Mar. 7, 2016)**

***Greene v. YRC, Inc.*, No. CV MJG-13-0653, 2016 WL 687478 (D. Md. Feb. 19, 2016)**

***Mesmer v. Charter Commc'ns, Inc.*, No. 3:14-CV-05915-RBL, 2016 WL 1436135 (W.D. Wash. Apr. 12, 2016)**

B. Notice of Rights and Responsibilities

***Labranche v. Frisbie Mem'l Hosp.*, No. 14-CV-566-PB, 2016 WL 4401994 (D.N.H. Aug. 17, 2016)**

Plaintiff was terminated from her job as an operating room nurse while out on FMLA leave. She later filed suit against her former employer, alleging (among other claims) FMLA interference and retaliation. The hospital moved for summary judgment, which the district court denied as to plaintiff's FMLA claims. The court held that there was an issue of fact as to plaintiff's interference claim and the questions of whether plaintiff received the required designation notice and whether the hospital miscalculated her FMLA leave. Plaintiff claimed she never received the notice letter, and defendants failed to produce time records or FMLA leave records rebutting plaintiff's allegations regarding the calculation of her FMLA leave. The court also held that there was an issue of fact as to plaintiff's retaliation claim, holding that plaintiff satisfied her burden of establishing a *prima facie* case of discrimination, as well as set forth sufficient facts that a reasonable jury could believe undermined the hospital's reason for terminating her employment. Indeed, defendant argued that it needed to fill another critical position and that is why plaintiff was terminated, but viewing the evidence in favor of plaintiff, the court credited plaintiff's claim that she could have filled the other role defendant claimed it needed to fill.

Summarized elsewhere:
***Craig v. UConn Health Ctr.*, No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)**

***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

***Velcko v. Saker Shoprites, Inc.*, No. 15-cv-1217 (PGS)(LHG), 2016 WL 4728106 (D.N.J. Sept. 9, 2016)**

C. Designation of Leave as FMLA Leave

***Razo v. Timec Co.*, No. 15-cv-03414-MEJ, 2016 WL 6576625 (N.D. Cal. Nov. 7, 2016)**

After plaintiff was laid off from his position as a welder supervisor, he brought suit under the FMLA against his former employer and its parent company alleging interference and

retaliation. Plaintiff requested to go on FMLA leave on three separate occasions, but his employer characterized each as "personal leave." Additionally, plaintiff was demoted after each leave period, which eventually led to plaintiff's termination. Both defendants moved for summary judgment, and the district court denied in part and granted in part defendants' motion.

The court granted the parent-company defendant's motion for summary judgment on all counts because plaintiff failed to establish a genuine issue of fact as to whether an employment relationship existed between plaintiff and the parent company. As to the FMLA claims against plaintiff's employer, the court denied defendant's motion for summary judgment because there were various issues of material fact. First, the court held that a genuine issue of fact existed as to whether plaintiff returned the required FMLA paperwork that his employer requested and, thus, whether plaintiff was entitled to entitled to FMLA in the first place. Second, the court held that a reasonable juror could find that plaintiff's employer violated plaintiff's right to be reinstated to his original position (or a position equivalent in all relative respects) given the timing of each of plaintiff's demotions, which occurred after every time plaintiff went on leave.

Summarized elsewhere:
***Jones v. Sharp Mfg. Co. of Am.*, No. 2:14-cv-03020-STA-tmp, 2016 WL 2344228 (W.D. Tenn. May 3, 2016)**

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

***Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016)**

Plaintiff was formerly employed as a project construction manager when he began to have issues with performance and attendance. He was diagnosed with depression and completed paperwork for a one-month leave of absence, which was approved. He returned to work prior to the expiration of the one-month leave period but continued to have performance issues and was terminated for performance issues. Plaintiff filed a lawsuit against his former employer for interference and retaliation in violation of the FMLA. The district court granted employer's motion for summary judgment, and plaintiff appealed. The Fourth Circuit Court of Appeals reversed summary judgment on the interference claim but affirmed on the retaliation claim.

In support of his interference claim, plaintiff alleged that defendant failed to provide him with required notice of his individualized FMLA rights. The court agreed that, based on the record, the notice of rights that defendant provided to plaintiff specifically failed to notify him of his right to job restoration. The court noted that such a violation alone would not give rise to a cause of action for interference, but plaintiff offered sufficient evidence of prejudice resulting from the failed notice. Plaintiff stated he would have taken the full, approved, 30-day leave had he understood his right to job restoration. Based on these facts, the court concluded that granting summary judgment to employer on the interference claims was improper. As to plaintiff's retaliation claim, the court concluded that plaintiff had not offered any evidence of pretext to undermine defendant's legitimate reason for terminating him. The court noted that the FMLA "does not prevent an employer from terminating an employee for poor performance, misconduct or insubordinate behavior." Here, plaintiff admitted some of the conduct that resulted in his termination and offered nothing other than speculation to support his claim for pretext.

***Hodges v. D.C.*, No. 12-CV-1675 (TSC), 2016 WL 1222213 (D.D.C. Mar. 28, 2016)**

Plaintiff worked for the D.C. Office of Inspector General and injured his back. After being absent due to his back injury, plaintiff provided his employer with a medical certification stating he needed periodic treatments and would need to be off work intermittently or work less than a full schedule and be absent from work for treatments. Plaintiff, however, requested continuous leave and employer denied the request for leave, explaining that plaintiff could use accrued paid leave or unpaid leave. Plaintiff did not return to work, even intermittently, for several weeks after he submitted the certification, and his employment was terminated. Both plaintiff and employer filed motions for summary judgment on plaintiff's claim for interference with FMLA leave. The district court held that plaintiff's certification for intermittent leave triggered employer's obligation to comply with the FMLA's notice requirements, including (i) notice of employee's eligibility to take FMLA leave, 29 C.F.R. § 825.300(b)(1), (ii) notice of employers expectations, employee's obligations, and consequences for employee's failure to meet those obligations, 29 C.F.R. § 825.300(c)(1), and (iii) notice of whether the leave will be designated and counted as FMLA leave, 29 C.F.R. § 825.300(d)(1).

The court denied employer's and plaintiff's motions for summary judgment stating there was a genuine issue of material fact as to whether employer's failure to give plaintiff the required notice actually caused plaintiff's termination.

***Alger v. Prime Rest. Mgmt., LLC*, No. 1:15-CV-567-WSD, 2016 WL 3741984 (N.D. Ga. July 13, 2016)**

Plaintiffs sued defendant, their former employer, for interfering with their rights under the FMLA, among other things. Following the entry of a default judgment, the magistrate judge issued a report on plaintiffs' motion for default judgment. Specifically, the judge recommended to the district court that it grant plaintiffs' motion and award them back pay, liquidated damages, attorneys' fees, and litigation costs. The court agreed.

The FMLA grants eligible employees 12 weeks of unpaid leave. That being so, an employer cannot not deny FMLA benefits to an employee who is entitled to them. When an employee requests leave that might be for an FMLA-qualifying reason, employer must give notice of employee's eligibility. Unless there are extenuating circumstances, an employer has five business days to give this notice. And failing to give it could constitute interference under the FMLA.

In holding that defendant failed to give the required FMLA notice, the court noted that defendant knew about plaintiffs' pregnancies. Plaintiffs sought leave, took leaves of absences, and requested maternity uniforms. Defendant even knew that one plaintiff was hospitalized for a pregnancy-related reason. Yet, defendant did not notify plaintiffs of their FMLA eligibility. The court also agreed with the magistrate judge on damages. The FMLA, as the court stressed, requires that a prevailing plaintiff receive back pay, attorneys' fees, and litigation costs. Further, the FMLA presumes that plaintiffs are entitled to liquidated damages, which is an amount equal to the back pay award. An employer, however, can rebut the presumption. First, an employer must show that it violated the FMLA in good faith. Second, employer must have reasonably believed that it was not violating the FMLA. Since defendant did not participate in the

proceedings at all, the court held that defendant did not act in good faith or with a reasonable belief.

***Fernandez v. Windmill Distrib. Co.*, No. 12-CV-01968, 2016 WL 452154 (S.D.N.Y. Feb. 4, 2016)**

In *Fernandez v. Windmill Distributing Company*, plaintiff was a former delivery driver for defendant, a wine and beer distributing company, who was injured on the job while unloading a keg of beer. Plaintiff notified the human resources department of his injury and provided a doctor's note recommending that he take time off work. Defendant did not apprise plaintiff of his FMLA rights; nor did it notify him that he was not allowed to take a leave of absence. Plaintiff nevertheless took nearly four months off from work. Five days after returning to work, plaintiff's supervisors demanded additional information about his leave of absence and asked for the names of his physicians. Two months later, plaintiff received word that his employment had been terminated, although he never received any formal notice from defendant of termination.

Plaintiff sued, alleging interference under the FMLA for defendant's failing to notify him of his right to take FMLA leave. Defendant moved to dismiss for failure to state a claim under Rule 12(b)(6). Explaining that plaintiff had taken at least a full 12 weeks of leave due to his injury, the court concluded that plaintiff failed to plead facts indicating that he could have returned to work at the end of the 12-week period. "[Plaintiff] does not contend that he was well enough to return after 12 weeks, nor does he argue that he could have better scheduled his FMLA leave if he had been notified of his rights…" The court also dismissed plaintiff's retaliation claim because he returned from leave for a full two months, and failed to allege any retaliatory conduct during that period, including that defendant actually terminated him.

***Sopinski v. Lackawanna Cty.*, No. 3:16-CV-00466, 2016 WL 6826166 (M.D. Pa. Nov. 18, 2016)**

Plaintiff, a former correctional officer at the Lackawanna County prison, filed four claims against his former employer under the FMLA, three for interference and one for retaliation. In Count I, an interference claim, plaintiff alleged employer charged plaintiff for an FMLA absence when he was not told he would be charged if he failed to work overtime. In Count II, also an interference claim, plaintiff said employer required him to obtain a doctor's note if he could not work overtime. In Count III, the third interference claim, plaintiff alleged employer questioned him, when he told employer he wanted to renew his FMLA leave to assist his ailing wife, about how he planned to use the leave. Plaintiff explained that this inquiry interfered with his FMLA rights since it made it known that using FMLA was discouraged by employer. In Count IV, a retaliation claim, plaintiff said employer retaliated against him by terminating his employment for alleged misuse of FMLA leave.

Employer sought dismissal of all four counts. Employer noted that the conduct plaintiff complained of in Count I was permitted by statute. "If an employee would normally be required to work overtime, but is unable to do so because of a FMLA qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement." 29 C.F.R. § 825.205(c). The

court agreed with employer but then contended that plaintiff's principal allegation involved not the policy itself but rather the fact that employer never informed him of it. The court ruled that employer's failure to provide plaintiff with appropriate notice regarding the fact that certain leave would be designated as FMLA leave might constitute interference under the FMLA. Employer's motion to dismiss Count I was denied.

Employer stated that neither requiring the officers to obtain a doctor's note (Count II) nor asking the officers how they planned to use their leave (Count III) constituted violations under the FMLA. The court agreed. The court said the FMLA expressly permits an employer to request a doctor's note from an employee who seeks FMLA leave. Plaintiff's allegations of interference in Count III were described by the court as "sophomoric." Employer's motion to dismiss Counts II and III was granted. The court affirmed that plaintiff had set forth specific facts in Count IV which, if proven, could entitle him to relief under the FMLA. If plaintiff could demonstrate that his adverse employment action was causally related to his invocation of FMLA rights, he could prevail on his retaliation claim. Employer's motion to dismiss Count IV was denied.

***Wintz v. Cabell Cty. Comm'n*, No. CV 3:15-11696, 2016 WL 7320887 (S.D. W. Va. Dec. 15, 2016)**

A former deputy clerk brought suit against a county circuit clerk's office alleging that her termination interfered with her rights under the FMLA and constituted unlawful retaliation for her exercise of her rights under the FMLA. It was disputed whether plaintiff was ever provided with any notice of her FMLA rights, although there was evidence she was orally informed that it was employer policy to exhaust sick and annual leave before an employee could use FMLA. Plaintiff was diagnosed with cancer and underwent surgery in March 2015, and was terminated approximately three weeks after her return in April 2015. Employer claimed that she was terminated due to a drinking problem and that plaintiff had been drinking during work both before and after her FMLA leave. Numerous individuals inside and outside of the office reported issues with plaintiff's drinking. Although plaintiff admitted to sometimes drinking during her lunch hour, she denied drinking heavily and being impaired.

In granting employer's motion for summary judgment, the court held that although there was evidence employer failed to provide the required notices under the FMLA, there was no evidence that plaintiff was prejudiced by the lack of notice. Further, under employer's policy, plaintiff never even reached the point that her FMLA leave might start as she still had remaining sick leave to burn. Plaintiff's retaliation claim was denied because employer offered a legitimate, non-discriminatory reason for her termination—drinking during the day and poor work performance as a result thereof—and because plaintiff's subjective beliefs that her work performance was satisfactory were insufficient.

Summarized elsewhere:
***Calderone v. TARC*, 640 F. App'x 363 (5th Cir. 2016)**

1. Eligibility Notice

Summarized elsewhere:
***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

2. Rights and Responsibilities Notice

Summarized elsewhere:
***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

3. Designation Notice

***Steckmyer-Stapp v. PetSmart, Inc.*, No. 15-CV-00025-RM-STV, 2016 WL 6962874 (D. Colo. Nov. 29, 2016)**

Employee brought interference and retaliation claims against her employer related to the paperwork for her FMLA leave. In July 2014, employee spoke with her supervisor about her need to take leave to care for her ailing daughter. Some confusion arose thereafter regarding the delivery of FMLA paperwork from employer and the return of such paperwork completed by employee. The confusion led to a letter from employer's benefits administrator advising that employee would be terminated for job abandonment due to a failure to return paperwork validating her leave of absence.

Notwithstanding this confusion, the paperwork was eventually located and employee's FMLA leave request granted in full, retroactively. In response, employee advised her employer that she was no longer able to return to work due to, among other things, interference with and retaliation for exercising her FMLA rights. She brought a lawsuit against her employer in the federal District Court for the District of Colorado.

The court granted summary judgment in favor of employer. It noted that, despite the confusion over the paperwork, employee was granted her full FMLA entitlement. Further, the mere misplacement of paperwork cannot rise to the level of an adverse employment action sufficient to support an FMLA interference claim.

With regard to employee's retaliation claim, the court concluded that no reasonable jury could conclude that employer had terminated her employment. The series of communications between employer and employee regarding the inability to locate the FMLA paperwork, together with the retroactive designation of the leave as FMLA qualifying, was sufficient to overcome the presumption of causality that might otherwise arise from the temporal proximity of the claim for FMLA leave and termination from employment.

V. Medical Certification and Other Verification

***Richardson v. AT&T Mobility Servs. LLC*, No. CV 2:14-1995-RMG, 2016 WL 3457015 (D.S.C. June 20, 2016)**

An employee who was terminated for accumulating attendance points alleged that her termination violated the FMLA and other laws. The magistrate judge recommended granting

employer's motion for summary judgment because employee failed to provide sufficient medical documentation in support of her leave request. The district court found no clear error in the recommendation.

A. Initial Certification

***Knott v. Grede II, LLC*, No. CV 14-00287-CG-M, 2016 WL 375148 (S.D. Ala. Jan. 28, 2016)**

Pro se plaintiff, a former "NDT operator," sued his former employer, a "cast iron foundry and machine operations facility," alleging that his employment was improperly terminated after defendant concluded that he had accumulated too many absences and "tardies." Plaintiff alleged that the absences should not have been counted against him because they were associated with his daughter's surgery and, thus, should have been covered under the FMLA. Defendant moved for summary judgment, and the district court granted the motion.

The court concluded that defendant's termination of plaintiff did not violate the FMLA because the FMLA certification plaintiff provided defendant did not cover the time period or absences at issue. Indeed, plaintiff admitted in his deposition that he did not request his daughter's doctor to inform defendant that plaintiff needed more time off. Nor did plaintiff take his daughter to see any physician about her condition after her surgery. Accordingly, plaintiff's FMLA interference and retaliation claims failed because plaintiff did not show that his daughter had a "serious health condition" on the days he claimed were covered by the FMLA, and therefore, plaintiff did not engage in statutorily protected activity.

B. Content of Medical Certification

Summarized elsewhere:
***Drumm v. Triangle Tech, Inc.*, No. 4:15-CV-00854, 2016 WL 1384886 (M.D. Pa. Apr. 7, 2016)**

C. Second and Third Opinions

D. Recertification

Summarized elsewhere:
***Holland v. Methodist Hosps.*, No. 2:14-CV-88-PRC, 2016 WL 5724355 (N.D. Ind. Sept. 30, 2016)**

***Marcum v. Smithfield Farmland Corp.*, No. 6: 16-180-DCR, 2016 WL 6780311 (E.D. Ky. Nov. 15, 2016)**

***Jurczyk v. Coxcom, LLC*, No. 14-CV-454-TCK-FHM, 2016 WL 3248417 (N.D. Okla. June 10, 2016)**

E. Fitness-for-Duty Certification

***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

Plaintiff, an Information Technology Director, brought this action against her former employer and its managing attorney alleging FMLA interference, FMLA retaliation, and two other causes of action. Plaintiff took leave under the FMLA for a back injury. One month before the expiration of her FMLA leave, she informed defendants that she wanted to return to work and was able to do so. She provided a fitness-for-duty certification stating that she was medically cleared to return to work with light duty restrictions. Defendants refused to allow plaintiff to return to work until she was "100% cured." Several days before plaintiff's FMLA leave expired, defendants informed her that she could not return to work unless she provided a medical certification confirming that she was medically cleared to return to work without any restrictions, and stated again that she must be "100% cured." Plaintiff alleged that she was able to perform the essential functions of the IT Director position with light duty restrictions, but was not 100% cured and thus was terminated from her employment.

Citing to 29 C.F.R. § 825.312(b), the court noted that the FMLA regulations concerning fitness-for-duty certifications contemplate two types of certifications: (1) one where the healthcare provider certifies that employee is "able to resume work," or (2) one where the healthcare provider "specifically address[es] the employee's ability to perform the essential functions of the employee's job." The question before the court was whether an employee who provides a fitness-for-duty certification that she is able to return to work "with light duty restrictions" may state a cause of action under the FMLA when the lower threshold "able to resume work" certification is requested by employer. The court held that the provision of such a fitness-for-duty certification does not foreclose an employee's FMLA claim.

The court interpreted the FMLA regulations regarding the submission of an "able to resume work" certification as less demanding than the regulations regarding employer's option to require an "ability to perform essential functions" certification. It concluded that an employee may be "able to resume work" even if she is unable to perform all the essential functions of her job. More particularly, it stated that an employee may be able to resume work with restrictions, yet she may or may not be able to perform any one of the essential functions of the position, depending on the specifics of the case. The court further noted, however, that even though the fitness-for-duty certification that plaintiff provided met her regulatory obligations, the reference to "light duty restrictions" may ultimately provide an alternative basis for the loss of her right to reinstatement. In other words, the court stated that it is possible for an employee's "light duty restrictions" to render him/her unable to perform one or more essential functions, and thus not entitled to reinstatement.

***Consedine v. Willimansett E. SNF*, No. 13-30193-MGM, 2016 WL 6774242 (D. Mass. Sept. 30, 2016)**

Plaintiff, an Admissions and Business Development Director, brought this action against her former employer, a long term care facility, alleging, *inter alia*, interference and retaliation in violation of the FMLA. Plaintiff's position required her to conduct at least two, and up to ten,

tours of the facility per week. The tours generally lasted between 30 and 45 minutes each, but they could also take longer than an hour. On May 19, 2012, plaintiff suffered an injury to her leg and on June 7, 2012 she requested leave under the FMLA from May 21, 2012 through August 21, 2012 to recuperate. Defendant granted plaintiff's request and plaintiff received the full 12 weeks of leave to which she was entitled. On several occasions, plaintiff's physician released her to return to work with certain restrictions contained in work modification notes. Defendant refused to allow plaintiff to return to work until she had "no restrictions" and was "100 percent." Defendant filed a motion for summary judgment, which the court denied.

With respect to the interference claim, the court determined that a jury could find that defendant interfered with plaintiff's FMLA rights by failing to restore her to her position, or an equivalent one, at the conclusion of her FMLA leave. This conclusion was based on the fact that it was not clear whether plaintiff was required, as an essential function of her job, to walk while giving tours rather than use a wheelchair or to "run[] to get data and paperwork," as described in one of plaintiff's physician's work modification notes.

With respect to the retaliation claim, the court determined that plaintiff could demonstrate a causal connection between her protected activity (requesting and receiving an FMLA leave) and an adverse employment action. The adverse employment actions included defendant's denials of her reasonable requests for accommodations in addition to plaintiff's employment termination. The denials began while plaintiff was still on an FMLA leave and continued until shortly after her leave ended. As such, the temporal proximity between the protected conduct and adverse employment actions was close.

***Reyes v. Phoenix Beverages, Inc.*, No. 13-CV-5588 (PKC) (VMS), 2016 WL 60668130 (E.D.N.Y. Oct. 13, 2016)**

Defendant, a beverage distribution company, employed plaintiff as an on premises sales representative by. Plaintiff filed suit against defendant when it prevented him from returning to work after he took FMLA leave for a non-work-related serious injury. Both parties moved for summary judgment, and the district court denied both motions, holding that defendant's specific fitness-for-duty certification notice requirement was insufficient under the FMLA notice requirements, but that an issue of material fact existed as to whether plaintiff was otherwise qualified to perform the essential functions of his job. Defendant had claimed that its policy of requiring a specific fitness-for-duty certification was sufficient under the FMLA, but the court rejected that argument and in turn held that defendant would be prohibited at trial from arguing that a letter it sent to plaintiff's doctor constituted sufficient notice. The court also held that defendant would be prohibited at trial from arguing that prolonged walking or standing were essential functions of plaintiff's sales representative position.

Defendant filed a motion for reconsideration, which the court granted in part and denied in part. In reconsidering its decision, the court held that it had overlooked certain testimony demonstrating that there was a genuine issue of material fact regarding whether prolonged walking or standing were essential functions of plaintiff's job. The court, however, rejected defendant's other arguments as to why it complied with the FMLA notice requirements for specific fitness-for-duty certification. The court found that the arguments were either rehashed

versions of previously rejected arguments or untimely new arguments that were improper in a motion for reconsideration.

Summarized elsewhere:
***Neal v. T-Mobile USA, Inc.*, No. 1:15-CV-0210-TWT-JSA, 2016 WL 4492837 (N.D. Ga. Aug. 1, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

***Kurylo v. Unemployment Comp. Bd. of Review*, No. 2296 C.D. 2015, 2016 WL 3266336 (Pa. Commw. Ct. June 15, 2016)**

F. Certification for Continuation of Serious Health Condition

Summarized elsewhere:
***Saldana v. Pub. Health Tr. of Miami-Dade Cty.*, No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)**

G. Certification Related to Military Family Leave

1. Certification of Qualifying Exigency

2. Certification for Military Caregiver Leave

H. Other Verifications and Notices

1. Documentation of Family Relationships

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

Summarized elsewhere:
***Smith v. Touro Infirmary*, No. 15-30851, 2016 WL 1084245 (5th Cir. Mar. 18, 2016)**

***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

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

***Ryder v. Shell Oil Co.*, No. 15-20594, 2016 WL 3227302 (5th Cir. June 10, 2016)**

Plaintiff sued her former employer for allegedly interfering with her ability to take FMLA leave during her pregnancy. Plaintiff, who had already been repeatedly absent from work without necessary approval, missed four days of work in May 2013 due to morning sickness. Following this absence, employer connected plaintiff with its third party leave administrator, and the leave administrator supplied her with the necessary FMLA paperwork. The leave administrator made clear that leave could be denied if the paperwork was incomplete. Plaintiff eventually submitted an FMLA form but the form did not include any information regarding her four-day absence in May or her morning sickness. Further, on the medical certification form, plaintiff's doctor wrote that plaintiff was, in fact, medically capable of performing her job duties during the relevant period. Employer therefore denied her leave request. The appellate court affirmed the district court's award of summary judgment to employer. The court held that plaintiff was not eligible for FMLA leave during the time period in question because her FMLA form did not address the absences at issue and her doctor indicated that she was able to work on the dates in question.

1. Employee

Summarized elsewhere:
***Neal v. T-Mobile USA, Inc.*, No. 1:15-CV-0210-TWT-JSA, 2016 WL 4492837 (N.D. Ga. Aug. 1, 2016)**

2. Employer

Summarized elsewhere:
***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

VI. Recordkeeping Requirements

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

A. Basic Recordkeeping Requirements

B. What Records Must Be Kept

C. Department of Labor Review of FMLA Records

CHAPTER 7.

PAY AND BENEFITS DURING LEAVE

I. Overview

II. Pay During Leave

A. Generally

***Cooper v. Spartanburg Cty. Sch. Dist. No. 7*, No. 7:13-cv-00991-JMC, 2016 WL 3610608 (D.S.C. July 6, 2016)**

Plaintiff, a contract teacher for defendant school district, brought this action *pro se* claiming, *inter alia*, interference and retaliation in violation of the FMLA. In December 2011, plaintiff requested an FMLA leave beginning January 2, 2012. Defendant approved the request, but notified plaintiff that any accrued leave may be substituted for unpaid leave and that once he used all accrued leave his pay would be adjusted accordingly. Plaintiff's physician's medical certification letters to defendant indicated that plaintiff's estimate date of return was May 1, 2012. On March 8th, plaintiff's physician sent an updated medical form to defendant, which indicated that plaintiff had been examined on January 19, 2012, and could have returned to sedentary duty as of January 3, 2012, but that his estimated date of return to full duty was still May 1, 2012. Plaintiff returned to work on March 13, 2012 and began complaining about his pay. In response, defendant met with plaintiff in April to explain the pay adjustment and review defendant's leave policies. Plaintiff later requested and was granted a second FMLA leave in December 2012. On April 12, 2013, plaintiff brought this action after the EEOC issued a notice of right to sue related to the April 2012 charge. Plaintiff remained employed by defendant.

With respect to plaintiff's interference claim, the court agreed with and adopted the reasoning of the magistrate judge. The court found that plaintiff returned to work in his same position and his salary remained the same; however, plaintiff's pay rate was adjusted because he did not work the 190 days he contracted to work. It held that plaintiff's pay rate was properly adjusted according to the number of weeks of unpaid leave he received under the FMLA.

With respect to retaliation, the court agreed with the magistrate judge's conclusion that plaintiff failed to establish a *prima facie* case, but went further in describing its reasoning. The court disagreed with plaintiff's arguments that he suffered from adverse employment actions by being denied the opportunity to make up days that other employees were allowed to make up; by not being allowed to return to work until two months beyond the time his doctor cleared him to return; and by reducing his pay. In the court's view, defendant properly adjusted plaintiff's pay and the make-up days occurred during plaintiff's unpaid FMLA leave; thus, plaintiff's salary was not "docked" two days as punishment. The court further noted that there was no evidence that defendant was informed that plaintiff could have returned to work on January 3, 2012 even though plaintiff knew that he was required to notify defendant of his intended return date.

B. When Substitution of Paid Leave is Permitted

1. Generally

***Gray v. City of Montgomery*, No. 2:16cv48-WHA, 2016 U.S. Dist. LEXIS 48505 (M.D. Ala. Apr. 11, 2016)**

Plaintiff sued multiple defendants for many claims, including violation of rights under the FMLA. Defendants moved to dismiss the complaint. The court granted dismissal of individuals from the FMLA claims because it noted that there is no individual liability under the FMLA in the Circuit. Plaintiff also stated in her complaint that she was denied the use of paid leave while she was absent. The court noted that an employer in the Circuit has the option of allowing an employee to use the paid leave and FMLA sequentially or concurrently. In other words, an employee is not entitled to a distinct 12-week leave; an employer can require that other leaves be combined with FMLA leave. The court noted that it was unclear if plaintiff was claiming that she was denied the right to use paid earned leave during the FMLA leave and dismissed the complaint without prejudice. Subsequently, plaintiff amended her complaint to allege a denial of the sick day benefit, and the court found that she had sufficiently pled this claim.

2. Types of Leave

a. Paid Vacation and Personal Leave

b. Paid Sick or Medical Leave

***Gray v. City of Montgomery*, No. 2:16CV48-WHA, 2016 W 4267625 (M.D. Ala Aug. 11, 2016)**

Plaintiff worked for a public safety agency of defendant, a municipality. Defendant maintained a policy of providing sick leave benefits to employees such as plaintiff. When plaintiff sustained injuries in an automobile accident, defendant did not extend sick leave time to her but instead docked her FMLA bank and forced her to take unpaid FMLA leave. When plaintiff needed time after that to recover from knee surgery, defendant refused to provide her 26 hours of sick leave she requested. Plaintiff then sued for the loss of these sick leave benefits she alleges she should have received. The court denied defendant's motion to dismiss this claim. It explained that, under the FMLA, an employer can allow an employee to take paid time off consecutively with an FMLA leave or can require that employee to take both leaves concurrently. Because it was not clear what policy defendant had adopted, the court ruled that it could not conclude that plaintiff's claim should dismissed.

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

III. Maintenance of Benefits During Leave

A. Maintenance of Group Health Benefits

1. Generally

2. What is a Group Health Plan

3. What Benefits Must Be Provided

4. Payment of Premiums

a. Methods of Payment

i. During Paid Leave

ii. During Unpaid Leave

b. Consequences of Failure to Pay

5. When the Obligation to Maintain Benefits Ceases

a. Layoff or Termination of Employment

b. Employee Notice of Intent Not to Return to Work

c. Employee's Failure to Pay Premiums

d. "Key Employees"

e. Other Circumstances

6. Rules Applicable to Multi-Employer Health Plans

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

1. When an Employer May Do So

2. How an Employer May Do So

C. Continuation of Non-Health Benefits During Leave

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

CHAPTER 8.

RESTORATION RIGHTS

I. Overview

II. Restoration to the Same or an Equivalent Position

***Quigley v. Meritus Health, Inc.*, No. CCB-14-2227, 2016 WL 759179 (D. Md. Feb. 26, 2016)**

Plaintiff worked as the night and weekend ultrasound technician, which position paid a higher rate than other ultrasound technician positions where employee worked a rotating shift. Plaintiff scheduled FMLA leave for foot surgery, but became ill and went out on leave in the month before surgery. While out on leave, defendant Meritus, which was a trauma center required to have ultrasound technicians available on a 24/7 basis, discussed moving plaintiff to the rotational shift. When plaintiff was released back to work, she was informed she had been placed on the rotational shift. Plaintiff objected, stating the change would impact her financially and not allow her to take care of family obligations. When she refused to work the rotational shift, defendant terminated her.

Plaintiff alleged in her interference claim that defendant violated her right to be reinstated on the night shift. The FMLA generally entitles an employee to return to same shift or equivalent work schedule she had prior to taking leave. Defendant took the position that there was no FMLA violation because the shift reorganization would have happened regardless of plaintiff's leave.

The parties filed cross motions for summary judgment on plaintiff's FMLA interference claim, which motions were denied by the court. Since the shift change had not been implemented before plaintiff took leave, a fact issue existed regarding whether the change was affected in some way by her leave.

***Miller v. RK Grocers, LLC*, No. 15-CV-10806, 2016 WL 1060401 (E.D. Mich. Mar. 17, 2016)**

Plaintiff brought claims against both her former employer and its successor in interest, alleging that defendants violated her right to job restoration as guaranteed by the FMLA. In April 2014, defendant (former employer) informed plaintiff that it had entered into an agreement to sell its location and plaintiff's employment would terminate on or before May 31, 2014. On

May 12, 2014, plaintiff requested FMLA leave to begin retroactively on May 9, 2014. Although plaintiff's FMLA request was approved, on May 27, 2014, the former employer sold the store, thus terminating plaintiff's employment.

On June 30, 2014 plaintiff applied for employment with the successor in interest but was ultimately not hired. That same day, plaintiff signed a separation agreement with her former employer stating that plaintiff: (1) was terminated on May 27, 2014; (2) released the company from any known or unknown claims that she may have against the company; and (3) understood and agreed that the termination of employment with the company was permanent, and that she had no right to future employment with the company.

On March 5, 2015, plaintiff filed suit alleging: (1) defendants (former employer) violated the FMLA in failing to restore plaintiff to equivalent available positions within geographically proximate worksites; and (2) the successor in interest "interfered with and denied" plaintiff's FMLA rights by refusing to restore plaintiff to her former position. Both defendants (former employer and successor employer) moved for summary judgment.

Plaintiff argued that because her right to restoration under the FMLA did not arise until the end of her leave (July 28, 2014), the right was prospective as of the date she signed the separation agreement with her former employer (June 30, 2014). In other words, plaintiff argued that the separation agreement she signed was prospective, because it covered an unexercised right to job restoration. The district court ultimately rejected plaintiff's argument by concluding that because plaintiff: (1) signed the separation agreement after she was terminated; and (2) was fully aware of the terms of her termination (i.e., she would not be restored to her job), her FMLA rights were not prospective and the release was valid and enforceable. In sum, the court granted defendant's (former employer) motion for summary judgment because the conduct (termination) that gave rise to the alleged violation (failing to restore plaintiff to an equivalent position) occurred prior to the execution of the separation agreement. Therefore, plaintiff validly released any FMLA claims she may have arising out of that conduct.

The court also granted the successor employer's motion for summary judgment, holding that a successor employer is required to treat plaintiff in the same manner as her former employer would have. Therefore, because plaintiff was not entitled to any FMLA restoration rights as to her former employer, she had no such entitlement with its successor employer.

***Cortazzo v. City of Reading*, No. 5:14-cv-2513, 2016 WL 1022267 (E.D. Pa. Mar. 15, 2016)**

Plaintiff, a police officer, brought this action against defendants, a municipality and its police chief, alleging, *inter alia*, FMLA interference and retaliation. Plaintiff was hired by defendant in 2001. Plaintiff alleged the following facts: On several occasions between October 2010 and April 2012, he was yelled at, treated disrespectfully, and subjected to civil liability and a five-day suspension because of mistakes defendant claimed he made. Plaintiff's complaint about these incidents was deleted. In July 2013, the individual defendant asked plaintiff to see the police department's psychologist. Upon arrival, plaintiff was advised it was for a "fit for duty exam," which caused him great embarrassment. Shortly thereafter, defendant claimed plaintiff made another mistake and then reassigned him to the video surveillance unit. In March 2014, plaintiff took a "stress leave," but defendants continued to harass plaintiff while

he was utilizing time defendants knew or should have known was qualified time under the FMLA. When plaintiff returned to work in September 2014, he was not restored to his original position.

Defendant filed a motion to dismiss, which the court denied as to plaintiff's interference claim but granted as to his retaliation claim. With respect to interference, the court rejected defendants' argument that plaintiff was not entitled to job restoration because he took more than 12 weeks of leave. Although the complaint did not allege that defendants maintained a policy of providing benefits that exceed the FMLA, the court held that it could be inferred that such a policy existed from the fact that plaintiff was able to return to work after six months. Additionally, while plaintiff did not allege when his 12 weeks of an FMLA leave were used, the court held that it could be found that he used an FMLA leave during his final 12 weeks of leave. With respect to retaliation, the court held that plaintiff had failed to allege sufficient facts to establish a causal connection between his invocation of FMLA rights and an adverse employment action. The court held that plaintiff's taking "stress leave" constituted the invocation of his FMLA rights, but that most of the events plaintiff complained of occurred before he took such leave. The only adverse employment action that could have occurred following such invocation was defendants' failure to restore plaintiff to his prior position when he returned to work six months later. The court held that this was too attenuated.

The court determined that the individual defendant could be found individually liable. This was because the claim for FMLA interference remained, the complaint referred to earlier incidents before plaintiff returned from his "stress leave," and because plaintiff alleged that the individual defendant was an employer as defined in the FMLA.

***Corbett v. Richmond Metro. Transp. Auth.*, No. 3:16cv470-HEH, 2016 WL 4492815 (E.D. Va. Aug. 25, 2016)**

Plaintiff, an administrative assistant, brought this action alleging FMLA interference and retaliation against her former employer, a transit authority, and two former coworkers, the Chief Executive Officer and Chief of Staff. Plaintiff was hired in 2002 and in 2008 was diagnosed as suffering from depression, panic attacks and anxiety. In May 2014, plaintiff met with human resources and requested that it encourage the CEO to leave plaintiff alone so that she could perform her work. Despite plaintiff's request that the conversation remain confidential, human resources reported plaintiff's concerns to the CEO. The CEO became distant, scrutinized plaintiff and complained about plaintiff's work in order to aggravate her symptoms. In August 2014, this caused plaintiff to seek medical help and request leave under the FMLA, which was granted. Plaintiff took four weeks of FMLA leave. When plaintiff returned to work in September 2014, the CEO informed plaintiff that her job duties and reporting requirements had changed. Specifically, plaintiff would no longer report to the CEO, but to the "peer-level co-worker" who had been promoted to Chief of Staff, and plaintiff was also relieved of some responsibilities. Thereafter, the individual defendants issued plaintiff a series of warnings related to her commission of undocumented and minor mistakes that she corrected, and also suggested that she retire early. In March 2015, plaintiff failed to put a telephone call through to the CEO, believing that she was already on a scheduled conference call, and was discharged for her failure to do so.

The court granted defendant's motion to dismiss plaintiff's interference claim, but denied it as to retaliation. As an initial matter, the court held that plaintiff was able to sue the CEO and Chief of Staff in their individual capacities. The court noted that circuits split on the question of whether a public official may be sued in his or her individual capacity under the FMLA; the Third, Fifth and Eighth Circuits say "yes," while the Sixth and Eleventh Circuits say "no." The court joined the majority of the circuits and two prior decisions from district courts within the circuit.

With respect to interference, the court agreed with defendants who argued that plaintiff failed to plead sufficient facts to satisfy the fifth element of a *prima facie* case: that employer denied employee her FMLA benefits. The court found that the changes made upon plaintiff's return from her leave were minor and did not violate the FMLA especially since her pay, benefits, and working conditions were all unaffected. With respect to retaliation, the court held that it was plausible that defendants' alleged actions were retaliatory responses to plaintiff's protected activity.

Summarized elsewhere:
***De Oliveira v. Cairo-Durham Cent. Sch. Dist.*, No. 14-3710-CV, 2016 WL 703968 (2d Cir. Feb. 23, 2016)**

A. General

B. Components of an Equivalent Position

***Davis v. Munster Med. Research Found., Inc.*, No. 2:14-CV-220, 2016 WL 5724348 (N.D. Ind. Sept. 30, 2016)**

Plaintiff worked for defendant as a security officer. After approximately 10 years on the job, she took FMLA leave for knee surgery. When she returned from leave, she was returned to her position as a security officer but given a different position assignment. Her former position assignment, which she had held for almost five years, was filled by a security officer with medical conditions as an accommodation to his age and deteriorating eyesight. Plaintiff filed suit alleging that defendant's failure to return her to former position assignment constituted interference and retaliation in violation of the FMLA. Defendant moved for summary judgment on both claims. The court denied defendant's motion. The court first addressed the interference claim. The court found that the new position assignment required more walking and other physical tasks, even if plaintiff did not actually have occasion to perform those duties. Therefore, there was a fact issue whether it was an equivalent position. Second, the court concluded there was a fact issue on defendant's claim that it would have reassigned plaintiff to another position to accommodate the other security officer even if plaintiff had not taken FMLA leave. In particular, plaintiff's own employment history prior to leave indicated that it was defendant's general practice to assign officers to the same assignment for years. The court also denied summary judgment on the retaliation claim. The court analyzed the retaliation claim under a "direct method" of proof asking whether the evidence would permit a reasonable factfinder to conclude that plaintiff's protected conduct caused the adverse employment action. First, the court examined whether the reassignment was an adverse action. The court concluded that there was a fact issue, reasoning that the failure to return plaintiff to her pre-leave

assignment could dissuade a reasonable employee from exercising her FMLA rights. Plaintiff also raised a fact issue on the causal connection element of her retaliation claim with evidence that her supervisor threatened her about going to human resources in discussions over an attendance warning after previously complaining to human resources about FMLA-related issues.

***D'Ambrosio v. Cresthaven Nursing & Rehab. Ctr.*, No. 14-06541 (JBS/KMW), 2016 WL 5329592 (D.N.J. Sept. 22, 2016)**

Plaintiff worked for defendant in numerous positions. Prior to going on medical leave for three months, plaintiff held the position of admissions clerk, which included some duties of an external case manager. However, before she started her medical leave, plaintiff was informed that the qualifications for an external case manager were changing and would require an LPN which plaintiff did not have. When plaintiff returned from leave, her former position was filled and there were no openings in admissions. The external case manager position had also been posted and filled. Plaintiff was therefore assigned to a vacant ward clerk position. This was a state mandated position and had to be filled by an existing employee because of a hiring freeze. Plaintiff initially made no objections to the assignment to employer. Her salary, benefits and civil service title remained the same as did her shifts, work location, and days off. Plaintiff later filed a grievance with the union about the reassignment, but the union refused to pursue it because it was not a demotion. In her subsequent lawsuit, plaintiff claimed that her reassignment from external case manager to ward clerk was a violation of the FMLA under both interference and retaliation theories. Employer moved for summary judgment on both claims. In granting employer's motion, the court concluded that plaintiff would have been reassigned from the role of external case manager regardless of her medical leave because she was no longer qualified to perform the external case manager duties. Further, she had not formally held the external case manager position before she went on leave. The court also found unpersuasive plaintiff's claim that the ward clerk job was a demotion, reasoning instead that the position was a lateral transfer. While the responsibilities may not have been identical, there was sufficient overlap in patient interaction and clerical work demonstrating that the positions were sufficiently similar to constitute equivalent positions. The court also granted summary judgment on the retaliation claim in the absence of proof of retaliatory intent. The court found no material fact dispute as to defendant's explanation for the reassignment based on its business needs.

Summarized elsewhere:
***Reyes v. Phoenix Beverages, Inc.*, No. 13-CV-5588 (PKC) (VMS), 2016 WL 60668130 (E.D.N.Y. Oct. 13, 2016)**

1. Equivalent Pay

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

2. Equivalent Benefits

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

3. Equivalent Terms and Conditions of Employment

***Mendillo v. Prudential Ins. Co. of Am.*, 156 F. Supp. 3d 317 (D. Conn. 2016)**

Plaintiff, a former call center employee, alleged FMLA retaliation and interference following an automobile accident in which she sustained several disabling injuries. Defendant granted plaintiff's FMLA leave request. However, it removed some of her duties based on quality concerns. With regard to the FMLA interference claim, defendant argued that it never denied any FMLA benefits to plaintiff. Plaintiff claimed that defendant "effectively deprived her of certain entitlements" under the FMLA. Plaintiff specifically claimed defendant removed a substantial portion of her duties while she was on intermittent/reduced schedule leave. The court noted employee was returned to the same position, and that it was employer's standard practice to remove duties from anyone who struggled with quality. The court granted summary judgment to employer, holding that the record failed to provide factual support for her interference claim.

Plaintiff's FMLA retaliation claim survived summary judgment. The court concluded plaintiff established her *prima facie* case through evidence that defendant subjected her to "increasingly severe stages of the Performance Improvement Process" the longer she was on FMLA leave, took away a significant portion of her duties while she was on a reduced schedule, and terminated her employment while she was still exercising her right to FMLA. Although defendant presented evidence that plaintiff had inconsistent call quality scores, there was also evidence that defendant was concerned with the management of her schedule (i.e., doctor's appointments and other obligations).

***Feagans v. Carnah*, No. 2:15-CV-00222-JMS-DKL, 2016 WL 7210944 (S.D. Ind. Dec. 13, 2016)**

Plaintiff sued a county prosecutor for retaliation under the FMLA and for interference with her FMLA rights after suffering an accidental fall resulting in severe injuries and precipitating plaintiff's need for FMLA leave. Plaintiff had been a child support administrator in the office for close to 27 years before her leave and had never been disciplined. In her role, she testified in court, she had her own office, and could negotiate settlements of child support disputes with attorney supervision. The day plaintiff returned from leave, the newly-elected prosecutor reassigned her as the office's receptionist, which included cleaning the kitchen and answering telephone calls behind a partition separating her from the rest of the office. There was evidence suggesting people wanted the person who had temporarily taken over for plaintiff during her leave to remain in that role, and there was evidence that plaintiff had made mistakes that were discovered while she was on leave—though plaintiff alleged finding mistakes was common. A few months after her return, the prosecutor terminated plaintiff's employment. The district court denied each party's motion for summary judgment, finding material questions of fact existed as to plaintiff's FMLA claims.

In response to plaintiff's claim that the prosecutor interfered with her rights by failing to reinstate her and providing only an illusory reinstatement prior to reassignment, the prosecutor argued that plaintiff was reinstated and only transferred after failing to complete her job responsibilities, that she was not entitled to reinstatement because she was not meeting expectations prior to leave, and that the receptionist position was an equal position. The court denied the prosecutor's argument that summary judgment was proper because plaintiff was restored to an equal position as her new duties were significantly less prestigious even though she received the same pay, but found that a question of fact remained as to the reasons for reassigning plaintiff the day she returned from leave and whether she was not meeting expectations in light of her clean record and the prosecutor's lack of experience working with plaintiff. The court also denied the prosecutor's motion for summary judgment as to the retaliation claim, finding that there was sufficient evidence that the prosecutor had discriminatory intent to survive summary judgment.

***Reed v. LMN Dev., LLC*, No. 3:14 CV 1695, 2016 WL 3523639 (N.D. Ohio June 28, 2016)**

A housekeeper who was terminated after she violated a company policy for selling discounted water park passes at a profit alleged that her termination interfered with and was in retaliation for her exercise of FMLA rights. Granting employer's motion for summary judgment, the court first rejected employee's interference claim, concluding that employee was allowed to take FMLA leave when requested. The court also found that upon the expiration of the leave, employee could not perform the essential functions of her housekeeping position and that she was not entitled to a light-duty position because that was not her regular position. The court also denied employee's retaliation claim because employee was terminated because she received money for more than the cost of the park passes.

Summarized elsewhere:
***Piburn v. Black Hawk-Grundy Mental Health Ctr., Inc.*, No. C15-2045, 2016 WL 1464570 (N.D. Iowa Apr. 13, 2016)**

III. Circumstances Affecting Restoration Rights

Summarized elsewhere:
***Razo v. Timec Co.*, No. 15-cv-03414-MEJ, 2016 WL 6576625 (N.D. Cal. Nov. 7, 2016)**

A. Events Unrelated to Leave

***Andres v. Coll. of the Mainland*, No. CV G-14-165, 2016 WL 1572588 (S.D. Tex. Apr. 19, 2016)**

Plaintiff, a college employee, took FMLA leave to recover from surgery. On the day her FMLA leave expired and she was scheduled to return to work, plaintiff was still recovering from surgery, so she obtained permission for more time off with a discretionary short term leave from her employer. The discretionary leave was not FMLA leave. While she was out on discretionary leave, plaintiff's position was eliminated due to budget cuts. Plaintiff was allowed to return to work, but her employer told her that she would be terminated after students at the college graduated at the end of that term. Plaintiff sued defendant for failing to reinstate her, and for terminating her in retaliation for taking FMLA leave. The district court granted defendant's

motion for summary judgment, holding that plaintiff failed to state a claim that she was entitled to reinstatement because on the day that she was to return from FMLA leave, she was still unable to work, which extinguished defendant's statutory duty to reinstate her to her former position. The court rejected plaintiff's claim that defendant should be estopped from asserting that she was no longer entitled to reinstatement because there was no evidence plaintiff believed that she was on FMLA leave during the time she was on discretionary leave; defendant did not lead plaintiff to believe that her discretionary leave was still within the FMLA period.

1. Burden of Proof

Summarized elsewhere:
***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

2. Layoff

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

Plaintiff, a power equipment operator, brought this action against his former employer, a pharmacy, and the company that acquired it. He alleged FMLA retaliation and several other causes of action. Plaintiff became ill at work and was sent to the hospital, where it was determined he had suffered a stroke. Plaintiff went on leave. He exhausted his 12-week FMLA leave and his 26-week short-term disability leave, and then received long term disability benefits until his return to work date approximately a month later. When plaintiff was medically cleared to return to work, he was informed that no vacant positions were available and, as such, that his employment was terminated.

Defendants argued that plaintiff could not make out a causal connection between his FMLA leave and the termination of his employment, and also argued that plaintiff could not demonstrate discriminatory animus in retaliation for his taking FMLA leave. Defendants cited to the absence of an available position for plaintiff to fill once he was medically cleared to return to work. The court rejected defendants' arguments, noting that two of defendants' employees acknowledged that the reduction in force took place four-and-a-half months after plaintiff attempted to return to work, creating an issue of material fact as to their cited reason for termination. The court stated that while an employer is entitled to reduce and/or reorganize its staff, it may not use its reduction in force or reorganization as a pretext to mask actual discrimination.

3. Discharge Due to Performance Issues

Summarized elsewhere:
***Tibbs v. Ill. Admin. Office of Ill. Courts*, 149 F. Supp. 3d 1015 (C.D. Ill. 2016)**

***Reed v. LMN Dev., LLC*, No. 3:14 CV 1695, 2016 WL 3523639 (N.D. Ohio June 28, 2016)**

4. Other

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

Plaintiff, a Lab Personnel/Phlebotomist, brought this action against her former employer, a hospital, alleging FMLA interference and discrimination. Defendant commonly allowed Lab Personnel/Phlebotomists with physical restrictions to perform only Lab Personnel duties, and even allowed employees who had no such restrictions to perform only those duties. In November 2015, plaintiff requested and was approved for FMLA leave in order to have surgery on her shoulder. While plaintiff was out, her direct supervisor, who was in charge of assigning duties to the Lab Personnel/Phlebotomists, assured her that when plaintiff returned she would assign only Lab Personnel duties to her until her physical restrictions were lifted. The assignment was approved by the department head. However, shortly before plaintiff was expected to return to work, defendant's human resources representative informed plaintiff that she would not be permitted to return to work due to her restrictions.

Defendant filed a motion to dismiss, which the court granted. With respect to the interference claim, the court held that there is no requirement under the FMLA that an employer accommodate an employee's restrictions when returning from FMLA leave. The court also held that an employee who is unable to perform an essential function of his/her position because of a physical or mental condition also has no right to restoration to another position under the FMLA.

With respect to the discrimination/retaliation claim, the court held that although there was a question as to whether plaintiff could establish the second element, she could not establish the third element. As to the second element, the court noted that there was a split in the circuit as to whether a plaintiff's termination constitutes an adverse action under the FMLA even if she were not entitled to reinstatement under the FMLA. The court held that plaintiff would fail to meet her burden in a court that requires she be entitled to reinstatement, but that she may be able to meet her burden in a court that does not require it. The court did not resolve the issue because it held that she could not meet the third element, that the adverse action was causally related to plaintiff's invocation of her FMLA rights.

Summarized elsewhere:
***Feagans v. Carnah*, No. 2:15-CV-00222-JMS-DKL, 2016 WL 7210944 (S.D. Ind. Dec. 13, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

B. No-Fault Attendance Policies

C. Employee Actions Related to the Leave

1. Other Employment

2. Other Activities During the Leave

3. Reports by Employee

Summarized elsewhere:
***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

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

***Casagrande v. OhioHealth Corp.*, No. 15-3292, 2016 WL 7378404 (6th Cir. Dec. 20, 2016)**

Plaintiff, a former registered nurse with defendant's Riverside Hospital, brought suit alleging FMLA interference and retaliation related to medical leave due to neck pain, elevated blood pressure, and anxiety. The Ohio district court dismissed both of plaintiff's claims on summary judgment and plaintiff appealed.

On appeal, the circuit court reversed the district court finding it erred as a matter of law. Regarding plaintiff's FMLA interference claim, the circuit court first determined that there was a genuine dispute of material fact as to whether defendant had a uniformly applied policy of requiring employees to provide medical certification that they are able to return to work before returning from FMLA leave taken for a serious health condition. While employer had required such a release from plaintiff for the attempted return at issue—resulting in a two month delay—it had failed to do so on another occasion. Moreover, there was no dispute that defendant failed to notify plaintiff that his failure to submit a medical certification would result in denial of job restoration. Accordingly, the circuit court determined, as a matter of law, that defendant interfered with plaintiff's FMLA rights. Defendant's mistaken belief was irrelevant as it "had the duty to make a correct FMLA-eligibility determination and notify [plaintiff] of his eligibility, of the requirements that flowed therefrom, and of the consequences of failing to adhere from them." The circuit court also determined as a matter of law that plaintiff was harmed by the interference as he was not compensated at full pay, he was not compensated for the entirety of the two-month period, and there was a significant delay by employer in making the back-pay payment. Circuit Judge Rodgers dissented from the majority's decision stating he believed plaintiff had provided sufficient evidence to create a genuine issue of material fact regarding his reinstatement, but not enough evidence to conclude that he was entitled to judgment as a matter of law.

Regarding plaintiff's FMLA retaliation claim, the circuit court found that plaintiff had submitted sufficient evidence from which a reasonable jury could conclude that defendant's proffered reason for terminating him was pretextual. Specifically, plaintiff's coworkers testified that plaintiff's supervisor scrutinized his performance more closely than that of other nurses following his return from FMLA leave. The district court had not credited this testimony holding it was based on hearsay and therefore lacked a proper foundation, but the circuit court determined that parts of the testimony were based on personal knowledge and therefore admissible. As a result, the district court's blanket determination to exclude the statements at issue was in error. Similarly, the circuit court found that the temporal proximity between the increased scrutiny and plaintiff's return from leave could support a finding of pretext. Defendant's discipline of plaintiff, including three criticisms in the span of five days, escalated sharply following his return from FMLA leave. Moreover, there was evidence in the record that

some of the issues for which plaintiff was disciplined had not resulted in similar discipline for other employees. The circuit court therefore reversed the district court's decision describing plaintiff's FMLA retaliation claim as a "classic jury question."

***Neal v. T-Mobile USA, Inc.*, No. 1:15-CV-0210-TWT-JSA, 2016 WL 4492837 (N.D. Ga. Aug. 1, 2016)**

Plaintiff worked at one of employer's retail location and was present during an armed robbery. Plaintiff was diagnosed with post-traumatic stress disorder and took her full 12 weeks of FMLA to seek treatment and recover. Employer sent plaintiff paperwork explicitly stating in bold text that she was required to fax a return to work certification to employer's leave administrator prior to returning to work, and to bring a copy of it with her on her first day back. Plaintiff failed to return to work at the end of her 12-week period of FMLA leave, but the parties subsequently engaged in negotiations regarding what store plaintiff would return to, under what conditions and set a new target date for her return.

However, plaintiff still did not produce a return to work authorization prior to her extended return date, and was given an additional week to do so after the new target date had passed. Plaintiff eventually received a return to work authorization, but only faxed it to employer's third party administrator, who did not file it properly, instead of also bringing a hard copy to her employer. As a result, employer had no knowledge that plaintiff ever produced a return to work certification. Plaintiff was discharged for failing to present a certification to return to work. Plaintiff filed a lawsuit which included claims of FMLA interference for defendant's failure to return her to her position following her leave, and FMLA retaliation for terminating her employment.

Defendant filed for summary judgment, and the Magistrate Judge assigned to the case recommended granting it. The Magistrate Judge first found that plaintiff had abandoned her interference claim when she failed to respond to defendant's argument that her interference claim was fatally flawed because she did not return to work at the end of her 12-week FMLA leave. The Magistrate Judge then determined that plaintiff was discharged solely for her failure to timely present the return to work certification legitimately required by her employer, and not for exercising her right to take leave under the FMLA.

Summarized elsewhere:
***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

***Consedine v. Willimansett E. SNF*, No. 13-30193-MGM, 2016 WL 6774242 (D. Mass. Sept. 30, 2016)**

***Reyes v. Phoenix Beverages, Inc.*, No. 13-CV-5588 (PKC) (VMS), 2016 WL 60668130 (E.D.N.Y. Oct. 13, 2016)**

***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

5. Fraud

***Poitras v. ConnectiCare, Inc.*, No. 3:14-CV-0981 (VAB), 2016 WL 3647313 (D. Conn. June 30, 2016)**

Plaintiff, a customer service associate, had been on and off of FMLA leave for several years. She suffered from a chronic degenerative disc disease which left her unable to sit or stand for long periods of time. She initially requested intermittent leave to miss two to three days of work per month. Her conditioned worsened, however, and she ultimately requested over a month off. Toward the end of her month off, plaintiff attended a bar and was video-recorded drinking alcohol and dancing. She posted the video on Facebook and several of her colleagues and supervisors saw the video. Several supervisors were outraged. The company terminated plaintiff's employment, citing the reason as her having deceived the company about the need for full-time FMLA leave and that she could have reported to work, to some extent, during that leave as evidenced by her dancing and drinking at the bar. The court denied summary judgment on plaintiff's FMLA claims for retaliation and failure to reinstate. Because the company terminated plaintiff just three days after she sought additional FMLA leave after the dancing video surfaced, the court determined there was a causal connection between her request for FMLA and her termination. Further, the anger expressed toward plaintiff and the dancing video, with the company not having done any research to determine if such activity was consistent with plaintiff's medical condition led the court to believe there was a causal connection between her protected FMLA rights and her termination. The court denied summary judgment on the failure to reinstate claim because defendant suspended plaintiff the day after her leave ended and terminated her two days after that.

D. Timing of Restoration

Summarized elsewhere:
***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

IV. Inability to Return to Work Within 12 Weeks

***Boileau v. Capital Bank Fin. Corp.*, 646 F. App'x 436 (6th Cir. 2016)**

A bank teller brought suit against her former employer claiming she was terminated in violation of the FMLA. The Sixth Circuit Court of Appeals affirmed the decision of the District Court for the Middle District of Tennessee granting defendant's motion for summary judgment as to plaintiff's FMLA retaliation claim. Plaintiff had lupus, which required her to miss work for indefinite periods of time on an unpredictable basis. While on FMLA leave, plaintiff's physician certified that plaintiff was incapacitated and her return date was deferred. Defendant subsequently contacted plaintiff and terminated her when she was unable to return to work after exhausting her FMLA leave. The court agreed that defendant provided a nondiscriminatory reason for discharging plaintiff when she could not return to work within the allotted time under the FMLA. Plaintiff claimed that defendant's failure to notify her that her FMLA leave was about to expire was evidence that defendant's articulated reason for terminating her was

pretextual. The court of appeals found that employer was under no obligation to warn plaintiff that leave was about to expire, and that the failure to warn was not demonstrative of pretext.

***Stewart v. Bear Mgmt., Inc.*, No. 5:15 CV 33, 2016 WL 1161983 (N.D. Ohio Mar. 24, 2016)**

Plaintiff requested, and was granted, one week of FMLA medical leave starting on February 16, 2013 following an injury and subsequent surgery. Plaintiff claimed she had received the right to return to work shortly thereafter with a 5-pound lifting restriction but no such doctor's note was ever found. Defendants would not allow plaintiff to return to work until she obtained a full medical release from her doctor because any conditional release that imposed a lifting restriction would prevent plaintiff from being able to perform the essential functions of her position. After more than three months without receiving a full medical release from plaintiff or her doctor, defendants terminated her employment, but payroll listed her formal termination date as February 23, 2013. Additional evidence in the record indicated that plaintiff could not return to work in any capacity until September 2013. Plaintiff alleged that defendants violated the FMLA by terminating her employment in retaliation for her taking medical leave. Defendants moved for summary judgment, arguing that termination was permitted under the FMLA because plaintiff had not obtained a full medical release to return to work within 12 weeks.

The district court agreed and granted defendants' motion. The court held that the closeness in time between plaintiff's FMLA request and her formal termination date was not itself enough to support a retaliation claim, and that the evidence demonstrated that defendants had understood that plaintiff was on medical leave and would allow her to return after obtaining a full medical release. The court also held that because there was no evidence that plaintiff was medically authorized to work within the 12-week period, plaintiff's entitlement to FMLA leave had expired. Because she was not able to perform the essential functions of her position during the duration of her FMLA leave, she lost her right to reinstatement under the FMLA.

***McFadden v. Tulsa Co. Bd. of Cty. Comm'rs*, 2016 WL 6902182 (N.D. Okla. Nov. 23, 2016)**

Plaintiff, a former deputy sheriff for the Tulsa County Sheriff's Office, sued her former employer as well as the Sheriff and an undersheriff, major, sergeant, and captain of defendant. Plaintiff alleged she was fired because she took leave under the FMLA and asserted an entitlement to reinstatement under the FMLA; a claim for retaliatory discharge in violation of the FMLA; and an equal protection claim under 42 U.S.C., § 1983. Defendants filed a 12(b)(6) motion to dismiss these claims.

For the individually named defendants, the undersheriff, major, sergeant, and captain argued that plaintiff's FMLA claims could only be brought against her "employer" and that they were not her "employer" for FMLA purposes. The court agreed with the major, sergeant, and captain, finding plaintiff did not adequately allege that those individuals had sufficient decision-making authority over plaintiff's FMLA leave requests or termination to be her "employer." The court disagreed with the undersheriff, however, finding that plaintiff adequately alleged he made the final decisions regarding plaintiff's FMLA leave and termination and was therefore her "employer." The court held that plaintiff's retaliatory discharge claim against the undersheriff as an individual defendant could proceed.

With respect to plaintiff's retaliation claim against employer and the Sheriff as an individual "employer," the court held that the temporal proximity of eight-and-one-half weeks between plaintiff's FMLA leave request and employment termination adequately stated a plausible claim for retaliatory discharge and was not subject to dismissal under Rule 12(b)(6).

The court also reviewed and dismissed plaintiff's FMLA entitlement to reinstatement claim. Because plaintiff admitted she would not have been able to return to work at the time her FMLA leave expired, the court held that defendant had not interfered with any FMLA benefit to which she was entitled. Plaintiff argued her entitlement claim should survive because her employer did not know she would be unable to return at the time she was terminated. The court disagreed on the ground that plaintiff's failure to demonstrate any entitlement to reinstatement was fatal to her claim.

Finally, the court also dismissed plaintiff's Section 1983 claim because the FMLA provides the exclusive means of recovery for violations of FMLA rights. Although a plaintiff may bring a § 1983 claim alongside an FMLA claim when there is a distinct substantive basis for the § 1983 claim, here plaintiff had no basis for her Section 1983 claim other than alleged retaliatory conduct prohibited by the FMLA.

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

Plaintiff, an Administrative Support Services Supervisor, brought an action in the District Court for the Eastern District of Washington, seeking damages stemming from alleged interference and retaliation under the FMLA, in addition to other federal and state claims, all of which related to her cancer diagnosis. As to plaintiff's FMLA claims, the court granted defendant's motion due to plaintiff's inability to return to work at the expiration of her allotted 12 weeks per 12-month rolling year. Even so, the court addressed plaintiff's individual claims of FMLA interference and retaliation, finding each inadequate on its own merits.

With regard to its initial reason for granting defendant's motion, the court found that although plaintiff presented arguments regarding only two periods of what she claimed were FMLA leave periods, there were actually nine separate leave periods that provide context to the issue of plaintiff's FMLA eligibility. Defendant produced evidence to support these leave periods, including the leave policy which states that the 12-month period in which the 12 weeks of leave entitlement take place is calculated by measuring forward from the date of any employee's first FMLA leave begins; plaintiff produced no evidence to rebut defendant's evidence. The court meticulously analyzed the spans of time, and held that plaintiff had exhausted her 12 weeks of approved FMLA leave on a number of different occasions both prior to and subsequent to the two leave periods her complaint focuses on, and that defendant allowed her to take FMLA leave even when she was not eligible because of her failure to satisfy the 1,250 hours requirement. The court held that defendant would have been within its right on a multitude of occasions to have terminated plaintiff for these reasons.

Plaintiff alleged four ways in which defendant interfered with her FMLA rights: (1) failure to reinstate her to her position or an equivalent position after she returned from FMLA leave, (2) delay in advancing her after she returned from leave, (3) requiring her to work while

she was on leave, and (4) failure to investigate complaints of discrimination and retaliation after she returned from leave. The court held that plaintiff was either not entitled to any position at all after returning from her FMLA leave, that plaintiff was unable to produce evidence supporting her allegations or rebutting defendant's legitimate explanations, or that plaintiff's own allegations were contradictory. As to her retaliation claim, the court held that plaintiff failed to establish that she met the second prong for *prima facie* retaliation—that she was adversely affected by an employment decision—because plaintiff's evidence, even viewed in the most favorable light, provided only conclusory allegations or allegations that defeated her own claims.

The case is currently on appeal in the Ninth Circuit Court of Appeals.

Summarized elsewhere:
***Taylor v. Ass'n of Ark. Counties*, No. 4:14CV00303-JM, 2016 WL 3014602 (E.D. Ark. May 24, 2016)**

***Johnson v. Golden Empire Transit Dist.*, No. 1:14-CV-001841-JLT, 2016 WL 3999996 (E.D. Cal. July 25, 2016)**

***Grant v. Hosp. Auth. of Miller Cty.*, No. 1:15-CV-15 (WLS), 2016 WL 5791546 (M.D. Ga. Sept. 30, 2016)**

***Neal v. T-Mobile USA, Inc.*, No. 1:15-CV-0210-TWT-JSA, 2016 WL 4492837 (N.D. Ga. Aug. 1, 2016)**

***Cortazzo v. City of Reading*, No. 5:14-cv-2513, 2016 WL 1022267 (E.D. Pa. Mar. 15, 2016)**

***Andres v. Coll. of the Mainland*, No. CV G-14-165, 2016 WL 1572588 (S.D. Tex. Apr. 19, 2016)**

***Kauai v. Keybank Nat'l Assoc.*, No. C15-702-TSZ, 2016 WL 4096403 (W.D. Wash. Aug. 1, 2016)**

V. Special Categories of Employees

A. Employees of Schools

Summarized elsewhere:
***Romano v. Bd. of Educ. for Bloom Twp. High Sch. Dist. #206*, No. 14-CV-9095, 2016 WL 2344581 (N.D. Ill. May 4, 2016)**

***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

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 BARGINING AGREEMENTS

I. Overview

II. Interrelationship with Laws

A. General Principles

B. Federal Laws

1. Americans with Disabilities Act

a. General Principles

b. Covered Employers and Eligible Employees

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

c. Qualifying Events

i. Serious Health Conditions and Disabilities

***Greene v. YRC, Inc.*, No. CV MJG-13-0653, 2016 WL 687478 (D. Md. Feb. 19, 2016)**

Summary judgment case where the parties filed cross motions for summary judgment. Plaintiff was employed as a truck driver by defendant. He began receiving treatment from his primary care physician for high blood pressure and high cholesterol. He received a dispatch from his supervisor to report to the Baltimore Terminal (on his regular route). He was irritated at being awakened from sleep but accepted the dispatch and drove to the terminal. He claimed he was entitled to an additional 15 minutes of pay because he had trouble closing a trailer door, but was told by his supervisor he was not entitled to the pay. Upset, he began experiencing chest pains, stomach pains, and shaking hands. His symptoms worsened, and he thought he might be experiencing a heart attack. He told a coworker he was having chest pains, having trouble breathing, and needed to leave.

Plaintiff's employment was governed by a collective bargaining agreement (CBA). His supervisor sent an email recommending he be discharged for "voluntary quit" due to his failure to contact a supervisor before leaving the terminal when sick. Unaware of the recommendation, plaintiff saw his doctor, who found his blood pressure was elevated and wrote a note stating plaintiff was having "health issues" and should be excused from work for nine days. Plaintiff filed a grievance, which was dismissed.

The court found genuine issues of fact on plaintiff's need to take FMLA leave, so neither party was entitled to summary judgment on the FMLA interference claim, and on the issue of whether plaintiff had a serious health condition and gave the requisite FMLA notice before leaving work. On plaintiff's retaliation claim, the court also found genuine issues of fact whether defendant retaliated against plaintiff for taking FMLA leave when it terminated him for "voluntary quit" under the CBA.

***Rivera v. Crowell & Moring, L.L.P.*, No. 14-CV-2774 (KBF), 2016 WL 796843 (S.D.N.Y. Feb. 18, 2016)**

A legal secretary brought an action in the District Court for the Southern District of New York against a law firm claiming she was discharged in violation of the FMLA. The court granted defendant's motion for summary judgment. The court agreed with defendant's argument that plaintiff could not show she suffered from a serious health condition under the FMLA. Although there was evidence that plaintiff suffered from chronic asthma, allergies and/or bronchitis, there was no evidence to support a determination that plaintiff's condition was serious or that it resulted in any incapacity, i.e., inability to work, as required under the FMLA.

The court also agreed with defendant's alternative argument that plaintiff failed to provide sufficient notice of her need for FMLA leave. By only providing notice that she was sick in a generic way, she did not provide sufficient information to put defendants on inquiry notice that her absences could qualify for FMLA leave. The court found that even when an employer has knowledge that an employee suffers from a chronic medical condition, employee must notify her employer that the specific absence issue is due to that known chronic condition.

Summarized elsewhere:
***Saldana v. Pub. Health Tr. of Miami-Dade Cty.*, No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)**

***Mesmer v. Charter Commc'ns, Inc.*, No. 3:14-CV-05915-RBL, 2016 WL 1436135 (W.D. Wash. Apr. 12, 2016)**

ii. Triggering Events for Leave of Absence Rights

Summarized elsewhere:
***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

d. Nature of Leave and Restoration Rights

i. Health Benefits

ii. Restoration

Summarized elsewhere:
***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

Deller v. Northampton Hosp. Co., No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)

iii. Light Duty

Summarized elsewhere:
***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

e. Medical Inquiries and Records

f. Attendance Projects

2. COBRA

3. Fair Labor Standards Act

Summarized elsewhere:
***Caggiano v. Ill. Dep't of Corr.*, No. 14 C 3378, 2016 WL 362383 (N.D. Ill. Jan. 29, 2016)**

4. 42 U.S.C. § 1983

Summarized elsewhere:
***Hall v. La. Workforce Comm'n*, No. CV 15-00533-BAJ-RLB, 2016 WL 1756897 (M.D. La. Apr. 29, 2016)**

***McFadden v. Tulsa Co. Bd. of Cty. Comm'rs*, 2016 WL 6902182 (N.D. Okla. Nov. 23, 2016)**

5. Title VII of the Civil Rights Act

***Hicks v. City of Tuscaloosa*, No. 7:13-CV-02063-TMP, 2016 WL 1180119 (N.D. Ala. Mar. 28, 2016)**

Plaintiff sued employer for pregnancy discrimination and FMLA retaliation and prevailed after a jury trial. court reduced amount of damages for the FMLA retaliation claim to the amount of actual wages she lost as a result of her discriminatory transfer. Since this amount was also included in the pregnancy discrimination damages, plaintiff was not entitled to recover that amount again pursuant to the FMLA. Plaintiff was, however, entitled to liquidated damages in an amount equal to her lost wages under the FMLA because these damages were not encompassed within the pregnancy discrimination award as liquidated damages are not available under the Pregnancy Discrimination Act.

***Barren v. Ne. Ill. Reg'l Commuter R.R. Corp.*, No. 13 CV 4390, 2016 WL 861183 (N.D. Ill. Mar. 7, 2016)**

Plaintiff Kimberly Barren worked for defendant Northeast Illinois Regional Commuter Railroad Corporation, d/b/a Metra, as a trainman who facilitates or supervises the movement of railroad equipment. Plaintiff claimed that defendant discriminated and retaliated against her on the basis of race and sex, and that she suffered adverse actions in the form of denied requests for FMLA leave. The district court granted summary judgment for employer on the ground that because plaintiff eventually received approved time off from work for the days she claims employer denied her leave, and because initial denials did not result in any materially adverse change to the terms and conditions of her employment, the denials did not constitute adverse actions.

Plaintiff also claimed that defendant breached a mediation contract by failing to process plaintiff's requests in a timely manner. The court decided that plaintiff had produced sufficient evidence to create a genuine dispute as to whether defendant breached its obligation to timely process her FMLA requests, when plaintiff claimed she requested leave two months ahead of time and yet defendant did not notify her of its decision to deny her request until the day of her requested leave.

Summarized elsewhere:
***Jones v. Allstate Ins. Co.*, No. 2:14-CV-1640-WMA, 2016 WL 4259753 (N.D. Ala. Aug. 12, 2016)**

***Belk v. Branch Banking & Tr. Co.*, No. 16-80496-CIV, 2016 WL 4216675 (S.D. Fla. Aug. 10, 2016)**

***Sparenberg v. Eagle All.*, No. CV JFM-14-1667, 2016 WL 447831 (D. Md. Feb. 4, 2016)**

6. Uniformed Services Employment and Reemployment Rights Act

7. IRS Rules on Cafeteria Plans

8. ERISA

Summarized elsewhere:
***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

9. Government Contract Prevailing Wage Statutes

10. Railway Labor Act

11. NLRA and LMRA

Summarized elsewhere:
***Gunter v. Cambridge-Lee Indus., LLC*, No. CV 14-2925, 2016 WL 2735683 (E.D. Pa. May 11, 2016)**

12. Genetic Information Nondiscrimination Act of 2008

13. Social Security Disability Insurance

C. State Laws

1. State Leave Laws

Summarized elsewhere:
***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

a. General Principles

***Zampitella v. Walgreens Co.*, No. 4:16-CV-781 (CEJ), 2016 WL 3627290 (E.D. Mo. July 6, 2016)**

Plaintiff, who suffers from spinal stenosis, was employed as a clerk by Walgreens. Due to his condition, plaintiff was prescribed Schedule II pain medication. In March 2015, plaintiff's doctor discontinued plaintiff's pain medication and instructed him to take FMLA leave while he was being weaned off the drugs. Plaintiff was approved for and took medical leave but soon after returning to work was discharged, presumably for misusing the drugs he previously had been prescribed. Plaintiff subsequently filed suit in the Circuit Court of St. Louis County, alleging that Walgreen's terminated his employment because of his disability and for asserting his rights under the FMLA. However, plaintiff asserted his claims only under the Missouri Human Rights Act (MHRA) and did not assert a claim under the FMLA itself. Walgreen's removed the case to federal court and plaintiff moved to remand.

The district court granted plaintiff's motion to remand, holding first, in line with a number of other federal courts, that the FMLA does not completely preempt state disability or family and medical leave law (citing 29 U.S.C. §§ (a) & (b) ("Nothing in this Act . . . shall be construed to modify or affect any . . . State law prohibiting discrimination on the basis of . . . disability" [and] "[n]othing in this Act . . . shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act."). The court also concluded that no issue of federal law was a necessary and central element of plaintiff's claim, as he was not required to establish that the FMLA was violated in order to prevail on his MHRA claim.

b. Effect of Different Scope of Coverage

i. Employer Coverage

ii. Employee Eligibility

c. Measuring the Leave Period

d. Medical Certifications

e. Notice Requirements

f. Fitness-for- Duty Certification

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

g. Enforcement

h. Paid Family Leave Laws

2. Workers' Compensation Laws

a. General Principles

b. Job Restructuring and Light Duty

***Garner v. Phila. Housing Auth.*, No. CV 15-183, 2016 WL 4430639 (E.D. Pa. Aug. 22, 2016)**

In *Garner v. Philadelphia Housing Authority*, plaintiff worked as a computer technician in a transit system's information management department, a portion of which was in a covered bargaining unit. Plaintiff's litigation included a claim regarding FMLA-related interference and retaliation, a claim regarding sexual harassment, and claims regarding Title VII and wage and hour issues. Motions for summary judgment were brought on behalf of employer and individual defendants. As to the retaliation claim, plaintiff alleged her pay was changed due to her being reassigned to light duty. This allegation was sufficient to establish a *prima facie* claim of retaliation. The court granted summary judgment to one individual defendant on plaintiff's interference claim, because there was no evidence that this defendant knew of the circumstances surrounding plaintiff's reassignment. Plaintiff had also been part of a mass layoff due to federal budget sequestration. The court granted summary judgment to employer, because there was no "unusually suggestive" proximity in time between plaintiff's protected activity and the adverse employment action of plaintiff's layoff.

c. Requesting Medical Information

d. Recovery of Group Health Benefit Costs

3. Fair Employment Practices Laws

Summarized elsewhere:
***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

4. Disability Benefit Laws

Summarized elsewhere:
***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

5. Other State Law Claims

***Vandevander v. Verizon Wireless, LLC*, No. 3:15-11540, 2016 WL 868831 (S.D. W. Va. Mar. 7, 2016)**

Former employee brought action in state court against employer alleging that he was terminated in violation of the FMLA along with several state law claims. Employer removed the case to federal court and then moved to dismiss. The District Court for the Southern District of West Virginia denied employer's motion to dismiss.

According to the complaint, employee worked as an accounts manager for employer and at various times used vacation time to attend hospital visits with his fiancée and for his son's serious medical conditions. In November 2014, employee informed management that he and his then-fiancée were expecting a child and he requested leave from work to attend pregnancy-related hospital visits with his fiancée who was living in Pennsylvania at the time. Employer, without providing employee any information about FMLA leave, informed employee that he had to use vacation time for the hospital visits. At one point in time employer informed employee that he did not qualify for FMLA leave because he and his fiancée were not married. Employer additionally refused to grant employee FMLA leave to care for his thirteen-year-old son's medical conditions and failed to notify him concerning his eligibility for FMLA leave. Eventually, employer terminated employee without providing any reason.

Employer argued that the state law claims must be dismissed because the FMLA provides the exclusive remedy in this case. The court rejected this argument and stated that the Act's terms revealed Congress' general intent to prevent the FMLA from preempting state law claims. Employer's motion to dismiss under 12(b)(6) was denied.

***Tex. Workforce Comm'n v. Wichita Cty., Tex.*, No. 02-15-00215-CV, 2016 WL 7157247 (Tex. App.--Fort Worth Dec. 8, 2016)**

Appellee, Wichita County, appealed the lower court's decision that an employee on unpaid FMLA leave is not entitled to unemployment benefits. This was an issue of first impression resulting from appellant's payment of unemployment benefits to a County employee while on FMLA leave. The court rejected appellant's argument that because employee was not performing work for pay for appellee, she was entitled to unemployment insurance. Instead, the court looked to the intent of both the FMLA and the Texas unemployment statute and found them to be mutually exclusive in purpose. The former is intended to provide short-term job security in the case of a serious health condition that prevents an employee from working, but who desires to return to the same job. The latter is to assist the unemployed who are ready and willing to work but need interim benefits until they find new employment.

The court held that to be considered unemployed for the purpose of unemployment benefits, an employee must be separated from their employer, not merely out on sick leave, and that this employee must be able and available for work. To require payment of unemployment benefits to employees on unpaid FMLA leave would run contrary to the intent of the FMLA, which is to maintain job security. The FMLA does not require an employee be paid during

FMLA leave and to award unemployment benefits in such cases would amount to a judicial mandate of paid FMLA leave.

Summarized elsewhere:
***Douglas v. Mayor & City Council of Balt. City*, No. CV RDB-15-0718, 2016 WL 927146 (D. Md. Mar. 4, 2016)**

D. City Ordinances

III. Interrelationship with Employer Practices

Summarized elsewhere:
***Holland v. Prot. One Alarm Monitoring, Inc.*, No. C15-259 RSM, 2016 WL 1449204 (W.D. Wash. Apr. 13, 2016)**

A. Providing Greater Benefits Than Required by the FMLA

***Hightower v. Savannah River Remediation, LLC*, No. 1:13-CV-03558-JMC, 2016 WL 1128022 (D.S.C. Mar. 23, 2016)**

Plaintiff worked as a lead trainer for defendant, a liquid waste contractor. After allowing plaintiff to take a two-month leave to recover from back surgery, defendant approved him to use the company's "work hardening" policy to reacclimate himself to a full-day of work. Under that policy, plaintiff could work one half-day and take the other half under its short-term disability plan. The next day, however, defendant retracted that approval. Plaintiff sued defendant, alleging that it violated both the interference and retaliation provisions of FMLA.

The court granted defendant's Motion for Summary Judgment on both claims. Plaintiff's interference theory was based on 29 CFR § 825.700, which requires an employer to abide by a plan that provides greater rights than does the FMLA. Plaintiff alleged that defendant violated that regulation by its refusal to extend him benefits under the "work hardening" plan. The court rejected that argument, holding that the purpose of that regulation was simply to ensure that FMLA was not interpreted in a way to abrogate any currently existing employee benefit plan. The regulation was not, the court observed, intended to provide an employee a civil claim under FMLA for breaching such a plan. For this reason, plaintiff's interference claim failed. In a footnote, the court held that plaintiff's claim also would have failed since plaintiff did not provide adequate notice to defendant of the need for leave under the FMLA when defendant refused to allow plaintiff to use the "work hardening" policy.

In his retaliation theory, plaintiff claimed he engaged in protected activity when seeking to use the "work hardening" plan. Because this plan, as previously held by the court, was not cognizable as FMLA leave, this could not form the basis of protected activity. His retaliation claim was therefore dismissed.

Summarized elsewhere:
***Nebeker v. Nat'l Auto Plaza*, 643 F. App'x 817 (10th Cir. 2016)**

***Cortazzo v. City of Reading*, No. 5:14-cv-2513, 2016 WL 1022267 (E.D. Pa. Mar. 15, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

B. Employer Policy Choices

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

Summarized elsewhere:
***Scraggs v. NGK Spark Plugs (U.S.A.) Inc.*, No. 2:15-CV-11357, 2016 WL 3676739 (S.D. W. Va. July 7, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

2. Employee Notice of Need for Leave

Summarized elsewhere:
***Perry v. Am. Red Cross Blood Servs.*, No. 15-5645, 2016 WL 3077644 (6th Cir. June 1, 2016)**

***Germanowski v. Harris*, No. CV 15-30070-MGM, 2016 WL 696097 (D. Mass. Feb. 19, 2016)**

***Acker v. Gen. Motors LLC*, No. 4:15-CV-706-A, 2016 WL 3661466 (N.D. Tex. July 1, 2016)**

3. Substitution of Paid Leave

***Ward v. D.C.*, No. 13-CV-1612 (TSC), 2016 WL 5674736 (D.D.C. Sept. 30, 2016)**

Plaintiff, a former Youth Correctional Officer at the Department of Youth Rehabilitation Services, asserted claims for failure to provide a reasonable accommodation, retaliation, and hostile work environment. In April 2012, plaintiff used accrued sick leave to take a paid leave of absence to recover from a mental breakdown after encountering coworkers who allegedly sexually harassed her in the past. In August, in anticipation of returning to work, plaintiff requested a number of accommodations, including work that avoided interaction with her alleged harassers; flexible leave to attend medical appointments; and exemptions from working overtime and weekends. Defendant denied plaintiff's overtime exemption request, but offered her an eight-hour midnight shift and told plaintiff that if she did not return to work by September 2, she would be considered absent without leave. Unable to return by that date, plaintiff requested, and was granted, FMLA leave. Defendant retroactively applied the FMLA leave beginning April 30, 2012, the date plaintiff went on paid leave.

On September 7, plaintiff's doctor sent a letter to defendant stating that plaintiff was released to return to work, but was unable to work shifts longer than eight hours and needed to maintain a regular sleep schedule. The doctor proposed that she work an early shift on Sunday through Thursday. Plaintiff reported for the midnight shift on September 16, under what she described as a "threat of disciplinary action," but was sent home. She later received an email explaining that she was never scheduled for the midnight shift because she had not responded to the offered accommodation. Plaintiff was placed on administrative leave and was required to submit to a fitness-for-duty examination before returning to work. When she did return on

October 18, plaintiff alleged that she was scheduled to work more than eight hours a day and her requests for leave to attend medical appointments were denied. Defendant transferred plaintiff between several positions for about a year before placing her in a position that allowed her to work an eight-hour day. Plaintiff subsequently filed suit, alleging, in part, that defendant retaliated against her by "retroactively applying FMLA leave to approved sick leave used several months prior."

In ruling on defendant's motion for summary judgment, the court noted that plaintiff's FMLA claim was unclear, but construed it to allege that defendant unfairly denied plaintiff compensation for leave that was previously approved. Because defendant did not present any evidence explaining why it failed to pay plaintiff for what she asserted was pre-approved paid leave, the court found that a reasonable fact-finder could determine that defendant acted with retaliatory motive and, therefore, denied defendant's motion for summary judgment as to that claim.

4. Reporting Requirements

5. Fitness-for-Duty Certification

***Kurylo v. Unemployment Comp. Bd. of Review*, No. 2296 C.D. 2015, 2016 WL 3266336 (Pa. Commw. Ct. June 15, 2016)**

Claimant was terminated from his job as a truck driver for allegedly failing to comply with his former employer's FMLA policy when he attempted to return to work after a brief hospital stay. Claimant testified that he attempted to provide employer with a doctor's note, but employer would not accept the note, instead demanding that he complete the company's FMLA documentation. When claimant did not submit the FMLA paperwork by employer's deadline, claimant was terminated.

Claimant sought unemployment compensation, and his initial request was approved by a referee. The referee concluded that claimant was eligible for unemployment compensation because claimant did not engage in any willful misconduct leading to his termination such that his request should be denied. The Unemployment Compensation Board of Review reversed that decision, concluding that claimant's failure to complete the FMLA paperwork that employer requested constituted willful misconduct.

Claimant sought review of the Board's decision in the Commonwealth Court of Pennsylvania. The court reversed the Board's decision. The court found that the Board's conclusion was not supported by the record's substantial evidence, as the real issue was whether claimant complied with employer's sick leave policy, not its FMLA policy, which only required a doctor's note to return. Accordingly, by providing employer with a doctor's note, claimant did not intentionally or deliberately violate employer's sick leave policy, and thus, claimant did not engage in any willful misconduct that led to his termination.

Summarized elsewhere:
***Bento v. City of Milford*, No. 3:13-CV-01385 (VAB), 2016 WL 5746340 (D. Conn. Sept. 30, 2016)**

***Jones v. Gulf Coast Health Care of Del., LLC*, No. 8:15-CV-702-T-24EAJ, 2016 WL 659308 (M.D. Fla. Feb. 18, 2016)**

***Dykstra v. Fla. Foreclosure Att'ys, PLLC*, No. 15-81275-CIV, 2016 WL 1644069 (S.D. Fla. Apr. 26, 2016)**

***Neal v. T-Mobile USA, Inc.*, No. 1:15-CV-0210-TWT-JSA, 2016 WL 4492837 (N.D. Ga. Aug. 1, 2016)**

6. Substance Abuse

7. Collecting Employee Share of Group Health Premiums

8. Other Benefits

9. Other Employment During FMLA Leave

10. Restoration to an Equivalent Position for Employees of Schools

IV. Interrelationship with Collective Bargaining Agreements

***Siddiqua v. N.Y. State Dep't of Health*, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)**

The Second Circuit Court of Appeals reversed and remanded the appeal brought by plaintiff, an Information Technology Specialist, after the District Court for the District of Connecticut entered judgment dismissing her complaint pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff brought claims of interference and retaliation in violation of the FMLA, seeking damages. Liberally construed, she alleged that her employment was improperly terminated for taking a trip to Bangladesh to care for her sick mother between April 4, 2011, and May 20, 2011 after she had requested and obtained prior permission to take such leave under the FMLA. Prior to filing suit, plaintiff had grieved the discipline and termination under her union, but on April 5, 2012 the arbitrator held that plaintiff's termination did not violate the Collective Bargaining Agreement between her union and her former employer.

The trial court found that plaintiff's claims were barred under the doctrines of collateral estoppel and *res judicata* because her FMLA claims had already been decided in defendant's favor both (1) in a prior arbitration proceeding related to a disciplinary grievance appeal she had filed pursuant to the provisions of her union's collective bargaining agreement, and (2) in a prior action she had brought in state court seeking to vacate the resulting arbitration award. Relying on the Supreme Court of the United States' decision in *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), the court of appeals held that the arbitration of related contract-based claims under the collective bargaining agreement did not bar the subsequent de novo review by a federal court of statutory claims, such as her FMLA causes of action. The court of appeals reasoned that plaintiff's statutory FMLA claims were outside the scope of the collective bargaining agreement and that there was no agreement between the parties that an employee's statutory claims could be submitted to, and adjudicated by, an arbitrator.

A. General Principles

***Croom v. Elkhart Prods. Corp.*, No. 3:15-CV-288 RLM-MGG, 2016 WL 4733469 (N.D. Ind. Sept. 12, 2016)**

Plaintiff employee was a member of the machinists' union. The union filed a grievance on plaintiff's behalf following his discharge pursuant to the applicable CBA. The grievance was ultimately resolved through binding arbitration with the arbitrator upholding the discharge. During the arbitration, the union argued that plaintiff's discharge was without just cause and he had been retaliated against, among other reasons, for using FMLA leave. Plaintiff subsequently filed a civil suit against defendant employer asserting an FMLA retaliation claim. Employer filed a counterclaim for declaratory judgment seeking dismissal of the lawsuit on the grounds the arbitrator's decision upholding plaintiff's discharge precluded his FMLA claim. The court granted plaintiff's motion to dismiss the counterclaim. The court held that the applicable CBA did not make arbitration of statutory claims mandatory. Therefore, under U.S. Supreme Court precedent, plaintiff was not precluded from bringing suit under the FMLA, regardless of whether his rights protected by the FMLA were duplicative of or similar to his right under the CBA to be free from unlawful retaliation.

***Tablizo v. City of Las Vegas*, No. 2:14-cv-00763-APG-VCF, 2016 WL 3583798 (D. Nev. June 30, 2016)**

Plaintiff filed suit alleging her former employer, defendant City of Las Vegas, retaliated against her for taking leave under the Family and Medical Leave Act ("FMLA"). Defendant moved for summary judgment arguing that a prior arbitration award in its favor barred re litigation of the reasons for plaintiff's termination. Furthermore, defendant argued that there was no evidence that plaintiff was retaliated against for using FMLA leave. Plaintiff responded that *res judicata* did not apply because the grievance procedure in the collective bargaining agreement excluded federal statutory claims from its scope. Further, plaintiff argued there were genuine disputes of fact to support her FMLA claims.

On May 6, 2010 plaintiff submitted her first request for FMLA leave. Plaintiff's supervisor denied the request, but plaintiff complained to a more senior supervisor and the leave was approved. In 2012, plaintiff was disciplined multiple times and ultimately terminated. The reasons for plaintiff's termination included failing to perform certain tasks and lying to her supervisor, as well as being disrespectful, disruptive in meetings, and failing to follow supervisory directives. In the course of the same year, plaintiff also took FMLA leave twice: April 17—May 17 and May 21—June 20. Plaintiff was terminated in November.

Defendant argued that plaintiff could not demonstrate retaliation, because plaintiff was granted all the leave she requested and plaintiff was terminated for legitimate reasons, including poor performance and insubordination. Plaintiff responded that she suffered disciplinary action during the time frame when she was taking FMLA leave, and her supervisor told her to quit taking leave, and plaintiff's supervisor also documented plaintiff's file to build a case to fire her.

The court first noted that the arbitration award had no preclusive effect under the Full Faith and Credit Act, because "federal courts are not required by statute to give *res judicata* or

collateral estoppel effect to an un-appealed arbitration award." The parties agreed in the collective bargaining agreement that the federal statutory claims were not covered by the grievance process. Therefore, the arbitrator was not authorized to resolve plaintiff's FMLA claims.

As to the FMLA claim, while styled as a "retaliation claim," the court found the claim was more appropriately an interference claim. As an interference claim, the court reasoned that even if defendant had legitimate reasons to terminate plaintiff, that is not the test for FMLA interference claims. The proper test on a motion for summary judgment for an interference claim is whether, viewing the facts in the light most favorable to plaintiff, a reasonable jury could find plaintiff's taking FMLA leave was a negative factor in an adverse employment decision. To that end, the court concluded that a reasonable jury could conclude that (1) defendant expressed hostility towards plaintiff for taking leave and believed plaintiff was abusing FMLA; (2) plaintiff's leave impacted her department and her supervisor's workload; (3) defendant was documenting plaintiff's alleged performance failures to build a case to fire her; and (4) the proximity in time between plaintiff's leave and her suspensions and termination suggested a causal relationship. Therefore, the court denied defendant's motion for summary judgment on the FMLA claim.

Summarized elsewhere:
***Siddiqua v. N.Y. State Dep't of Health*, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)**

B. Fitness-for-Duty Certification

CHAPTER 10.

INTERFERENCE, DISCRIMINATION, AND RETALIATION CLAIMS

I. Overview

II. Types of Claims

***Sasser v. ABF Freight Sys., Inc.*, No. 3:14-CV-1180, 2016 WL 6600428 (M.D. Tenn. Nov. 7, 2016)**

Plaintiff brought suit against her former employer alleging that she was discharged in retaliation for taking leave under the Family and Medical Leave Act ("FMLA"). The district court granted summary judgment to employer on plaintiff's FMLA retaliation claim. The timing of employer's termination decision was the key to the court's decision. According to the district court, the decision had been made before plaintiff was involved in a car accident and took an FMLA-protected leave. Because there was no FMLA leave for employer to consider when it made the termination decision, the leave could not have played any role in the termination decision and plaintiff could not establish a *prima facie* case of retaliation. The court also held that even if plaintiff could have established her *prima facie* case, she could not prove that employer's stated reason for the termination decision—i.e., her performance—was a pretext for unlawful retaliation.

A. Interference With Exercise of Rights

***Woldeselassie v. Am. Eagle Airlines, Inc.*, 647 F. App'x 21 (2d Cir. 2016)**

Plaintiff, a flight attendant, alleged her previous employer violated the FMLA by interfering with her FMLA rights and retaliating against her for exercising her FMLA rights. The district court granted summary judgment to employer finding there was no evidence of FMLA interference or retaliation.

On appeal, the Second Circuit Court of Appeals affirmed the district court's ruling with respect to plaintiff's FMLA interference and retaliation claims. Regarding her FMLA interference claim, plaintiff had to demonstrate her FMLA eligibility by establishing that she had worked or been paid for 504 hours in the calendar year. The court of appeals found plaintiff failed to a raise a genuine issue of material fact with respect to defendant's evidence that plaintiff worked less than 300 hours in the year before applying for FMLA leave, as plaintiff's submission of paystubs and documents did not demonstrate FMLA eligibility. Therefore, plaintiff did not establish that she was entitled to FMLA leave at the time it was denied.

Regarding her FMLA retaliation claim, the court of appeals found that plaintiff exercised her right to FMLA leave in the past without any negative consequences, and that she was given a warning related to her attendance approximately a year before she took FMLA leave. Plaintiff was also given a number of opportunities to attend meetings regarding her attendance and was warned that failure to attend was grounds for termination. Therefore, the court of appeals affirmed the district court's ruling granting of summary judgment to defendant on plaintiff's FMLA retaliation claim, because the evidence did not give rise to an inference of retaliatory intent.

***Hernandez v. Bridgestone Ams. Tire Operations*, 831 F.3d 940 (8th Cir. 2016)**

Plaintiff worked as an hourly tire builder for defendant employer. Plaintiff took intermittent FMLA leave beginning on November 2011. At that time, defendant calculated that plaintiff had 504 hours of FMLA time based on 12-hour shifts and 42-hour workweeks that defendant worked. During this time, plaintiff volunteered to perform overtime shifts offered by defendant. Plaintiff exhausted his FMLA leave on July 10, 2012, but continued his intermittent absences to care for his son. Because these post-July 10 absences violated defendant's attendance policy, he was terminated. Plaintiff sued alleging that deductions defendant made to plaintiff's FMLA entitlement for non-mandatory overtime shifts he missed interfered with his rights under the statute. The district court agreed, entering summary judgment in his favor. A jury thereafter returned a $75,681 verdict to plaintiff. Plaintiff then asked for an award of $113,586 in attorneys fees and costs, but the district court reduced his fee and cost award to $76,318. Defendant appealed the jury verdict and plaintiff cross-appealed the district court's ruling on fees.

The court of appeals affirmed the summary judgment entered in plaintiff's favor, but on different grounds than that reached by the district court. The court of appeals first held that, contrary to the district court's view, the overtime hours plaintiff missed were mandatory as opposed to voluntary. The court of appeals explained that, under employer's policy, employer

would not initially require employees to work overtime. Instead, it would allow them to submit their names as volunteers to work those hours. Employer would then choose who among those volunteering would be awarded overtime. For those employees selected to work overtime, the hours for which they "volunteered" then became mandatory overtime hours. Because plaintiff volunteered and was selected to work overtime, that overtime work constituted mandatory overtime hours. This was significant because an employer can charge employee absences for mandatory overtime against an employee's FMLA entitlement pursuant to 29 C.F.R. § 825.205(c). The court of appeals faulted the district court's rationale on grounds that, because it viewed the overtime as voluntary, it concluded that defendant inappropriately deducted missed mandatory overtime from "plaintiff's annual allotment." Rather, the district court should have held defendant interfered with plaintiff's FMLA rights when it "improperly calculat[ed] his FMLA-leave entitlement." The court of appeals also disagreed with the district court's view that defendant could not properly calculate plaintiff's FMLA allotment due to the variance of overtime hours in plaintiff's weekly shifts. It reasoned that defendant could—but did not—use 29 C.F.R. § 825.205(b)(3), which authorizes an employer with an employee working different weekly hours to calculate a weekly average of hours scheduled over the past 12 months preceding the leave. In doing so, defendant interfered with plaintiff's FMLA rights when it did not schedule any of plaintiff's mandatory overtime hours in his FMLA leave-allotment, but deducted them from his leave entitlement.

The court of appeals affirmed and reversed in part the district court's fee and cost award. The court of appeals affirmed the district court's 20% reduction of plaintiff's fee request. Plaintiff had brought three separate FMLA claims but only prevailed on one, the interference claim. While each of them shared the same common factual core, the district court did not abuse its discretion when making its fee award. the district court also did not abuse its discretion by reducing plaintiff's costs award, ruling that its law clerk fees were excessive and that scanning costs were part of the law firm's overhead. Finally, the court of appeals reversed the district court's ruling that it could not award costs for computer assisted legal research. Because this can be awarded as costs if the prevailing party shows that separately billing for such research is the "prevailing practice in a given community," remand was necessary to determine whether such costs were proper.

***Taylor v. Ass'n of Ark. Counties*, No. 4:14CV00303-JM, 2016 WL 3014602 (E.D. Ark. May 24, 2016)**

Plaintiff had been employed as an administrative assistant when her employment was terminated based on her failure to return to work after the expiration of her FMLA leave. Plaintiff filed a lawsuit claiming that defendant had interfered with her rights under the FMLA by "prematurely" terminating her employment prior to the expiration of her FMLA leave and had discriminated against her for taking FMLA leave by terminating her employment. Plaintiff was on an initial 30-day period of FMLA leave from May 25, 2012 to June 25, 2012, which her doctor later extended to September 4, 2012. In August 2012, plaintiff advised that she planned to return to work on August 17, 2012, which would have been at the expiration of her 12 weeks of FMLA. Defendant advised plaintiff that she would need to provide a clearance from her doctor since his most recent notification had placed her off work through September 4, 2012. When plaintiff saw her doctor again, he placed her off work until January 2, 2013. On

August 20, 2012, defendant notified plaintiff that her employment was being administratively terminated.

Defendant filed a motion for summary judgment seeking dismissal of both claims. A district court in Arkansas granted defendant's motion for summary judgment on both claims. As to the interference claim, the undisputed facts established that plaintiff had received her full 12 weeks of leave and, based on plaintiff's doctor's note, she was unable to return to work and perform her job duties at the end of the 12 weeks. Accordingly, there was no evidence that defendant had deprived plaintiff of any entitlement under the FMLA. As to the discrimination claim, plaintiff offered no proof that she was fired for exercising her rights under the FMLA and no evidence of pretext as to defendant's stated reason for terminating her: Her inability to return to work at the end of her FMLA leave.

***Landry v. Howell*, No. 5:14-CV-00167 (LJA), 2016 WL 5387629 (M.D. Ga. Sept. 26, 2016)**

Misty Laundry, a former store manager employed by Fresh Way Market, brought a claim alleging interference and retaliation under the FMLA. Defendant's motion for summary judgment, arguing that plaintiff's condition was not a chronic serious health condition under the act and that she failed to provide the appropriate notice, was denied. The court found that plaintiff's condition of Medullary Sponge Kidney Disease, which required six surgical procedures in seven months and attendance at more than 10 non-surgical doctor appointments constituted a chronic serious health condition under the FMLA. The court noted that because plaintiff's need for leave was unforeseeable, it was only necessary for plaintiff to provide sufficient information for employer to reasonably determine whether the FMLA may apply to the leave request. After her initial hospitalization, plaintiff informed employer that she had a rare kidney disease or a serious medical condition and that she would need continuous care, follow-up visits, and possible future surgeries. The court determined that this was sufficient notice to employer under the FMLA. Plaintiff's interference claim failed as a matter of law because plaintiff failed to produce evidence of any harm that would entitle her to damages or equitable relief. In terms of plaintiff's retaliation claim, the court concluded that the suspicious timing of plaintiff's write-ups, combined with the expectation that plaintiff work while out sick and defendant's statements presented sufficient circumstantial evidence to allow a reasonable fact finder to conclude that plaintiff's work performance was not the real reason she was demoted.

***Miller v. BNSF Ry. Co.*, No. 14-2596-JAR-TJJ, 2016 WL 2866152 (D. Kan. May 17, 2016)**

Plaintiff brought suit against her former employer alleging, *inter alia*, interference with her FMLA rights when defendant refused her FMLA leave, disciplined, and ultimately terminated her employment. Plaintiff, who had bipolar disorder and ADHD, requested intermittent leave because certain mediactions she was taking affected her ability to concentrate and caused irregular sleeping patterns, which often caused her to oversleep. On numerous occassions, plaintiff did not contact defendant until after the start of her shift to report that she would be tardy and request FMLA leave to cover the time she missed work.

Defendant disciplined and ultimately discharged plaintiff, arguing that she was not covered by the FMLA because she did not provide notice as soon as possible as required by the Act. To support its argument, defendant relied on *Valdivia v. BNSF Ry. Co.*, 2009 WL 352604

(D. Kan. Feb. 12, 2009), in which the court held that plaintiff in that case—who suffered from migraines—knew of his potential need for leave when he took a second dose of medication that he knew caused him to experience grogginess and sleep through his alarm. The court rejected defendant's argument. The court noted that, although defendant's summary of Valdivia was correct, that case was decided after a bench trial—not summary judgment. The cour reasoned that defendant in Valdivia also was denied summary judgment because the court there determined that the evidence presented a genuine issue of material fact. Thus, the court held that there remained a genuine issue of material fact as to the same issue here, and denied defendant's motion for summary judgment.

***Shields v. Boys Town La., Inc.*, No. CV 15-3243, 2016 WL 3690052 (E.D. La. July 12, 2016)**

Plaintiff, a development director, claimed that defendant interfered with her right to FMLA leave by terminating her, and retaliated against her for taking FMLA leave, among other claims. Defendant filed a motion for summary judgment. The United States District Court for the Eastern District of Louisiana denied summary judgment in part, and granted it in part.

Plaintiff took at least 37 FMLA days, and, accordingly, was unable to meet her development metrics for the year. Defendant informed plaintiff that her performance was unsatisfactory. Thereafter plaintiff was suspended for making racially insensitive remarks. Ultimately, defendant terminated plaintiff, citing "workplace misconduct, lack of support of the Executive Director, inadequate performance, including a lack of cultural competency."

The court noted that plaintiff did not claim that she was denied any FMLA leave or that she was discouraged from taking FMLA leave. Similarly, she did not claim she lost compensation or any loss of benefits. Accordingly, the court granted summary judgment to employer on the interference claim.

Next, the court addressed the retaliation claim. Because plaintiff's supervisors spoke negatively about plaintiff's performance while she was on FMLA and her subsequent termination listed "inadequate performance" as one of the reasons, plaintiff established a *prima facie* case of FMLA retaliation. Defendant relied on the reasons stated in plaintiff's termination letter as the legitimate, non-discriminatory reasons for her termination. The court analyzed each of the reasons and, in particular, noted that the reason of poor performance was not supported by plaintiff's performance reviews and statements of her supervisors. Accordingly, the court refused to award summary judgment to defendant on plaintiff's FMLA retaliation claim and/or Title IV discrimination claim.

***Chase v. U.S. Postal Serv.*, 149 F. Supp. 3d 195 (D. Mass. 2016)**

Plaintiff was involved in a serious motor vehicle accident. As a result, plaintiff simultaneously filed and was approved for both worker's compensation and FMLA leave. Although defendant (former supervisor) knew plaintiff's injury required him to take paid leave, defendant was unaware that plaintiff's FMLA leave ran concurrent with his worker's compensation leave. While plaintiff was still on leave, he was arrested and charged with possession of cocaine with intent to distribute, and conspiracy to violate Massachusetts drug laws. Almost four months after plaintiff's arrest, defendant, urged by USPS labor relations

department, took disciplinary actions against plaintiff that ultimately led to his termination. Plaintiff filed suit alleging his termination was retaliation for taking FMLA leave.

During the bench trial, the district court recognized that the outcome hinged on which causation standard should be applied to defendant's actions. Although the Supreme Court of the United States held Title VII retaliation claims must be proved according to the traditional principle of "but-for" causation, plaintiff argued that absent a First Circuit decision adopting "but-for" causation standard for FMLA retaliation claims, plaintiff need only prove that his FMLA leave was a negative factor in defendant's decision to terminate him. The court concluded that because the FMLA is ambiguous as to what casual standard governs retaliation claims, Chevron deference is owed to the Department of Labor. Pursuant to the DOL's regulations, under the FMLA, it is unlawful to "use the taking of FMLA as a negative factor in employment actions." Therefore, the court held that any meaningful causal connection between the taking of FMLA leave and an adverse employment action constitutes retaliation.

After yielding to the Department of Labor's interpretation of the FMLA, the court ultimately held plaintiff's retaliation claim failed. The court clarified that in order for defendant to retaliate, defendant must have knowledge of employee's FMLA leave or notice sufficient for a reasonable defendant to learn that the leave was FMLA- protected. Although FMLA was formally invoked, because the supervisor had no knowledge or reason to believe that FMLA was being used concurrently with worker's compensation, the court held that it was implausible that defendant's adverse employment actions were the product of discrimination or retaliation. The court reasoned that the FMLA does not impose liability on employers who take adverse employment actions against employees on FMLA leave who demonstrate their belief, however mistaken, that the FMLA was not invoked. The court concluded that it was plaintiff's use of worker's compensation that upset defendant and ultimately contributed to his termination, not his FMLA leave.

***Kempton v. Delhaize Am. Shared Servs. Grp. LLC*, No. 2:14-CV-00494-JDL, 2016 WL 1069647 (D. Me. Mar. 17, 2016)**

Plaintiff, an assistant customer service manager, sued her former employer for interfering with her FMLA rights and retaliation. After plaintiff's husband contracted Lyme disease, she was granted intermittent FMLA leave to care for him. Defendant had a policy of disciplining employees who clocked in early or left work early, and plaintiff was disciplined for violating the policy. Plaintiff admitted that her former employer granted her FMLA leave whenever she requested it, and although her last approval letter had the dates omitted inadvertently, it had no effect on her ability to use FMLA leave. Defendant erroneously told her that she could not extend her FMLA leave, but plaintiff had filed such requests enough times before to know that she did not need defendant's assistance to request an extension.

The court found that plaintiff could not establish an FMLA inference claim because she did not assert enough facts that would allow a reasonable jury to conclude that defendant denied her FMLA benefits. As to her retaliation claim, although a temporal proximity could give rise to a causal connection, the court found that there was a lack of evidence establishing pretext because plaintiff's record was replete with instances during which she left her shift without authorization, and granted defendant's motion for summary judgment.

***Leslie v. Mich. Bell Tel. Co.*, No. 15-11205, 2016 WL 4191736 (E.D. Mich. Aug. 9, 2016)**

Plaintiffs, who were previously employed by defendant as service representatives, filed suit against their former employer. They alleged that defendant forced them to resign by retaliating against them and creating a hostile work environment because of FMLA leave they had previously taken. Defendant moved for summary judgment, but the district court denied the motion. The court concluded that the evidence, including testimony from plaintiffs' former supervisors, supported plaintiffs' claims that defendant had a policy to target FMLA users for termination and discipline.

***Thomas v. Lighthouse of Oakland*, No. 12-CV-15494, 2016 WL 2344350 (E.D. Mich. May 4, 2016)**

Plaintiff filed a lawsuit against defendant claiming that it interfered with his rights under the FMLA and retaliated against him for exercising his rights by terminating him. Plaintiff took approved FMLA leave. When his approved leave ended, plaintiff failed to return to work. Despite efforts by employer to encourage him to commit to a return date, he failed to do so and, eventually, his employment was terminated for job abandonment.

Defendant moved for summary judgment dismissing plaintiff's FMLA claims, and the District Court for the Eastern District of Michigan granted defendant's motion. As to his interference claim, plaintiff alleged that company employees and supervisors harassed him, pressured him, and encouraged him to return to work from FMLA leave early. However, the court concluded that the only evidence plaintiff offered in support of this claim were his own conclusory allegations. He provided no specific evidence as to such conduct by his supervisors and coworkers. In addition, the court held that the record contained evidence showing that defendant facilitated plaintiff's exercise of his FMLA rights by providing him with information as to classifying his time off as FMLA leave and providing him with opportunities to return to work after he missed return-to-work deadlines. As to plaintiff's retaliation claim, the court noted that while temporal proximity may be sufficient to meet the low burden necessary for a *prima facie* case of FMLA retaliation, it cannot serve as pretext to overcome an employer's legitimate reason for termination. Since plaintiff offered no evidence of pretext, his retaliation claim could not survive summary judgment.

***Farha v. Cogent Healthcare of Mich., P.C.*, No. 14-14911, 2016 WL 795882 (E.D. Mich. Feb. 29, 2016)**

Plaintiff was a physician with defendant, Cogent Healthcare of Michigan, a group medical practice that furnished staffing services to hospitals. Plaintiff suffered a detached retina, for which she sought FMLA leave. Following her termination, plaintiff sued defendant under the FMLA for (1) interfering with her right to take medical leave and (2) terminating her in retaliation for her attempting to do so. Defendant moved for summary judgment. As to plaintiff's interference claim, the court held that defendant's failure to provide plaintiff with the required notice of her eligibility to take FMLA leave, which ordinarily may be construed as interference with an employee's rights under the FMLA, was immaterial in this case because plaintiff was unable to show that the lack of notice caused her any harm. As to plaintiff's retaliation claim, the court engaged in the *McDonnell Douglas* analysis and concluded that a

reasonable jury could find a causal connection between the scheduling problems caused by plaintiff's FMLA request and the termination of employment. The court granted summary judgment in part as to the interference claim, but denied in part as to the retaliation claim.

***Munter v. Lifecare Med. Ctr.*, No. CV 14-4575 (MJD/LIB), 2016 WL 2858793 (D. Minn. May 16, 2016)**

Plaintiff was a licensed practical nurse at medical center and nursing home owned by defendant. Over the course of her 20 year tenure with defendant, plaintiff developed serious medical issues with her knees, for which she took multiple FMLA leaves without incident. Finally, plaintiff's doctor recommended knee replacement surgery, which would have required a two to three month period of leave. Employer mistakenly informed plaintiff that she had exhausted her FMLA leave, when plaintiff actually had four weeks of FMLA leave left. Employer encouraged her to delay surgery until she had sufficient FMLA time available, as she would not have to pay COBRA continuation coverage costs and would be guaranteed job reinstatement. Plaintiff delayed the surgery, but struggled to perform her work during her shift and engaged in a pattern of staying significantly past the end of her shift to complete her duties. Employer issued plaintiff a series of progressive discipline for working excessive hours without permission which ultimately resulted in plaintiff's discharge. Plaintiff sued for, *inter alia*, interference and retaliation violations of the FMLA.

The court granted employer's motion for summary judgment on plaintiff's FMLA claims finding that employer's misstatement that plaintiff had exhausted her FMLA leave when she wanted to have surgery did not create a genuine issue of material fact. The court determined that the misstatement was not material to plaintiff's decision to have the surgery or not because it was undisputed that plaintiff needed two to three times the amount of FMLA leave that she had available to recover from the surgery. In addition, plaintiff did not testify that she would have proceeded with the surgery had she known that she had four weeks of FMLA available.

***West v. J.O. Stevenson, Inc.*, No. 7:15-CV-87-FL, 2016 WL 740431 (E.D.N.C. Feb. 24, 2016)**

A sales manager of a car dealership brought a retaliation claim under the FMLA against several entities affiliated with the dealership, and its owner, who were collectively a part of the Stevenson Automotive Group, which included other dealerships owned by Stevenson.

Plaintiff was terminated two months after a car accident in December 2015 left him cognitively impaired. After the accident, plaintiff contacted defendant's general manager to say he didn't believe he was able to work as scheduled, to which the general manager responded "that's what you need to do, sit home in self-pity feeling sorry for yourself." After returning to work, plaintiff visited a chiropractor who observed he had signs of a closed head injury with post-concussion type syndrome, affecting his speech and awareness. Plaintiff met with the owner who told him he could stay home until the end of the year but would need to provide a doctor's note before being allowed to return to work. While on approved leave, defendant's assistant general manager contacted plaintiff allegedly pressuring him to return to work. When plaintiff contacted the general manager, he was told he should return to work by January 2, 2016 if he "wanted to keep his job." Unable to secure a return-to-work note from his doctor, plaintiff retuned to work but repeatedly told the general manager he needed leave to recover from his

injury. He was granted leave in mid-January for the death of his unborn son, but still suffered from the effects of his injury after returning to work, along with severe depression. The general manager refused to grant leave or alternate work arrangements, and demanded plaintiff's resignation due to the dealership's decreased profitability. Plaintiff refused, and was terminated.

Plaintiff alleged defendants interfered and retaliated against him by terminating him after taking FMLA leave.

The Stevenson Automotive Group had shared employees and used an integrated marketing scheme, an integrated system to document sales, a common web page, and a common payroll.

The affiliate companies and owner filed motions to dismiss challenging plaintiff's allegations that they collectively were his joint or integrated employer. Finding that plaintiff had failed to properly allege facts in his complaint that he was jointly employed, including facts suggesting the joint employers exercised control over his work, the court dismissed the joint employer claim, but found plaintiff had pleaded his integrated employer theory with sufficient specificity.

The court dismissed plaintiff's FMLA interference claim because, despite his assertion that his forced return to work resulted in a longer recovery period, plaintiff had failed to allege any monetary loss or equitable relief, such as front pay.

The court found however, that the complaint adequately stated an FMLA retaliation claim based on his firing, after his repeated requests for additional leave were denied and his resignation was demanded.

***Hockenjos v. Metro. Transp. Auth.*, No. 14-CV-1679 (PKC), 2016 WL 2903269 (S.D.N.Y. May 18, 2016)**

(Appeal filed with Second Circuit on June 6, 2016)

Summary for May 18, 2016 opinion:

Plaintiff worked as an engineer for defendant. Prior to 2010, plaintiff experienced no performance issues during his employment. However, certain personal issues he began facing that year resulted in him missing work, which, in turn, impacted his work performance. Defendant counseled plaintiff on his work performance issues, which occurred mostly before - but some after - two FMLA leaves he took. The day after he returned from his second FMLA leave, he was terminated. Plaintiff sued alleging interference and retaliation theories under the FMLA. The court granted defendant's motion for summary judgment on both theories.

The court ruled that, given plaintiff's record of poor performance, no reasonable jury could conclude that his FMLA leave constituted a negative factor in his termination, noting that his work performance issues arose prior to him taking any of his two FMLA leaves. The court also rejected his argument that it could infer that his FMLA leave was a contributing factor to his termination on grounds that he was discharged the day after returning from his second FMLA leave. It explained that, because an employer can fire an employee at any time during his leave,

defendant did not interfere with defendant's rights in view of the fact that it terminated him for above-referenced work performance reasons. In doing so, the court also rejected plaintiff's reliance on 29 C.F.R. § 825.216(c), which provides that an employee is not entitled to restoration of his position if he cannot perform the essential functions of his job when returning to work. The court observed that that section addresses the issue of when to assess an employee's ability to perform the duties of his job. This was different than subsection (a) of the regulation, which provides that, as just noted, an employer can fire an employee at any time during employee's FMLA leave. The court further disagreed with plaintiff's argument that his work performance problems were a product of his mental health issues, observing that this was an improper attempt to conflate ADA liability in an FMLA claim. The court dismissed plaintiff's two discouragement / interference theories. The first lacked merit because, despite being allegedly berated during a meeting prior to his first FMLA leave, there was no mention of FMLA leave during that meeting. As to his second theory, plaintiff's view that he was discouraged from taking his second FMLA leave failed because he either misconstrued the record or because defendant actually offered him more FMLA before taking that leave.

The court granted defendant's motion for summary judgment on plaintiff's retaliation theory by applying the traditional *McDonnell Douglas* burden-shifting scheme. It questioned whether plaintiff could establish a *prima facie* case, stating that his demonstrated record of poor work performance would not arguably not satisfy the element that he was a qualified employee. However, the court explained that this same reason doomed him on pretext. Plaintiff's reliance on the temporal proximity between his return from FMLA leave and his firing the next day was misplaced due to, as just noted, his sustained record of poor performance that pre-dated long before he took any FMLA leave. Two e-mails authored by defendant's managers also were of no help to plaintiff. One of those e-mails, which had a handwritten note "we have no documents to prove" were not pretextual because there was no mention of FMLA leave in it. The other e-mail, which contained a statement that management was building a strong case against plaintiff, also was not, by itself, pretextual. Because this was not inconsistent with plaintiff's long history of poor performance, summary judgment on plaintiff's retaliation claim was warranted.

***Miller v. N.Y. State Police*, No. 14-CV-00393A(F), 2016 WL 2868840 (W.D.N.Y. May 17, 2016)**

Plaintiff brought suit against the New York State Police alleging interference and retaliation in violation of the FMLA. In denying defendant's motion to dismiss with respect to both claims, the district court rejected defendant's argument that plaintiff was granted the requested leave in the form of an unpaid suspension. The court found that defendant's act of placing plaintiff on involuntary suspension in response to his request for FMLA leave did not equate to granting plaintiff's FMLA leave request as plaintiff had no say on when the leave would end, nor was there any guarantee that he would be returned to his former position. The court further reasoned that the close temporal proximity between plaintiff's FMLA request and suspension was sufficient to state a claim for retaliation.

***Lynn v. True N. Mgmt., LLC*, No. 15-CV-2650, 2016 WL 6995290 (N.D. Ohio Nov. 30, 2016)**

Plaintiff, a cashier and customer service representative for defendant brought ADA, FMLA and state claims for disability discrimination, failure to accommodate, and FMLA

violations in district court. The discrimination and failure to accommodate claims were allowed to go forward based on the evidence provided that plaintiff was denied use of a cane at work. She began using the cane after filing a request for intermittent FMLA leave due to low back syndrome, osteoarthritis of the knees, and migraines. Plaintiff filed FMLA interference and retaliation claims. The court split on the FMLA claims.

The court found, based on the facts submitted, that defendant forced plaintiff to take more FMLA leave than she requested. Instead of intermittent leave, defendant placed plaintiff on 12 weeks of "involuntary" FMLA leave and then terminated her. The court held the interference claim unripe and found no grounds for the interference claim because plaintiff did not request further FMLA leave upon the expiration of the wrongfully exhausted FMLA leave. However, the court allowed the retaliation claim to stand based on the timing of defendant's actions. Here, employer placed plaintiff on a 12-week FMLA leave four weeks after plaintiff submitted her Physician's Certificate for intermittent leave. Upon the expiration of the 12 weeks, defendant terminated plaintiff. The court found the events to close in time to be coincidental.

As part of the damages, plaintiff requested liquidated damages for willful violation of the FMLA, causing mental and emotional distress. The court dismissed the request for damages related to mental and emotional distress as not being allowed under the FMLA.

***Holland v. Prot. One Alarm Monitoring, Inc.*, No. C15-259 RSM, 2016 WL 1449204 (W.D. Wash. Apr. 13, 2016)**

Plaintiff worked as a manager for defendant employer beginning in 2007. In December 2010 and September 2012, defendant counseled plaintiff for his abusive treatment of his subordinates. On May 1, 2013, plaintiff asked for—and defendant provided him—an application to take FMLA leave. Two weeks later, on May 14, 2013, defendant human resources manager Betsy Scott received additional reports of plaintiff's abusive conduct to his subordinates. On May 20, 2013, plaintiff visited his doctor, who assisted him in completing his application for FMLA leave. Plaintiff, however, did not turn ever turn his FMLA application in to defendant. Scott completed her investigation of the reports of plaintiff's additional abusive conduct on May 27, 2013. During her investigation, she learned that plaintiff intended to seek FMLA leave. Scott e-mailed defendant's CEO and recommended that plaintiff be discharged. On June 4, 2013, defendant terminated plaintiff. Plaintiff filed suit alleging that defendant violated the FMLA when discharging him. The court granted defendant's motion for summary judgment on his FMLA claim.

The court first noted the unique nature of his FMLA claim. This was not an instance where plaintiff requested to take FMLA leave; instead, it was one where he requested FMLA paperwork, presumably to take FMLA leave. Under these circumstances, plaintiff's theory was properly characterized as an interference claim. In order to prevail under this theory, the court would not apply the traditional *McDonnell Douglas* burden-shifting test; rather, it would determine whether plaintiff's intention of seeking FMLA leave was a 'negative factor' in his discharge. The court also noted that, while employer motivation was not relevant in interference cases, it was applicable to plaintiff's case because it would not be possible for plaintiff to prove denial of FMLA benefits without discussing the motive for his termination.

The court rejected plaintiff's argument that the temporal proximity between his intention of seeking FMLA leave on May 20, 2013 and his discharge on June 4, 2013 was a "negative factor" in his firing. The court explained that his termination occurred almost directly after Scott received reports of plaintiff's abusive conduct on May 14, 2013. As a result, no reasonably jury could conclude that his intent in seeking FMLA leave was a "negative factor" in his termination. The court also rejected his contention that defendant failed to follow its progressive discipline policy with him but did so with other similarly situated managers. This was because the policy allowed defendant to deviate from it at will or due to egregious behavior. Finally, plaintiff's view that defendant violated FMLA when it did not interview him with respect to the May 14, 2013 reports failed because defendant had investigated similar complaints in the past and concluded that the new ones had merit. In doing so, the court also observed that, even if he brought a retaliation claim, it too would lack merit since plaintiff could not demonstrate the a causal connection between the protected conduct of intending to seek FMLA leave and his termination for the reasons stated above.

Summarized elsewhere:
***Henderson v. Mid-South Elecs., Inc.*, No. 13-CV-1166-KOB, 2016 WL 3068413 (N.D. Ala. June 1, 2016)**

***Quigley v. Meritus Health, Inc.*, No. CCB-14-2227, 2016 WL 759179 (D. Md. Feb. 26, 2016)**

***Greene v. YRC, Inc.*, No. CV MJG-13-0653, 2016 WL 687478 (D. Md. Feb. 19, 2016)**

***Jaskiewicz v. St. Mary's of Mich.*, No. 15-CV-10265, 2016 WL 627730 (E.D. Mich. Feb. 17, 2016)**

***Lightner v. CB&I Constructors, Inc.*, No. 14-CV-2087, 2016 WL 6693548 (S.D. Ohio Nov. 14, 2016)**

***McFadden v. Tulsa Co. Bd. of Cty. Comm'rs*, 2016 WL 6902182 (N.D. Okla. Nov. 23, 2016)**

***Duncan v. Chester Cty. Hosp.*, No. CV 14-1305, 2016 WL 1237795 (E.D. Pa. Mar. 29, 2016)**

***Duong v. Bank of Am., N.A.*, No. 1:15-CV-784, 2016 WL 899273 (E.D. Va. Mar. 2, 2016)**

1. *Prima Facie* Case

***Tennial v. UPS*, 840 F.3d 292 (6th Cir. 2016)**

Plaintiff, an African American UPS manager, brought multiple claims against his employer, including an interference claim and a retaliation claim under FMLA. The district court granted summary judgment and granted costs to employer. Plaintiff appealed. He requested FMLA leave because of stress, depression and anxiety allegedly caused by a hostile work environment. UPS granted the FMLA leave even though it resulted in plaintiff missing employer's peak holiday season. Plaintiff returned from leave and assumed his prior position. Roughly seven months after returning from FMLA leave, he was demoted for failure to meet goals of a management performance improvement plan (MPIP) that had been put in place due to performance failures after his return from FMLA leave. In his suit, he alleged both interference

and retaliation under the FMLA. The appeals court explained that unlawful intent on the part of an employer was not necessary to prove an interference claim, but was required for a retaliation claim to survive. The court rejected his interference claim, without applying the elements of a *prima facie* case, because FMLA leave had been granted to him in two separate years. Plaintiff also alleged that there was retaliation because he was placed on an MPIP after returning from FMLA leave and later demoted based on failing to meet the goals under the MPIP. Plaintiff alleged that the causal connection element of the *prima facie* case consisted of (1) timing of his demotion and (2) his supervisor's hostility to employees taking leave during the holiday season. The appeals court dismissed the timing inference based on the intervening seven months between plaintiff's return and demotion. The appeals court dismissed the hostility claim on the basis that the decision was made by another supervisor, not the one who said that the company disliked persons who took leave during the holiday season. Because plaintiff had not raised a genuine dispute as to the causal connection element of his retaliation claim, the appeals court determined that he had not established a *prima facie* case.

***Bento v. City of Milford*, No. 3:13-CV-01385 (VAB), 2016 WL 5746340 (D. Conn. Sept. 30, 2016)**

Plaintiff, a community outreach worker, sued her employer, a city, alleging interference with her FMLA rights. A federal district court granted employer's motion for summary judgment. The court found that employee was granted all the FMLA leave she requested and that employer acted correctly when it sought "fitness-for-duty" documentation from employee's psychiatrist. The court also noted that the FMLA does not provide any remedies for emotional harm.

***Hewett v. Triple Point Tech., Inc.*, No. 3:13-CV-1382 (SRU), 2016 WL 1092437 (D. Conn. Mar. 21, 2016)**

Throughout plaintiff's two-year employment, defendant expressed concern about plaintiff's lengthy lunches and late arrivals. Plaintiff responded to complaints by informing defendant that her tardiness was due to her traveling home to self-administer medicine. After learning about plaintiff's medical needs, defendant accommodated plaintiff by making space available for her to self-administer medicine at work. Although plaintiff was able to self-administer her medication at work, she took paid sick leave when necessary. In addition to complaints about plaintiff's tardiness, defendant also received multiple complaints about plaintiff's low performance and unprofessional office conduct. After receiving these complaints about plaintiff's work performance, defendant terminated plaintiff's employment. Plaintiff brought an FMLA action against defendant alleging: (1) interference with her ability to obtain leave under the FMLA; and (2) retaliation for her requesting or appearing to need FMLA leave. At summary judgment, the district court granted defendant's motion for summary judgment holding: (1) plaintiff failed to state a cognizable claim for FMLA interference, and (2) plaintiff failed to produce evidence of retaliation.

To make out a *prima facie* case of FMLA interference, plaintiff must establish: (1) she is an FMLA-eligible employee; (2) defendant is a covered employer under the FMLA; (3) she was entitled to take FMLA leave; (4) she gave notice to her employer of her intention to take leave; and (5) she was denied FMLA benefits to which she was entitled. Also, the Second Circuit has

suggested that as part of the *prima facie* case, a terminated plaintiff must also show that employer "considered [the exercise of FMLA rights] a negative factor in its decision to terminate [her]." The court held plaintiff successfully proved elements one through four; however, plaintiff failed to prove element five because she actually admitted that defendant never denied her any requested medical leave. The court also held that plaintiff failed to prove that defendant considered plaintiffs exercise of FMLA rights as a negative factor in its decision to terminate her. Rather, defendant offered convincing evidence that plaintiff was not fired for FMLA reasons, but for her low work performance. Accordingly, the court dismissed plaintiff's interference claim.

In order for plaintiff to establish a *prima facie* claim of retaliation, she must establish: (1) she exercised rights protected under the FMLA; (2) she was qualified for her position; (3) she suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an interference of retaliatory intent. The court held that, not only did plaintiff fail to uncover any evidence of retaliatory animus, she never actually exercised any of her FMLA rights because she never requested nor was denied FMLA leave. If plaintiff never exercised her FMLA rights, then she could not have been retaliated against for requesting FMLA leave. Accordingly, the court dismissed plaintiff's retaliation claim.

***Bunch v. Cty. of Lake*, No. 15 C 6603, 2016 WL 1011513 (N.D. Ill. Mar. 14, 2016)**

Plaintiff, a correctional officer, brought claims against his employer alleging race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12102 ("ADA"), age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §623 *et seq.* ("ADEA"), and the FMLA after he was terminated following back surgery. Plaintiff alleged that employer's actions were in retaliation against him for providing statements in support of a coworker's gender discrimination claims during an Equal Opportunity Commission investigation. Defendant alleged that plaintiff had exhausted all of his FMLA leave and when he was denied additional non-FMLA leave, he did not return to work on the day he was expected. On a motion to dismiss, the district court allowed the Title VII, ADA and ADEA claims to proceed to discovery but dismissed without prejudice plaintiff's FMLA claim because of an inconsistency between his complaint and his response brief. Plaintiff admitted in his complaint that he had exhausted his 12 weeks of FMLA leave, but in the same pleading alleged that he had not yet exhausted his entitlement to 12 total weeks of work during the previous 12 month period. The court rejected plaintiff's argument that there are different ways to calculate the 12-week period because he first raised that argument in his reply to the motion to dismiss and did not plead it in his complaint. While a plaintiff may not amend a complaint by pleading facts that are inconsistent with allegations in the complaint, a dismissal without prejudice left open the opportunity for plaintiff to amend the complaint to replead the claim.

***Ruckebeil v. Cancer Treatment Ctrs. of Am., Inc.*, No. 15 C 08259, 2016 WL 878585 (N.D. Ill. Mar. 8, 2016)**

The court denied defendants' motion to dismiss for failure to state a claim with respect to each FMLA claim plaintiff brought. Plaintiff's claims included FMLA interference and FMLA retaliation against her former employer and her former supervisor (collectively "defendants"). Based on the following allegations included in plaintiff's complaint, the court held plaintiff

sufficiently pled each of her FMLA claims against employer and, individually, against her former supervisor. Plaintiff was granted intermittent FMLA leave to care for her two children with series health conditions. As she increasingly took FMLA leave, her supervisor gave her verbal and written warnings for violating the company's attendance and phone usage policies. After taking FMLA leave, plaintiff's supervisor started to "watch [her] like a hawk" and point out every mistake she made. Shortly thereafter, plaintiff's supervisor placed her on a Performance Improvement Plan ("PIP") because of a pattern of absences on Fridays and Mondays. Plaintiff informed her supervisor that these absences were approved FMLA leaves. Her supervisor extended her PIP by one day for each day she took FMLA leave. Ultimately, her supervisor placed her on a second PIP. During the period she was on this PIP, plaintiff took FMLA leave for eleven and a half days. Defendant terminated plaintiff's employment for not completing the second PIP.

The court denied defendants' motion to dismiss on all claims under the FMLA. First, plaintiff pled sufficient facts to state a claim against defendant employer because she alleged defendant both terminated her to prevent reinstatement and terminated her in retaliation for taking FMLA leave. Second, plaintiff pled sufficient facts show individual liability against her former supervisor because her former supervisor allegedly had supervisory authority over her and was responsible, at least in part, for the alleged FMLA violations. Accordingly, the court denied defendants' motion to dismiss plaintiff's FMLA interference and FMLA retaliation claims against both defendants.

***Ruggio v. Tyson Foods, Inc.*, No. 3:14-CV-1916 JD, 2016 WL 1660484 (N.D. Ind. Apr. 26, 2016)**

Plaintiff, an accounting clerk, brought claims of FMLA retaliation and interference against her employer. Employer moved for summary judgment on both claims. The court found that plaintiff's interference claim failed because she did not show that her employer denied her any FMLA benefits. During her employment, employer retroactively designated two periods of absences as FMLA leave upon plaintiff's request. Plaintiff had multiple absences after she returned from the second FMLA leave. Plaintiff claimed that she felt pressured to return to work early and that her third set of absences were caused by her early return and should have been protected leave under the FMLA. However, the court found that plaintiff was not entitled to FMLA leave for the third set of absences as her medical records did not support her claim and because she had reported to her employer that her absences were unrelated to her health. The court also found that plaintiff's retaliation claim failed because she failed to establish a causal connection between her protected activity and her termination. The court found that temporal proximity of two months between plaintiff's last FMLA leave and her termination was insufficient standing alone, that the comments made by plaintiff's supervisor were stray comments, and that plaintiff herself had identified her third set of absences (which led to her termination) as unrelated to any protected activity.

***Marshall v. Rawlings Co.*, No. 3:14-CV-359-TBR, 2016 WL 1389991 (W.D. Ky. Apr. 7, 2016)**

Plaintiff worked for defendant first as an analyst. Over the next seven years, she was promoted to a team lead, and then demoted to analyst and ultimately discharged. Beginning after

her promotion she took a series of short FMLA leaves and intermittent FMLA leave for depression. Plaintiff had difficulty keeping up with her workload, even though it had been modified to take into account her leave. While she was able to meet some deadlines, she was unable to meet others. As a result of these performance issues, employer contended, the President of the division demoted her back to analyst. During this period, plaintiff claimed that she was harassed about the leave, including being aggressively questioned by the Vice President of her division about her team during an awards luncheon. She also claimed the same Vice President asked her during a meeting about her backlog if she planned to be absent again. Plaintiff was ultimately discharged by the President of the company for making false allegations of harassment against the Vice President and others. Plaintiff made the allegations, which concerned conduct that occurred beginning almost a year prior, in a meeting called to discuss her absence from her desk for almost a full day. Following her discharge, plaintiff sued under the FMLA for interference and retaliation. Employer filed a motion for summary judgment on both claims, which the district court granted.

Summary judgment was granted on the interference claim because plaintiff did not dispute employer's evidence that it had granted all the FMLA leave she requested and she received all of the FMLA leave to which she was entitled, thus she failed to state a *prima facie* case. The court also denied the retaliation claim concluding that the undisputed evidence was the decisionmakers as to the demotion and termination did not know about plaintiff's FMLA leave. Alternatively, the court entertained plaintiff's cat's paw theory, but concluded it did not apply in this case because plaintiff had not presented evidence that the non-decision-making subordinate employees had been motivated by retaliatory animus. One stray remark was not enough. Nor were plaintiff's own subjective perceptions of hostility. Finally, the court found no evidence of pretext. Specifically, plaintiff was unable to demonstrate that (i) employer had no basis in fact for the adverse decisions, (ii) employer's proffered reasons did not actually motivate its actions, or (iii) employer's reasons were insufficient to motivate its actions.

***Thompson v. Beacon Behavioral Hosp., Inc.*, No. CV 15-5455, 2016 WL 4720006 (E.D. La. Sept. 8, 2016)**

Plaintiff was an RN at a health care facility, which was purchased by a hospital. She claimed that she was never notified of the change in ownership of the healthcare facility at which she worked and heard that she needed to apply for a position with the hospital through word of mouth. Plaintiff applied for a job with the hospital and eventually was offered a position as an LPN. She discussed her desire for FMLA leave at the health care facility, and was seven months pregnant at the time she was offered a position by the hospital. Plaintiff responded to the job offer with an inquiry about the details of the job offer. Plaintiff did not report to work the day the hospital expected her to report and the hospital rescinded the job offer. Plaintiff filed suit against the hospital alleging, among other claims, FMLA interference and retaliation claims. The hospital filed a motion for summary judgment. The court denied the motion for summary judgment finding issues of material fact existed as to both FMLA claims. With regard to the retaliation claim, the court acknowledged that while the Fifth Circuit recognizes a future right to FMLA leave, which may be extinguished based on legitimate grounds for termination, the facts regarding whether the hospital had knowledge of plaintiff's pregnancy at the time of the adverse employment action were in dispute. Then the court applied the typical *McDonnell Douglas* framework to her retaliation claim and determined that genuine issues of material fact existed

regarding both whether the hospital took an adverse employment action against plaintiff arising from disputed facts as to whether plaintiff had rejected the LPN job offer and whether plaintiff's pregnancy was known by the hospital and causally connected to the alleged adverse employment action.

***Miller v. Rd. Comm'n for Oakland Cty.*, No. 15-13976, 2016 WL 7210712 (E.D. Mich. Dec. 13, 2016)**

Plaintiff was an information systems supervisor for his employer, Road Commission of Oakland County. In December 2014, to care for his wife during her recovery from an automobile accident, employee applied for and received FMLA leave. In 2015, employee took leave for FMLA, as well as non-FMLA, reasons. Due to a computer system failure, he was asked to re-designate which absences were due to FMLA reasons.

In June 2015, employee was given a negative performance review. Around the same time, he discovered in employer's computer system an undated "confidential employee overview," created by employer's human resources director to share with legal counsel, which indicated that employer was considering his termination. Shortly thereafter, employee resigned and filed claims for FMLA interference and retaliation, by way of constructive discharge, in the federal District Court for the Eastern District of Michigan.

The court granted summary judgment on the claims in favor of employer. With regard to interference, the court noted that employee himself had designated which of his absences were FMLA-qualifying, leaving employer privileged to discipline him for unauthorized, non-FMLA absences. No evidence was offered that employer denied employee any leave to which he was entitled.

With regard to retaliation, the court concluded that there was no evidence allowing for a finding that employee's working conditions were deliberately so intolerable as to warrant his resignation. Further, with regard to the confidential memo, the fact that the memo was never communicated to him precluded his reliance on it in support of a constructive discharge claim.

***Scott v. Valley Elec. Contractors, Inc.*, No. 15-CV-14281, 2016 WL 7100250 (E.D. Mich. Dec. 6, 2016)**

Plaintiff, an office professional for defendant, brought suit in the district court for interference and retaliation under the FMLA. The district court granted defendant's motion for summary judgment on both claims. The court first addressed timeliness issues. The issues revolved around the number of adverse actions taken by employer. The first came in the offer of a voluntary layoff near the end of a six-week paid maternity leave. This action fell outside of the two-year statute of limitations; and since no willfulness argument was made to extend the period, the court found it untimely. The second came when, after seven months, defendant did not rehire plaintiff as it had claimed it would when she took the layoff. The claim based on this action was found to be timely.

Regarding the interference claim, the court found plaintiff never requested or expressed a desire to utilize unpaid FMLA leave. Near the end of the six weeks of paid leave, plaintiff contacted her supervisor hoping to obtain a lighter work schedule. The supervisor offered her a

temporary layoff as an option. Plaintiff accepted the layoff in order to collect unemployment, knowing that FMLA leave would be unpaid. Because of plaintiff's choice to utilize layoff instead of leave, the court held that no *prima facie* case was made for an interference claim. Without an intention to take FMLA leave, there can be no denial or interference. As to the retaliation claim, the court again found no *prima facie* case. In order to make a case for retaliation, plaintiff must have either, 1) requested and been denied FMLA leave, which the court held she did not; or 2) show that the use of FMLA was the cause for not being rehired. The court held since plaintiff did not request FMLA leave, defendant's decision to not rehire her cannot be construed as retaliation for using FMLA.

***Brown v. HCA Health Servs. of N.H., Inc.*, No. 15-CV-323- AJ, 2016 WL 141672 (D.N.H. Jan. 12, 2016)**

In the spring of 2015, plaintiff requested a 12-week medical leave of absence to recover from surgery. Before applying for FMLA leave, defendant notified plaintiff that her position was being eliminated. As a result, plaintiff brought suit alleging interference with her FMLA rights. Defendant moved to dismiss plaintiff's complaint for failure to adequately plead whether plaintiff notified defendant of her intention to seek FMLA leave (a required element of an FMLA claim).

The district court, in denying defendant's motion to dismiss, held that plaintiff's complaint sufficiently alleged: (1) defendant was a covered employer under the FMLA; (2) plaintiff was entitled to FMLA leave; (3) plaintiff exercised her FMLA rights by making multiple leave requests under the FMLA; (4) defendant terminated plaintiff just before she formally applied for leave, effectively denying her FMLA benefits. Viewing the complaint holistically, the court denied defendant's motion to dismiss the FMLA interference claim, holding that plaintiff plausibly alleged that her termination was triggered by her FMLA leave request resulting in denial of her FMLA rights.

***Velcko v. Saker Shoprites, Inc.*, No. 15-cv-1217 (PGS)(LHG), 2016 WL 4728106 (D.N.J. Sept. 9, 2016)**

Plaintiff was a night crew clerk for Saker Shoprites. He took FMLA leave because of his chronic and extreme skin disorders. He began leave in mid-September and received a letter at the end of October that he was terminated due to job abandonment because he had not continued to contact the company. The company claimed that he was only suspended pending termination. The company claims that he was sent a packet after seven days which included FMLA paperwork. Notes in the Human Relations office indicate that longer disability leave was discussed with plaintiff. Plaintiff contests receipt of FMLA forms. When plaintiff returned to work, he was sent to a different location and eventually terminated. Plaintiff filed both interference and retaliation claims under the FMLA as well as claim under NJ law, but eventually withdrew the summary judgment motion on the retaliation and NJ law claims. The court determined that there were material issues of fact surrounding plaintiff's receipt of FMLA paperwork. However, it was undisputed that plaintiff received an employee handbook. The company argued that the employee handbook mentioned FMLA leave. The court was willing to accept the employee handbook reference to FMLA only as general notice of FMLA leave. An issue existed due to conflicting medical evidence of whether plaintiff would have exhausted his

FMLA leave before he could return to work. The court noted that it was not clear whether plaintiff could return to work within his protected FMLA period. Plaintiff also requested liquidated damages under the FMLA claims, which the court deferred because of the existence of triable issues of good faith.

***Sweet v. Cty. of Gloucester*, No. 15-282 (RMB/AMD), 2016 WL 3448275 (D.N.J. June 15, 2016)**

Plaintiff brought suit alleging that defendant interfered with his rights to exercise FMLA benefits. Plaintiff, however, for the first time, attempted to assert an FMLA retaliation claim in his opposition to defendant's motion for summary judgment. The court found that plaintiff's attempt to recast his FMLA interference claim as an FMLA retaliation claim was improper, and dismissed the action. The court further found that plaintiff failed to submit sufficient evidence to survive summary judgment on his FMLA interference claim.

The dispute in this case arose when defendant, Wayne Wurtz, a supervisor with the County of Gloucester, imposed discipline on plaintiff John Sweet. Sweet suffers from attention deficit disorder, anxiety disorder, and occasional cluster headaches. As a result of his condition, Sweet applied for intermittent FMLA leave for the first time. Plaintiff's request for FMLA leave was approved by defendant. However, several weeks later plaintiff was charged with insubordination and excessive absenteeism for failing to report for mandatory overtime. Plaintiff filed a grievance against his supervisor, claiming that he could not be forced to work overtime because of his right to intermittent FMLA leave. The grievances were settled and, as a result, the disciplinary matters related to his failure to report for overtime were voided and removed from plaintiff's personnel file.

The court noted that to succeed on an FMLA interference claim, plaintiff must show (1) he was entitled to FMLA benefits; (2) his employer violated §2615 by interfering, restraining, or denying his exercise of FMLA rights; and (3) he was prejudiced by the interference. Prejudice occurs when an employer's failure to advise a plaintiff of his FMLA rights renders him unable to exercise the right to leave in a meaningful way, thereby causing injury. Here, plaintiff was unable to demonstrate prejudice because his employer's actions did not prevent from exercising his FMLA rights. Plaintiff's request was granted and he was not forced to work overtime. Furthermore, plaintiff's disciplinary marks were removed from his personnel file. Therefore, the court granted summary judgment in favor of defendants.

***Corrado v. N.Y. Unified Court Sys.*, No. 12-CV-1748(DLI)(MDG), 2016 WL 660838 (E.D.N.Y. Feb. 17, 2016)**

Plaintiff, a female attorney, filed charges against her employer, the New York State United Court System for retaliation in violation of the Family Medical Leave Act (FMLA, among other claims. Plaintiff took a three-week leave of absence under the FMLA to care for her daughter who was seriously ill (the "FMLA Leave"). Plaintiff alleged that almost immediately upon her return, she was issued negative performance evaluations that were based on false and pre-textual information, she was ordered to attend counseling sessions because of alleged "time and leave issues," she was verbally bullied, and that her supervisors behaved in an intimidating manner towards her. As a result, plaintiff alleged that she was constructively

discharged because no reasonable person could continue to work in such an adverse environment.

Defendants moved to dismiss plaintiff's FMLA claim, arguing: (1) the negative employment reviews were not based on retaliatory intent, and (2) that the individual manager defendants were not "employers" for purposes of the FMLA. The Court disagreed with both arguments. Because defendants conceded that plaintiff's amended complaint alleged retaliation for the FMLA Leave, defendants were barred from "turn[ing] around and claim[ing] that she failed to make this allegation." With regards to the individual manager defendants being employers, the court followed the Second Circuit's "economic reality" test and determined that they had the "power…to fire" plaintiff. The court dismissed plaintiff's retaliation claim for the FMLA under the New York City Human Rights Law) ("NYCHRL") because FMLA Leave is not a protected activity under the NYCHRL.

***Workneh v. Super Shuttle Int'l, Inc.*, No. 15-CV-3521 (ER), 2016 WL 5793744 (S.D.N.Y Sept. 30, 2016)**

Plaintiff, a transport operations manager, filed suit alleging various claims of discrimination and retaliation after defendant terminated his employment for job abandonment, alleging that defendant ignored or denied his requests for medical leave on several occasions in violation of the FMLA. Specifically, plaintiff alleged that on one occasion, defendant required him to report to work despite his doctor's orders to recover from a serious illness at home. On a separate occasion, plaintiff requested two weeks of accrued vacation. Defendant initially asked that plaintiff move his vacation start date to a week later; however, plaintiff informed defendant that he had a post-surgery appointment that first week. Plaintiff asserted that defendant accepted his request and, therefore, took his vacation as planned. When plaintiff dropped off documents while on vacation to support a request for medical leave, defendant told him that his vacation time had not been approved and directed him not to return to work until defendant contacted him. After not hearing from defendant for a few weeks, plaintiff reached out to ask when he could return to work and was told that he had been terminated.

Defendant filed a Rule 12(b)(6) motion to dismiss all claims for failure to state a claim. The court granted the motion without prejudice as to plaintiff's FMLA claim. In doing so, it found that plaintiff failed to allege two critical elements of the *prima facie* case—that he was an eligible employee entitled to FMLA leave, and that defendant was an employer as defined in the FMLA.

***Carter v. PNC Bank, N.A.*, No. 1:15 CV 1817, 2016 WL 5338014 (N.D. Ohio Sept. 23, 2016)**

Plaintiff, a customer service associate, sued her employer, a bank, for both retaliation and interference under the FMLA. The lawsuit was based on plaintiff's request for intermittent leave to care for her father. In response to employer's motion to dismiss, the district court recognized that the Sixth Circuit applies the *McDonnell Douglas* framework to FMLA interference claims. First, a plaintiff must make a *prima facie* interference case, which requires her to establish: (1) her eligibility under the FMLA, (2) FMLA coverage of employer, (3) her entitlement to leave, (4) that she gave proper notice of her intention to take leave, and (5) employer denied her

the benefits to which she was entitled. For an interference claim, a plaintiff also must show she was harmed or prejudiced by employer's FMLA violation.

Ultimately, the court found that plaintiff failed to establish the final element of the *prima facie* case. Employer did not deny her FMLA benefits. On the contrary, it approved plaintiff's request for leave. And indeed plaintiff took the leave. Afterwards, the court noted that plaintiff returned to her former job. Therefore, because employer in fact approved her request for FMLA leave, the court held that plaintiff was not harmed or prejudiced by a denial of benefits. Moreover, her concerns about job security did not constitute harm.

But even if plaintiff could make a *prima facie* case, she still would not prevail, the court added. Her FMLA certification form was insufficient, and thus she was not entitled to leave. After employer asked plaintiff to submit a medical certification for her request for leave, plaintiff submitted an incomplete certification. It was missing information regarding the duration of the disability, and frequency and duration of the requested leave. Accordingly, employer asked plaintiff to submit a revised certification within seven days. Yet the revised certification was still insufficient. Nonetheless, employer granted plaintiff's request for leave, though initially denying it. So plaintiff received her requested FMLA benefits, despite failing to submit a complete and sufficient certification form (even after notice of the defect and the statutorily-required seven days to cure it). That plaintiff was not entitled to the FMLA benefits in the first place precluded her from establishing the third element of the *prima facie* case, the court held.

Finally, the court held that plaintiff failed to show that employer's legitimate business reason for terminating plaintiff—her performance—was pretext. Plaintiff, however, argued that her supervisor's comments showed that, in truth, she was terminated for requesting leave. In one of their first encounters, while discussing plaintiff's health conditions and future with the company, her supervisor said: "Maybe this is not the position for you." On a different occasion, while discussing plaintiff's father's medical issues, the supervisor suggested that plaintiff should "look for another position because of your issues." In the end, the court was not convinced. Though plaintiff believed that her supervisor's comments related to her FMLA request, she also admitted not knowing this with certainty. Merely believing that such comments are related to an FMLA request is not enough, according to the court. The court granted employer's motion for summary judgment and dismissed plaintiff's FMLA interference claim. Plaintiff abandoned her retaliation claim before the court could consider it.

***Douglas v. City of Cleveland*, No. 14-CV-00887, 2016 WL 1110258 (N.D. Ohio Mar. 22, 2016)**

Plaintiff, a full-time assistant administrator in the City Health Department's MomFirst program, sued the City of Cleveland and her supervisor under the FMLA, claiming she was terminated in retaliation for her use of four days of family leave to care for her ailing mother and not rehired as required by City policy. Plaintiff, who was the last hired, was considered "non-essential staff" in the MomFirst program. Defendants claimed that plaintiff was laid off because of budget cuts and that her supervisor did not know of plaintiff's use of FMLA leave at the time plaintiff was laid off. There was evidence that plaintiff had three consecutive job reviews noting the need for improvement in her job performance. Plaintiff was given 30 days to improve in accordance with a "Performance Improvement Plan," during which time she was suspended for

one day by human resources for violating its terms. Defendant also claimed that it offered plaintiff a part-time version of her position, which plaintiff declined. The district court granted summary judgment for defendant, finding that plaintiff failed to make a *prima facie* case of retaliation because the undisputed evidence of the budget cuts, plaintiff's performance issues, and the fact that plaintiff was the last-hired in a non-essential position, were sufficient explanation for plaintiff's termination and that plaintiff did not establish a causal connection between her use of FMLA leave and her termination. The court noted that plaintiff also failed to present evidence that may have satisfied the *prima facie* case under the "cat's paw" theory of retaliation, recognized in the Sixth Circuit. Under the "cat's paw" theory, a claimant can satisfy the causal connection requirement with indirect evidence that an unknowing supervisor was encouraged by another employee to violate a claimant's FMLA rights, even where the supervisor had no direct knowledge of the protected activity.

***Hice v. David J. Joseph Co.*, No. 1:15-CV-534, 2016 WL 1625824 (S.D. Ohio Apr. 25, 2016)**

(Appeal filed with Sixth Circuit on May 26, 2016)

Summary for Apr. 25, 2016 opinion:

Plaintiff sued defendant employer in state court alleging a claim for wrongful termination in violation of public policy. Defendant counterclaimed, seeking damages for conversion on an unpaid balance on a company credit card and the return of his company-owned cell phone and iPad. Plaintiff responded to the counterclaims by dismissing his state court complaint without prejudice. The state court then granted defendant's motion for summary judgment on its counterclaims. Plaintiff then filed a complaint in federal court alleging the public policy claim he pursued in state court and an FMLA claim. In his public policy claim, plaintiff alleged that he was terminated in violation of the public policy for seeking a protective order against a woman he claimed was domestically abusing him. Defendant moved for summary judgment, arguing that his federal claims should be dismissed since they should have been raised as compulsory counterclaims in the state court action. Summary judgment on plaintiff's FMLA claim was also appropriate, according to defendant, because plaintiff could not establish a *prima facie case*.

The federal court granted defendant's motion for summary judgment on both grounds. First, the court ruled that both of plaintiff's federal claims constituted compulsory counterclaims. This was because defendant's conversion claim implicated facts surrounding his termination, particularly his contention that he was fired for seeking a protective order. Defendant's contention with respect to that issue was that it initially allowed plaintiff to borrow his cell-phone and iPad to use as evidence in prosecuting his protective order against a domestic abuser. When that ended, plaintiff's continued dominion over that property constituted conversion and was thus intertwined with his public policy claim. The court also held that the credit card claims were compulsory counterclaims based on plaintiff's allegations that defendant would allow him to carry a balance on the credit card or pay them off later, though it did not explain how this related to the substance of his public policy claim. Also, while plaintiff did tangentially raise the protective order issue with respect to his FMLA claims, the court never expressly discussed how that issue was intertwined with his wrongful termination claim.

Nonetheless, the court also held that plaintiff could not establish a *prima facie* case under either theory. His interference claim failed because he did not suffer from a serious health condition entitling him to leave. The court rejected his claim that he suffered from anxiety and sleeping issues, reasoning that plaintiff was never hospitalized for those conditions. The court also held that plaintiff failed to notify defendant of his need to take FMLA leave. Summary judgment on his interference claim was therefore appropriate. This very same reason also warranted summary judgment on plaintiff's retaliation claim. Because plaintiff never asked for FMLA leave, he could not have engaged in any protected activity necessary to support a retaliation claim. The court also rejected plaintiff's arguments regarding the temporal proximity between his discussion of the protective order with two managers and his termination, stating that neither of them factored in the decision to fire plaintiff, and the person who ultimately fired him did not know about any of his purported medical issues nor his attempts to seek a protective order.

***Sartin v. Okla. Dep't of Human Servs.*, No. 15-CV-686-TCK-TLW, 2016 WL 4083388 (N.D. Okla. Aug., 1, 2016)**

A programs manager, who had supervisory authority over professional staff at the state's Department of Human Services, alleged that her supervisor retaliated against her for taking FLMA leave. Plaintiff asserted claims of FMLA interference and retaliation, among other claims. Defendant argued it was entitled to judgment on its motion to dismiss for failure to state a claim. The United States District Court for the Northern District of Oklahoma granted the motion to dismiss the FMLA interference claim, but denied it as to retaliation.

Employee alleged that after she returned from FMLA leave, her supervisor retaliated against her by: (1) reprimanding her for three performance deficiencies, and (2) changing her work location. The location change increased plaintiff's commute time, and the new location did not have handicap-accessible restrooms. Notably, plaintiff did not assert that her supervisor prevented her from taking her FMLA leave.

The court held that plaintiff failed to state an interference claim because she took the entirety of leave, including an extra 10 days. However, plaintiff successfully stated a claim for retaliation. Plaintiff's allegations relating to the performance review and location change suggested a plausible causal connection sufficient to set forth a *prima facie* case.

***Drechsel v. Liberty Mut. Ins. Co.*, No. 3:14-CV-162-KS-BN, 2016 WL 6139097 (N.D. Tex. Oct. 20, 2016)**

In *Drechsel v. Liberty Mutual Insurance Company*, plaintiff was a 60-year-old, Inside Property Loss Specialist II for defendant. From 2009 to 2012, plaintiff took various medical leaves of absence due to various medical conditions, most recently for depression, anxiety, and high blood pressure. Defendant's third-party administrator advised plaintiff that he was not eligible for disability benefits, but defendant advised him that he may be covered by the FMLA. Plaintiff, however, never appealed the disability benefits denial or applied for FMLA leave. Shortly thereafter, plaintiff resigned. He later sued, alleging constructive discharge, disability discrimination and retaliation, and FMLA interference and retaliation.

The district court granted defendant summary judgment. With respect to the FMLA interference claim, the court concluded that plaintiff "points to no action taken by defendant that prevent him from applying for or taking FMLA leave." As for the retaliation claim, the court noted that plaintiff had alleged that he received lower compensation and was overlooked for promotion as a result of his FMLA leave. It rejected the claim, however, because he presented no evidence that his pay changed after he last took medical leave, or that he was denied a sought-after promotion during that time. "As such, the Court must find that Plaintiff has failed to establish that he suffered an adverse employment action after he returned from his FMLA leave."

Summarized elsewhere:
***Douyon v. N.Y. City Dep't of Educ.*, No. 15-3932, 2016 WL 6584894 (2d Cir. Nov. 7, 2016)**

***Fraternal Order of Police, Lodge 1 v. City of Camden*, No. 15-1963, 2016 WL 6803036 (3d Cir. Nov. 17, 2016)**

***McCants v. Grede II, LLC*, No. CV 15-00027-CG-M, 2016 WL 4080160 (S.D. Ala. July 29, 2016)**

***Gaydos v. Sikorsky Aircraft, Inc.*, No. 14-CV-636 (VAB), 2016 WL 4545520 (D. Conn. Aug. 31, 2016)**

***Craig v. UConn Health Ctr.*, No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)**

***Fritzler v. Royal Caribbean Cruises, Ltd.*, No. 6:15-CV-01193-JTM, 2016 WL 3422808 (D. Kan. June 22, 2016)**

***Marcum v. Smithfield Farmland Corp.*, No. 6: 16-180-DCR, 2016 WL 6780311 (E.D. Ky. Nov. 15, 2016)**

***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

***Kohler v. TE Wire & Cable LLC*, No. CV 14-3200 (JLL), 2016 WL 885045 (D.N.J. Mar. 8, 2016)**

***Barletta v. Life Quality Motor Sales Inc.*, No. 13-CV-02480 (DLI) (ST), 2016 WL 4742276 (E.D.N.Y. Sept. 12, 2016)**

***Bergman v. Kids by the Bunch Too, Ltd.*, No. 14-CV-5005 (DRH)(SIL), 2016 U.S. Dist. LEXIS 62596 (E.D.N.Y. May 10, 2016)**

***Shultz v. Congregation Shearith Isr. of the City of N.Y.*, No. 15-CV-7473 (JPO), 2016 WL 4367974 (S.D.N.Y. Aug. 18, 2016)**

***Rizzo v. Health Research, Inc.*, No. 1:12-CV-1397, 2016 WL 632546 (N.D.N.Y. Feb. 16, 2016)**

***Lynn v. True N. Mgmt., LLC*, No. 15-CV-2650, 2016 WL 6995290 (N.D. Ohio Nov. 30, 2016)**

***Earp v. Eucalyptus Real Estate, LLC*, No. CIV-14-1195-D, 2016 WL 2939547 (W.D. Okla. May 19, 2016)**

***Kercher v. Reading Muhlenberg Career & Tech. Ctr.*, No. CV 15-06674, 2016 WL 7048961 (E.D. Pa. Dec. 5, 2016)**

***Snider v. Wolfington Body Co.*, No. CV 16-02843, 2016 WL 6071359 (E.D. Pa. Oct. 17, 2016)**

***Garner v. Phila. Housing Auth.*, No. CV 15-183, 2016 WL 4430639 (E.D. Pa. Aug. 22, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 4376610 (S.D. Tex. Aug. 17, 2016)**

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 3974820 (S.D. Tex. July 25, 2016)**

2. Interference Claims

***Tilley v. Kalamazoo Cty. Rd. Comm'n*, No. 15-1592, 2016 WL 3595715 (6th Cir. June 27, 2016)**

Plaintiff was formerly employed as a supervisor for defendant. After he was terminated from his employment, plaintiff sued defendant, claiming his termination violated the FMLA. Initially, the district court granted summary judgment to defendant, but the Sixth Circuit Court of Appeals reversed and remanded that decision. The district court granted summary judgment to defendant a second time, and plaintiff appealed. The court of appeals reversed the district court's second grant of summary judgment to defendant on plaintiff's interference and retaliation claims. First, the court concluded there was a dispute of fact as to whether plaintiff provided timely notice of his intent to use FMLA leave. While plaintiff did not submit any FMLA paperwork until after defendant made the decision to terminate him, there was evidence that plaintiff and/or his wife had given timely verbal notice to defendant of his need for FMLA leave. In so concluding, the court held that the position defendant's representative took in his deposition—that plaintiff should have informed him of the need for FMLA leave immediately upon going to the hospital for what he thought might be a heart attack—was unreasonable. Second, the court addressed plaintiff's claim that defendant's request that plaintiff locate his missing emergency pager and terminating him for failing to locate it qualified as interference. The court concluded that defendant did not interfere with plaintiff's FMLA rights by requesting that he locate the pager, and that such contact was *de minimis*. Finally, the court concluded that there was a dispute of fact as to the reasons for plaintiff's termination, and whether his use of FMLA was one of the reasons. This dispute was created by the language of the termination letter which referred to certain of plaintiff's performance failures that predated his need for FMLA leave and included his failure to complete a task that was due on the date plaintiff left work to go to the hospital and his need for FMLA leave began.

***Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149 (8th Cir. 2016)**

Plaintiff worked for defendant clinic as a physician's assistant. During her employment she was frequently behind in patient charting and out of compliance with clinic charting standards. After several disciplinary warnings, she was placed on a 90 day performance plan and given specific deadlines for completing patient charts that were stricter than some clinic standards. Near the end of the plan, she broke her foot and took FMLA leave. Plaintiff was in violation of the charting standards articulated in the performance plan at the time she went on leave. While on leave, her supervisor and others at the clinic contacted plaintiff about her status and asked her to perform some duties from home. Plaintiff agreed and did not express reservations about doing so. Plaintiff's supervisor testified that he should not have been directing plaintiff to work while on leave but explained that he was not aware that she was entitled to be completely free of work duties. He also testified that the physicians were frustrated about being short-staffed. Before plaintiff returned to work, the clinic physicians and management met to discuss the charting issues and together decided that it would not renew plaintiff's contract. Plaintiff was informed of the non-renewal the day after she returned to work. Plaintiff sued under the FMLA on both an interference and retaliation theory. The clinic moved for summary judgment on both claims, which the district court granted. The district court's decision was upheld on appeal.

With respect to the interference claim, the court described the evidence reviewed by the district court as close, but concluded that while the clinic did direct plaintiff to complete work-related tasks from home while on leave, plaintiff had not presented evidence that the requests were a condition of her employment nor that her compliance with them was anything but voluntary. The court agreed with the district court that the clinic's requests were therefore consistent with the FMLA regulations that permit voluntary and uncoerced acceptance of work by employees on medical leave, so long as acceptance is not a condition of employment. The court analyzed plaintiff's retaliation claim under both a direct evidence and the *McDonnell Douglas* framework. The court rejected plaintiff's direct evidence theory reasoning there were no direct statements or actions linking any decisionmaker to an illegal motive; rather, plaintiff was relying more on the general sequence of events leading to her non-renewal and the clinic's continued concern with her charting while on FMLA leave. The Eighth Circuit also agreed with the district court that there was insufficient evidence of pretext in the non-renewal. Specifically, the court found no basis for discrediting the clinic's proffered justification for the non-renewal. Even if the clinic incorrectly counted some of the FMLA days against the charting deadline, the non-renewal was based on a more global failure to meet charting deadlines which began many months before plaintiff took FMLA leave. Finally, the appellate court also agreed with the district court that plaintiff's comparator evidence was insufficient because it dealt with a different supervisor and a rural as opposed to an urban clinic where the needs were different.

***Nebeker v. Nat'l Auto Plaza*, 643 F. App'x 817 (10th Cir. 2016)**

Plaintiff worked as defendant's office manager and controller for over five years, experiencing several serious health conditions throughout. At no time did plaintiff request formal FMLA leave. Instead, she simply missed work when needed, informing the owner of the company each time. Eventually, the owner became concerned about the level of plaintiff's tardiness and absenteeism, which culminated in a heated meeting in which he recited plaintiff's

recent absences and tardiness and informed plaintiff that "this wasn't working for him." At the conclusion of the meeting plaintiff stated that she understood it was not working for the owner and, assuming she was fired, cleaned out her desk under the supervision of another manager sent by the owner to observe her, and left. Plaintiff subsequently sent an e-mail to the owner stating that she had not quit or resigned, but believed that the owner had fired her. The owner did not respond to this e-mail, and plaintiff commenced a lawsuit which included claims for interference with her rights under the FMLA.

The district court granted summary judgment to employer finding that plaintiff had not provided her employer with information sufficient to indicate that she might have a medical condition which qualified her for FMLA leave, and plaintiff appealed. The court of appeals affirmed the award of summary judgment, but on the alternate grounds that plaintiff had suffered no prejudice due to any interference with her FMLA rights that may have occurred. First, the court of appeals agreed with the district court that under Utah law the circumstances of the termination of plaintiff's employment failed to show that she had been discharged, as the actions of the owner did not show his "unequivocal intent" to discharge her. The court of appeals also determined that the fact that plaintiff received her normal salary and benefits throughout her employment, even during those times she was absent or late for work due to purported serious health conditions, prohibited a finding of interference based upon either of the two theories presented by plaintiff—her employer's failure to provide notice that she was entitled to FMLA leave, or her employer discouraging her from taking FMLA by making comments hostile to her allegedly health-related tardiness and absenteeism.

***Han v. Emory Univ.*, No. 15-14858, 2016 WL 5436895 (11th Cir. Sept. 29, 2016)**

Plaintiff, who worked as a manager, had a medical condition that forced her to frequently miss work in the mornings. Plaintiff repeatedly requested a flexible work schedule, which employer declined to approve. Employer encouraged plaintiff to apply for FMLA, but she failed to do so until April 2013. After plaintiff's intermittent FMLA leave was approved, employer instructed her to report her FMLA hours and required her to complete reports on the work she accomplished when she was not on leave. Beginning in August 2013, plaintiff repeatedly failed to record her FMLA hours or to even record her time in the office. Plaintiff was given several warnings but continued to fail to accurately record her time. Employer terminated plaintiff in October 2013. Plaintiff then filed suit, claiming retaliation and interference in violation of the FMLA. The district court granted employer's motion for summary judgment. On appeal, the court of appeals affirmed, finding that employer's progress reports and manual tracking of FMLA hours was not interference and that plaintiff had not established prejudice sufficient to support her claim of interference. The court of appeals also found no retaliation because plaintiff failed to show that employer's reason for termination, plaintiff's insubordination, was pretext for unlawful retaliation.

***Hayes v. Voestalpine Nortrak, Inc.*, No. 2:14-CV-2322-AKK, 2016 WL 2587971 (N.D. Ala. May 5, 2016)**

Plaintiff asserted interference and retaliation claims under the FMLA and defendant moved for summary judgment. The court held that fact issues precluded summary judgment on the interference claim but granted summary judgment on the retaliation claim because plaintiff

failed to show a causal link between his discharge and FMLA-protected activity and he failed to rebut defendant's legitimate reason for his discharge.

Suffering from a chronic condition, plaintiff applied for FMLA leave but his certification form from his doctor was incomplete, which resulted in denial by defendant of plaintiff's request for leave. Defendant admitted that it never informed plaintiff in writing that the form was deficient. The court held that where an employer had knowledge of an employee's health problems and did not state in writing what additional information employee should have submitted to render the certification complete, there was a factual dispute about whether employer's failure to engage in certification dialogue with employee constituted interference with employee's FMLA leave.

The court determined there was no issue of fact that would keep the FMLA retaliation claim alive because plaintiff did not inform the decision-maker, who discharged plaintiff for exceeding the amount of absences permitted under defendant's no-fault attendance policy, that plaintiff had been seeing a doctor, needed to be off work for an extended period of time, or had engaged in any other protected activity.

***McCants v. Grede II, LLC*, No. CV 15-00027-CG-M, 2016 WL 4080160 (S.D. Ala. July 29, 2016)**

Plaintiff brought suit against his former employer, alleging defendant interfered with his right to take FMLA leave and terminated him in retaliation for exercising his rights under the Act. Following a gunshot wound, plaintiff submitted two FMLA certifications regarding his need for intermittent leave. After being approved for FMLA protected leave, plaintiff accumulated nineteen absences and thirteen leave-earlies that were not supported by his FMLA certifications. Defendant terminated plaintiff for excessive absenteeism. In granting defendant's motion for summary judgment, the district court found plaintiff's excessive absenteeism was not covered by the FMLA and that there was no evidence linking plaintiff's termination to his FMLA protected leave.

***Watson v. Yavapai Cty.*, No. CV-14-08228-PCT-NVW, 2016 WL 3548765 (D. Ariz. June 30, 2016)**

Plaintiff was employed as a clerk in the Yavapai County Assessor's Office. In 2004, she injured her back and neck in a car accident and experienced episodes of pain from then on. Over the course of the next several years, her treating physician imposed restrictions of limited periods of extended sitting, frequent stretch breaks and taking 2-3 days off per month. Plaintiff had no issues in having these restrictions met. In 2009, a new County Assessor was elected and from the beginning, plaintiff and the new Assessor did not mesh well but, again, plaintiff was accommodated in a variety of ways. In February 2013, Watson failed to attend a workshop that she specifically requested to attend and the Assessor suspended her. From that point on, every effort to manage plaintiff's accommodations or to address her performance shortcomings was met with defiance, contempt and accusations of espionage and conspiracies. Plaintiff repeatedly wrote multi-page diatribes, addressed to the Assessor and the human resources department, every time the Assessor met with her to discuss her ongoing request for accommodations—accommodations that often conflicted with her doctor's proposed restrictions—or to address a

multitude of performance and conduct concerns. Ultimately, after going through the progressive discipline process, the Assessor decided to discharge plaintiff and provided her with the required notice of intent to do so under the County's procedures. A few weeks later, just prior to the hearing to address and uphold (or disapprove) the termination decision, plaintiff requested FMLA leave to attend her husband's chemotherapy treatments. The request was denied but plaintiff elected not to attend the hearing. The County Commission agreed with the termination decision and plaintiff was discharged.

Plaintiff subsequently filed suit, alleging claims under both the ADA and FMLA and the district court granted summary judgment to the County on all of her claims. With respect to plaintiff's FMLA claims, the court held that she could not establish an interference claim because she had been given all of the FMLA leave she had requested, over the course of many years and without consequence, and the only leave request that was denied came after the decision to discharge her already had been made. As the court summarized, "[W]here an employee takes FMLA leave for years without consequence, then is suspended for misconduct, then increases her FMLA leave while continuing to engage in misconduct, and then is fired[,] [these circumstances] do not raise a triable issue of FMLA interference. Otherwise, any bad employee who suspects she will be fired could simply increase her FMLA leave, forcing employer to either keep her or face trial. 'The FMLA does not impose this Hobson's choice.'" (*quoting Fleming v. IASIS Healthcare Corp.*, 151 F. Supp. 3d 1043 (D. Ariz. 2015).

With respect to plaintiff's FMLA retaliation claim, the district court held that the only protected activity in which she engaged was her request for FMLA leave just prior to the hearing regarding the termination decision. However, because the termination decision already had been made, plaintiff could establish no causal connection between the two events. Accordingly, the trial court dismissed the claim.

***Black v. Valley Behavioral Health Sys., LLC*, No. 2:15-CV-02130, 2016 WL 3406137 (W.D. Ark. June 17, 2016)**

Plaintiff was an RN at an acute psychiatric facility, who had a history of various disciplinary actions throughout her employment, including a complaint related to neglectful treatment of a patient, inappropriate behavior toward coworkers, and absences. On October 26, 2014, eleven days after her most recent disciplinary warning, plaintiff was hospitalized for five days and inquired about FMLA leave. On November 5, 2014, plaintiff's supervisor received a complaint about plaintiff's behavior toward a pediatric patient, and an anonymous complaint on a compliance hotline. On November 11, 2014, plaintiff's supervisor and the facility's CEO decided to terminate plaintiff's employment. In the same meeting in which plaintiff was notified of her discharge, she hand-delivered her FMLA paperwork. Plaintiff sued for FMLA retaliation.

The district court granted employers' motion for summary judgment, noting that even if the court made the "generous assumption" that plaintiff made a *prima facie* showing of retaliatory discrimination under the FMLA, she failed to present sufficient evidence to give rise to even a favorable inference of pretext. Plaintiff offered no evidence that the well-documented disciplinary history of plaintiff misconduct was illegitimate. Moreover, the district court quoted the Eighth Circuit in finding the timing of the discharge does not call into question the significant

disciplinary history, stating "'[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.'" *Hervey v. Cty. of Koochiching*, 527 F.3d 711, 723 (8th Cir. 2008).

***Andrews v. Pride Indus.*, No. 2:14-CV-02154-KJM-AC, 2016 WL 5661741 (E.D. Cal. Sept. 30, 2016)**

Plaintiff claimed FMLA retaliation and interference against his former employer. After several months of leave, plaintiff's doctor provided employer with a note indicating his restrictions were expected to last until a specific date. Defendant responded with a letter directing plaintiff to contact employer one week before the end date of his restrictions to provide a return-to-work note or to resign. Plaintiff did not contact defendant by the deadline. Plaintiff's doctor subsequently provided a request for an additional three weeks of leave. Plaintiff arrived to work the afternoon his leave expired with an unsigned note extending his leave. He brought a signed note back to defendant three days later. The same day, defendant terminated plaintiff for failing to comply with its earlier instructions by the stated deadline and for failing to return to work.

Defendant moved for summary judgment. The United States District Court for the Eastern District of California granted defendant's motion for summary judgment. Based on Ninth Circuit Court of Appeals precedent, the court first held plaintiff's claim should be characterized as an FMLA interference claim. The court reasoned the "anti-termination and retaliation provisions apply to discrimination and retaliation against the employee after that employee opposed an employer's violations of the FMLA," while terminating an employee for taking FMLA leave is FMLA interference. The court held plaintiff provided no evidence that defendant considered his FMLA leave to be a negative factor. Rather, defendant allowed "a lengthy leave without expressing concern about the reason for the leave or its length."

***Canupp v. Children's Receiving Home of Sacramento.*, No. 2:14-01185 WBS EFB, 2016 WL 1587195 (E.D. Cal. Apr. 20, 2016)**

Plaintiff sued her employer for both "retaliation" (or "discrimination") and "interference" (or "entitlements") claims under the FMLA. Ultimately, the district court denied the motion to dismiss the interference claim in which plaintiff accused employer of not giving her the full 12 weeks of FMLA leave. But, the court granted a motion to dismiss the retaliation claim, and a motion to dismiss an interference claim in which plaintiff accused employer of not reinstating her as required under the FMLA.

In refusing to dismiss the interference claim, the court cited the conflicting evidence regarding both the amount of leave taken by plaintiff and the manner by which employer calculated her leave. This conflicting evidence, however, did not stop the court from dismissing the retaliation claim. The court held that an employer is not subject to the retaliation prohibitions of the FMLA simply because it miscalculated plaintiff's leave. The court also held that plaintiff was not entitled to reinstatement because she was not able to return to work. In so doing, the court noted that plaintiff represented that she was "completely disabled for all work-related

purposes" on state disability and social security forms. Thus, plaintiff could not subsequently say that she could have worked.

***Gaydos v. Sikorsky Aircraft, Inc.*, No. 14-CV-636 (VAB), 2016 WL 4545520 (D. Conn. Aug. 31, 2016)**

In *Gaydos v. Sikorsky Aircraft, Inc.*, plaintiff, a supervisor in a helicopter blade assembly operation, encountered a series of problems associated with his FMLA leave for the care of ill parents. He alleges he was transferred to a non-supervisory position in retaliation for having taken leave that was said to have interfered with his job performance, and later, that that he was included in a reduction in force where a supervisor's "expressions of disdain" regarding his FMLA leave were part of his job record. The court granted summary judgment for employer, in part, on plaintiff's retaliation claim, because employee did not lose salary during his transfer and because his period of transfer was short—i.e., there was no evidence that employee's career was harmed or that the transfer was a factor when employees were scored regarding the reduction in force. The court determined that plaintiff's supervisor's "expressions of disdain" ("we can't go on like this") were evidence for a jury to assess as pretext for retaliation, notwithstanding the fact that employer had argued there was no evidence that the decision maker knew about those statements. Summary judgment was denied on this prong of employer's motion.

***Lovely-Coley v. D.C.*, No. CV 12-1464 (RBW), 2016 WL 3198227 (D.D.C. June 8, 2016)**

Plaintiff employee worked as a detective in the District of Columbia Metropolitan Police Department. She requested intermittent leave on three occasions in 2010 to take care of a sick child. Each of these requests was initially denied, forcing employee, the complaint alleged, to use sick and vacation leave for her absences. Employee complained about the denial of her FMLA requests to the Department's EEO office. Thereafter, she claims that the Department took a series of retaliatory actions against her, including two low performance reviews that she alleged made her ineligible for promotion in 2010. The low reviews were overturned after a lengthy appeal process.

Plaintiff sued alleging violations of the FMLA's interference and anti-retaliation provisions and sought reimbursement for the sick and vacation pay she was required to use as well as compensation for lost promotion potential. The Department moved for summary judgment. With respect to the interference claims, the Department argued that it permitted plaintiff to take leave whenever she needed, so plaintiff was not prejudiced by the denial and therefore could not maintain an interference claim. The district court disagreed. It reasoned that there was at least a genuine dispute about whether plaintiff properly elected to take FMLA leave as well as whether the Department's conduct deterred her from taking FMLA leave. If the latter was correct, a jury could find prejudice because plaintiff was forced to use FMLA leave she otherwise would not have taken. The court also denied summary judgment on the retaliation claim, reasoning that even though the low reviews were eventually raised, there was still a fact issue whether the low reviews hurt plaintiff's candidacy for promotion at the time she received the reviews, which occurred well before they were amended.

***White v. City of Sylvester*, No. 1:14-CV-00076 (LJA), 2016 WL 1270236 (M.D. Ga. Mar. 31, 2016)**

Plaintiff, a female police officer, filed charges with the Equal Employment Opportunity Commission (EEOC) for discrimination based on race, sex, disability and retaliation against her employer, the City of Sylvester Georgia. Plaintiff alleged interference and retaliation claims against defendant under the FMLA for (1) failing to properly advise plaintiff of her ability to claim leave permitted by the FMLA, and (2) harassing plaintiff due to her taking and using leave that was authorized by and protected under the FMLA. In her amended complaint filed on November 21, 2014, plaintiff alleged two violations which took place in 2012 and 2013. Defendant argued that plaintiff's claims were time-barred since they were filed past the two-year statute of limitations. However, the court held that because plaintiff pled more than a "general averment" of defendant's willfulness in violating the FMLA, the FMLA's three-year statute of limitations applied. Thus, plaintiff's claim was timely filed.

Defendant filed a motion to dismiss plaintiff's complaint. Regarding her interference claims, because plaintiff was allowed to take FMLA leave by defendant in both 2012 and 2013 and because plaintiff could not plead specific facts regarding her being "pressured to return" early from her FMLA leave, the court granted defendant's motion to dismiss these claims. Regarding her 2012 retaliation claim, plaintiff pled that (1) she took FMLA leave after being cautioned by her doctor that she was at risk of having a miscarriage, (2) she was denied a promotion approximately one month after returning from FMLA leave and (3) she was told that the denial was because of "sick leave issues." Thus, she adequately pled specific facts to show that she engaged in a statutorily protected activity, experienced an adverse employment action, and that there was a causal connection between the protected activity and the adverse action. Therefore, the court dismissed both her 2012 and 2013 interference claims, but allowed plaintiff to proceed on her 2012 retaliation claim. Plaintiff did not allege a 2013 retaliation claim.

***Patrick v. Cowen*, No. 3:14-CV-782 RLM, 2016 WL 1460333 (N.D. Ind. Apr. 13, 2016)**

Plaintiff was a deputy patrolman for a sheriff's department. When he was reassigned to a position in the jail, he refused to accept the assignment and told his supervisor he was going home sick. Over the next few weeks, he periodically faxed doctor's notes stating he could not return to work, and eventually he applied for FMLA leave. He sent a letter his employer disagreeing with the date when his FMLA leave would expire, and his employer did not respond. He failed to return to work at the end of his leave, so his employment was terminated.

Employee filed a lawsuit alleging violations of the FMLA. The court held employee's FMLA retaliation claim could proceed to trial, because defendants did not move for summary judgment specifically on the issue of retaliation. On employee's interference claim, the court held employee's FMLA start date was the date he became unable to appear at work due to his condition (not one month later, when he finally submitted his FMLA paperwork). However, the interference claim survived summary judgment. The court found there was an issue of fact as to whether employee would have been discharged if employer had responded to his letter indicating disagreement over the date his leave would end. Thus, the court held both claims would proceed to the jury.

***Soriano v. City of E. Chi.*, No. 2:13-CV-439 JD, 2016 WL 1244015 (N.D. Ind. Mar. 30, 2016)**

Plaintiff, an equipment operator for defendant General Services/Street Department of the City of East Chicago filed charges against his employer asserting claims for FMLA interference and retaliation after he was terminated from his position. Plaintiff took FMLA leave for surgery related to a hernia, but his employer only approved leave retroactively to a date three days short of when plaintiff started his leave. Plaintiff alleged that defendant inferred with his FMLA rights by not characterizing these three days as FMLA leave and for holding these absences against him in deciding to terminate his employment. Defendant, however, pointed to plaintiff's long history of poor attendance and frequent tardiness, and asserted that plaintiff did not properly follow applicable procedures upon his return from FMLA leave. Defendant moved for summary judgment on both of plaintiff's FMLA claims.

The Court held that even accepting defendant's version of events, a jury could find that defendant's decision to terminate plaintiff's employment was not strictly based on a failure to follow proper procedures after his return from FMLA leave. With regard to the interference claim, the court found that the days he was marked as absent could have been a factor in defendant's decision to terminate plaintiff. With regard to the retaliation claim, the court acknowledged that plaintiff "does not need to prove that 'retaliation was the only reason for [his] termination; [he] may establish an FMLA retaliation claim by 'showing that the protected conduct was a substantial or motivating factor in the employer's decision.'" As such, the court held that there were genuine disputes of fact as to whether plaintiff's FMLA leave was a motivating factor for his termination. Therefore, the court denied defendant's motion on both of plaintiff's FMLA causes of action.

***Kimzey v. Metal Finishing Co.*, No. 15-1369-JTM, 2016 WL 7475744 (D. Kan. Dec. 29, 2016)**

Plaintiff is a former employee of Diversified Services, Inc., which was staffed by Syndeo, Inc and DSI's parent Metal Finishing Corporation ("MFS"). Plaintiff sued MFC and his supervisor for violation of FMLA rights, specifically interference and retaliation. Defendants filed for summary judgment. Plaintiff's duties were numerous and included maintenance, shipping, receiving and processing. In 2015, plaintiff injured his shoulder in a motorcycle accident. He had shoulder surgery. He took FMLA leave for eight weeks, and admitted that he did not have difficulty obtaining leave or receive criticism for the same. He returned to work on the processing line, with some pain, at the same compensation and benefits. However, his post-return processing work increased with an associated increase in physical demands, required the exercise of less discretion, and less use of certain of his skills. The court declined to grant summary judgment on the issue of interference because there was an issue of whether the job was the same or an equivalent position.

After plaintiff's return to work, it was reported that he was "running his mouth." It was suspected that he was complaining about his work on the processing line. Eventually, he was terminated, and his supervisor filled out a form saying he was eligible for rehire. The court granted summary judgment on his retaliation claim, which rests on plaintiff's claim that defendants were in fact willing to re-employ him, but withdrew their offer after the FMLA claim. The court dismissed calls from the insurer related to settlement, not an offer of work.

***Nowlin v. Novo Nordisk, Inc.*, No. 3:14-CV-612-DJH-LLK, 2016 WL 3566248 (W.D. Ky. June 27, 2016)**

Plaintiff worked as a drug representative for defendant, and was responsible for making and recording a least eight sales visits per workday. She also applied for and was approved for intermittent FMLA leave to care for her father. On one occasion, plaintiff was contacted by her employer while on leave to return some damaged drug samples plaintiff had reported prior to going on leave, but had not yet returned, to do so "as soon as possible." Plaintiff mailed the samples back over the weekend before she was to return from leave. Shortly thereafter, plaintiff's manager conducted an examination of call activity for individuals holding plaintiff's position in his district, found plaintiff's documentation of her visits severely lacking, and commenced an investigation which led, approximately two months later, to plaintiff's discharge. Plaintiff filed suit claiming FMLA interference and retaliation for taking FMLA leave.

The district court granted employer's motion for summary judgment. Plaintiff admitted that employer had never denied any FMLA leave that she had requested and only pointed to the incident regarding mailing back the damaged samples as evidence of interference. The court rejected this argument finding that she could have mailed them prior to beginning her leave, and her employer's reminder statement to mail them "as soon as possible" did not require her to do so while she was on leave. The court also rejected plaintiff's retaliation claim which she supported solely with the temporal proximity of her last FMLA leave to her discharge two months later. The court determined that this was insufficient to establish the causal connection element of a *prima facie* case of retaliation.

***Lopez v. City of Gaithersburg*, No. CV RDB-15-1073, 2016 WL 4124215 (D. Md. Aug. 3, 2016)**

Plaintiff was employed as a police officer. After being told she was having a high risk pregnancy, plaintiff requested leave from work prior to and after the birth of her child. She was given and completed FMLA forms prior to taking leave and eventually turned in a medical certification. At the time, plaintiff claims she was told by a human resources representative that she did not have to use FMLA for her leave prior to the birth, but could use paid annual leave instead. The City labeled plaintiff's pre-birth leave as sick, annual or personal leave, and her leave post-birth as FMLA. The City later claimed the pre-birth leave was also FMLA leave. Prior to the end of her approved FMLA leave, plaintiff requested a 10-day extension due to post-birth follow up appointments, among other things. The City denied the request, stating that plaintiff had no more FMLA leave available. Plaintiff then requested unpaid leave and that request was also denied. When plaintiff failed to return to work at the end of her FMLA leave, her job was terminated. She was told in a written letter that she was being terminated based on the expiration of her FMLA leave and failure to provide medical verification that she was fit to return to work at the end of her FMLA leave. The decisionmaker also noted that, among other concerns, plaintiff had provided inconsistent return dates and insufficient documentation of her medical condition and work restrictions. Plaintiff sued and asserted both an interference and retaliation claim under the FMLA. Cross motions for summary judgment were filed.

The district court granted the City's motion for summary judgment on the interference claim. The court rejected plaintiff's argument that she still had FMLA leave available at the time

she was discharged on the grounds the City failed to timely designate her pre-birth leave as FMLA. The court based its decision on the failure of plaintiff to prove she had been prejudiced by the City's failure to designate the pre-birth leave as FMLA at the time. According to the court, had such leave been designated as FMLA at the time, plaintiff's own medical documentation demonstrated that she would not have been able to return to work when her FMLA leave expired and she failed to come forward with proof that she would have structured her leave differently if the City had timely designated the pre-birth leave as FMLA. The district court, however, found there was a fact issue on plaintiff's retaliation claim. First, the there was a fact issue whether the City had an "active policy" to permit employees to take all available paid leave prior to utilizing FMLA leave. Second, there was a fact question whether that policy had been uniformly applied. The court explained that if such a policy existed and it had been unequally applied to plaintiff, that could be a basis for a retaliation claim. Lastly, the court found there was a fact issue as to whether a subordinate misrepresented plaintiff's actions with respect to her leave request in order to have her terminated.

***Winkler v. Home Depot U.S.A., Inc.*, No. CV 15-06-BLG-SPW, 2016 WL 3087052 (D. Mont. May 31, 2016)**

Plaintiff Jacqueline Winkler was employed as a stock and price clerk at Home Depot. She claimed that at some point during her employment, her manager told employees that he did not like employees who took time off due to work-related injuries and that employees would be "written up" if they suffered a workplace injury. In early 2013, plaintiff injured her shoulder at work. Over the course of the next several months, she was issued progressive discipline due to absences for which she did not have sufficient leave (presumably, although not clear in the opinion, these absences were not for FMLA-qualifying reasons). In July 2013, plaintiff requested and was given 12 weeks of FMLA leave for shoulder surgery and post-surgical recovery. Following her return from leave, plaintiff accumulated several more absences that were not leave-qualifying and was discharged. She filed suit, alleging claims of interference, discrimination and retaliation under the FMLA.

Home Depot moved for summary judgment, and the district court granted its motion. First, the court concluded that plaintiff in fact had only interference, and not a discrimination or retaliation claims because, according to the complaint, the Company considered her FMLA leave as a negative factor in failing to reinstate her to her previous position upon her return from leave; in failing to provide her with 12 weeks of FMLA leave; and in stopping contributions to her health insurance (citing 29 U.S.C. § 2615(a)(1)). Each of these alleged actions sounded in interference, not in discrimination or retaliation. However, in rejecting each of these allegations, the court noted that plaintiff was, in fact, provided with all of her leave and was restored to her previous position when her leave was exhausted. With respect to her health insurance claim, plaintiff conceded that she had stopped her Home Depot insurance and had signed up on her spouse's health insurance instead, and provided no evidence to support that the stoppage was related to her taking of FMLA leave.

***Ross v. Youth Consultation Serv., Inc.*, No. 2:14-2229 (KSH) (CLW), 2016 WL 7476352 (D.N.J. Dec. 29, 2016)**

The court had cross motions for summary judgment before it related to a case in which plaintiff, a licensed practical nurse, was terminated for not returning to work after she had exhausted 12 weeks' of FMLA leave for a hip problem. She was unable to work as of October 1, 2012. In mid-October, her doctor informed her employer that she would remain unable to work until April 21, 2013, well outside her FMLA period. She was informed that she would be terminated as of January 4, 2013. She filed suit on April 8, 2014 under the FMLA and New Jersey law. The court determined that employer should have provided information after it learned that her return to work was unknown so that the notice was personalized. She claimed that she would have structured her leave differently had she known in advance that it was limited to 12 weeks. The court also ruled that a request for FMLA does not necessarily trigger the interactive exchange process under New Jersey disability law. The court granted plaintiff summary judgment on the interference claim.

***Dement v. Twp. of Haddon*, No. 15-6107 (RBK/KMW), 2016 WL 6824362 (D.N.J. Nov. 17, 2016)**

Plaintiff, a police officer, asserted claims against the township where he served and other individual defendants, alleging interference and retaliation under the FMLA. The defendants moved to dismiss his claims. Plaintiff alleged as follows: He suffered from a condition whereby his visual acuity was gradually decreasing. At one point, the plaintiff requested an accommodation with modified work duty and informed his supervisors that a medical leave of absence may be necessary in the future to undergo treatment. Employer denied his request, suspended him without pay, and informed him that he was immediately being placed on involuntary FMLA leave until his termination. The New Jersey district court dismissed both claims. Plaintiff's interference claim alleged that by forcing him to take leave, defendants interfered with his right to take protected leave when it would be actually required in the future. The court noted that the third circuit had not yet recognized a cause of action for such "involuntary leave" claims. However, the court did not find it necessary to address the viability of such a claim because plaintiff did not successfully plead the elements of an interference claim. Plaintiff did not plead that he was denied the benefits to which he was entitled under the FMLA by only alleging that he notified defendant that he may need future FMLA leave. He did not request a specific future leave. The court also noted that even if it would recognize an involuntary leave claim, plaintiff did not plead a ripe claim for involuntary leave under a test articulated in the Sixth Circuit for such claims. First, he did not plead that he did not suffer from a serious health condition, so it was not clear that his employer forced him to take leave in the absence of a serious health condition. Second, the claim would not have been ripe because he had not been denied an FMLA leave at a later date as a result of the involuntary leave.

The court also dismissed plaintiff's FMLA retaliation claim. The court noted that for an FMLA retaliation claim under third circuit law, a plaintiff must prove that: (1) he invoked his right to an FMLA-qualifying leave; (2) he suffered an adverse employment action; and (3) the adverse action was causally related to his invocation of rights. Plaintiff here did not invoke his right to an FMLA-qualifying leave; he only told employer that such leave would be requested in the future. Accordingly, the court dismissed this claim as well.

***Kohler v. TE Wire & Cable LLC*, No. CV 14-3200 (JLL), 2016 WL 1626956 (D.N.J. Apr. 25, 2016)**

Plaintiff alleged that his employer's stated reason for terminating him was a pretext for age and disability discrimination, in violation of the FMLA and New Jersey Law against Discrimination ("NJ LAD"). The district court had earlier in the case granted defendant's motion for summary judgment on plaintiff's retaliation claim, holding that plaintiff had failed to make a *prima facie* showing of FMLA interference, but denied summary judgment to both parties on plaintiff's interference claim, holding that neither party satisfied the burden of proof. Defendant moved the court to reconsider its prior order denying summary judgment on the interference claim, arguing that the decision was inconsistent with its grant of summary judgment to defendant on the retaliation claim. The court denied that request because defendant had failed to account for the differing standards of proof with regard to retaliation and interference claims. Once plaintiff had made a *prima facie* showing of interference, the burden shifted to defendant, and defendant here did not meet its burden of demonstrating a non-discriminatory reason for terminating plaintiff.

***Kohler v. TE Wire & Cable LLC*, No. CV 14-3200 (JLL), 2016 WL 885045 (D.N.J. Mar. 8, 2016)**

Plaintiff, a 62-year-old man, brought an action alleging that his employer, a manufacturer of wire and cable products, violated the FMLA by interfering with plaintiff's right to FMLA leave by terminating him while he was out on medical leave. Plaintiff also alleged that defendant retaliated against him for exercising his rights under the FMLA by not reinstating him. Plaintiff moved for partial summary judgment regarding his FMLA interference claim. Defendant sought summary judgment regarding each of plaintiff's claims.

The court rejected plaintiff's argument that interference claims are subject to a strict liability standard and denied plaintiff's motion regarding this claim. The court found that an employer may terminate an employee who is on FMLA leave as long as the dismissal would have occurred regardless of employee's request or taking of FMLA leave. The court declined to dismiss plaintiff's claim of interference as duplicative of his claim for retaliation and determined that plaintiff's interference claim did not require a showing by plaintiff that he was prejudiced by the denial of 12 weeks protected leave. The court also found that plaintiff's termination while on medical leave as unduly suggestive of retaliation. Once employer offered a non-discriminatory rationale for the termination, the burden shifted to plaintiff to show that the company's reasons were a pretext for discrimination. Since the record before the court demonstrated that the company was supportive and helpful regarding plaintiff's need to take time off, the court granted defendant's motion for summary judgment regarding plaintiff's retaliation claim, finding that plaintiff could not sustain his burden.

***Marsh-Godreau v. SUNY Coll. at Potsdam*, No. 8:15-cv-0437 (LEK/CFH), 2016 WL 1049004 (N.D.N.Y. Mar. 11, 2016)**

Plaintiff, a Keyboard Specialist II, filed charges with the Equal Employment Opportunity Commission (EEOC) against her employer, SUNY College at Potsdam, asserting discrimination and retaliation claims under the Family Medical Leave Act ("FMLA"), among other claims.

Plaintiff also alleged an FMLA claim for failure to immediately reinstate plaintiff at the end of her leave. Plaintiff was diagnosed with depression, fibromyalgia, and bipolar II disorder and went on intermittent medical leave pursuant to the FMLA due to her disabilities. Plaintiff alleged that defendant refused to allow plaintiff to return to work on a part-time work schedule, that defendant executed a negative performance appraisal that made over 10 references to plaintiff's medical leave and its impact on plaintiff's department, and that a document in her personnel file contained a number of observations from her coworkers on how plaintiff's work behavior was affected by her disability.

The defendant moved to dismiss plaintiff's amended complaint in its entirety and plaintiff moved to amend her complaint. The Court held that plaintiff's claims, including her FMLA claim, were barred by the Eleventh Amendment because SUNY is an arm of the state. Plaintiff requested leave to file a second amended complaint that named Karen Ham ("Ham"), Director of Career Planning at SUNY, as a defendant and alleging willful violation of plaintiff's FMLA rights against her. Defendant did not contest plaintiff's allegations of willfulness. However, the court, applying a three year statute of limitations, found that only one of plaintiff's FMLA claims was timely—namely, that she was removed from data entry duties. Because it is defendant's burden to establish that the amendment is futile and they failed to do so, plaintiff's motion to amend her amended complaint was granted.

***Shultz v. Congregation Shearith Isr. of the City of N.Y.*, No. 15-CV-7473 (JPO), 2016 WL 4367974 (S.D.N.Y. Aug. 18, 2016)**

Plaintiff, a program director of a Jewish congregation, brought discrimination claims against her employer and several individuals under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law, alleging wrongful termination and, in the alternative, constructive discharge. Plaintiff also asserted a claim under 29 U.S.C. § 2612(a), alleging interference with rights protected by the FMLA. Plaintiff had informed her employer that she was pregnant right before she left on her honeymoon; when she returned to work, defendants terminated her, stating that her position had been eliminated. After she hired a lawyer, employer sent her a letter reinstating her to her previous position and continued to issue her paychecks. Plaintiff believed she had been terminated initially because defendants disapproved that she was pregnant at the time of her wedding. As such, she claimed defendant violated the FMLA because, by terminating or constructively discharging her, defendant "'impeded her ability to continue employment and take [protected] leave.'" The court rejected this argument and held that, while a plaintiff need not establish a *prima facie* case of FMLA interference at the initial pleading stage, an interference claim must be plausible to survive a motion to dismiss. The court having found that plaintiff did not plausibly allege that she had been terminated or constructively discharged, found that, likewise, plaintiff failed to plausibly allege that defendants denied her leave and, "accordingly, [] failed to state an interference claim." Therefore, the court granted defendants' motion to dismiss. The court did not address the alternative argument for dismissal, which was that plaintiff failed to allege that she gave defendants notice of her intent to take FMLA leave.

***Tuggle v. Las Vegas Sands Corp.*, No. 2:15-cv-01827-GMN-NJK, 2016 WL 3456912 (D. Nev. June 16, 2016)**

Plaintiff, a former employee, sued defendants for discrimination and retaliation under the FMLA, alleging that after she had notified her employer of her lupus diagnosis, employer treated her negatively despite her positive performance reviews and eventually terminated her employment. Defendants filed a motion to dismiss. Construing plaintiff's allegation that defendants' conduct "constitute[d] discrimination and retaliation under the FMLA by, among other things, terminating Plaintiff's employment after Plaintiff opposed Defendants' unlawful practices through complaints to management," the court found that "Plaintiff's allegations appear to relate to retaliation for exercising her rights under the FMLA, which is more properly construed as a claim for interference under 29 U.S.C. § 2615(a)(1), as opposed to (a)(2)." The court quoted *Loncar v. Penn Nat. Gaming*, 2015 WL 5567277, *4 (D. Nev. Sept. 22, 2015): "When a plaintiff alleges retaliation for exercising her rights under the FMLA, courts in the Ninth Circuit construe the claim as one for interference under § 2615(a)(1)." The court dismissed plaintiff's FMLA claim with leave to amend.

***Perez v. U.S. Cotton, LLC*, No. 1:15 CV 226, 2016 WL 541469 (N.D. Ohio Feb. 11, 2016)**

Plaintiff, who was approved for intermittent FMLA leave due to morning sickness caused by her pregnancy, was fired after missing two consecutive days of work. There was dispute about whether plaintiff's brother had called her supervisor on those days to notify them that she was merely "sick" or that she was sick because of her pregnancy. There was also a dispute whether plaintiff had told a coworker that she was sick because of a viral infection contracted from her daughter. The district court granted summary judgment for defendant, finding there was no evidence plaintiff had informed defendant she was suffering from a pregnancy-related illness on those two days. The Sixth Circuit does not presume that when an employee suffers from a chronic and intermittent condition and requests time off, that the requested leave is due to that particular condition during the period of absence. The court found inadmissible a Department of Labor investigator's notes that the brother had informed defendant his sister would be missing work because she was "not feeling well because of her pregnancy," finding that it did not qualify under the public records exception to the hearsay rule.

***Janczak v. Tulsa Winch, Inc.*, No. 13-CV-0154-CVE-FHM, 2016 U.S. Dist. LEXIS 72539 (N.D. Okla. June 3, 2016)**

The court had to decide who had the burden of proof in regard to establishing the three elements of an FMLA interference claim in the Tenth Circuit. In the Tenth Circuit, an FMLA interference claim consisted of three elements: (1) that employee was entitled to FMLA leave; (2) that some adverse action by employer interfered with employee's right to take FMLA leave; and (3) that employer's action was related to the exercise or attempted exercise of her FMLA rights.

The parties stipulated to the first two elements so the court had to decide which party carried the burden of proving the third element. Plaintiff argued that because he proved the first two elements, employer had the burden of disproving the third element. Employer argued that plaintiff had the burden of proving all three elements, after which employer bore the burden of

proving its affirmative defense (e.g., that it would have terminated plaintiff regardless of the exercise of his FMLA rights).

The court outlined a number of Tenth Circuit decisions, which were "inconsistent in its statement of the burden of proof." In the end, the court concluded that under the law of the case doctrine, it was bound by the Tenth Circuit's decision as reached in a prior appeal of the case. In that prior appeal, the appellate court took the view that, if a plaintiff proves the first two elements, employer must prove the third element. Given this prior pronouncement in the case itself by the appellate court, the court would include a special interrogatory on the verdict form that provided the following: "Has Tulsa Winch, Inc. proven by a preponderance of the evidence that Janczak's termination was not related to the exercise of Janczak's FMLA rights?"

***Ormsby v. Sunbelt Rentals, Inc.*, No. 6:15-CV-01403-AA, 2016 WL 4708537 (D. Or. Sept. 7, 2016)**

A service technician plaintiff sued his employer for interference with his rights under the FMLA and for discrimination/retaliation under the FMLA. The district court granted employer summary judgment on the discrimination/retaliation claim because plaintiff failed to produce evidence showing he was fired for opposing leave practices or reporting an FMLA violation. The court explained that even if he had inquired about protected leave, this would only raise an interference claim, not a discrimination/retaliation claim. However, the court denied employer summary judgment on plaintiff's interference claim, finding that a reasonably jury could render a verdict for plaintiff on that claim because plaintiff asserted—and a defendant witness agreed—that plaintiff had informed employer about his migraine headaches.

***Fullerton v. Pottstown Hosp. Corp.*, No. CV 15-5329, 2016 WL 3762811 (E.D. Pa. July 13, 2016)**

In *Fullerton v. Pottstown Hospital Corporation*, plaintiff was terminated for substandard work, failure to comply with hospital policy, and unprofessional conduct. Plaintiff filed FMLA interference and retaliation claims against employer, alleging employer unlawfully discriminated against her and fired her because she was disabled and availed herself of FMLA leave. Plaintiff suffered from Crohn's disease and fibromyalgia, and was frequently absent from work, including taking FMLA leave. Employer filed a motion for summary judgment, contending that plaintiff failed to establish that her firing was based on her disabilities and taking FMLA leave.

The court stated, "[t]o prevail on an FMLA retaliation claim, the plaintiff must prove that (1) she invoked her right to FMLA-qualifying leave, (2) she suffered an adverse employment decision, and (3) the adverse action was causally related to her invocation of rights." *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 301-02 (3d Cir. 2012). Employer conceded there were adverse actions (written warnings) against plaintiff regarding her frequent absences, but argued that plaintiff could not demonstrate her FMLA request led to her termination. Employer also contended that plaintiff's termination was based on evidence submitted by supervisors who were unfamiliar with plaintiff and did not know she had taken FMLA leave. The court said, although employee engaged in behavior that warranted her being fired, other evidence, such as (a) the fact that she was fired within 17 days of returning from leave; (b) her supervisor phoned her multiple times when she was out on leave; and (c) her

supervisorwas antagonistic towards her on her return from leave, were sufficient to suggest that plaintiff's FMLA request was also a factor in her firing. The court denied summary judgment on plaintiff's FMLA retaliation claim.

The court stated that to establish an FMLA interference claim, a plaintiff must show (1) she was eligible for leave; (2) she gave appropriate notice of her need for leave; and (3) she was denied leave to which she was entitled under the FMLA. Plaintiff claims employer interfered with her right to take FMLA leave by failing to offer her FMLA leave before October 2014; failing to code several of her absences as FMLA leave; and harassing her when she was out on leave and when she returned. Although plaintiff states that her supervisor's phone calls to her when she was out on leave pressured her to return to work before her leave expired, the court said the evidence showed plaintiff was out of work beyond the date her leave expired. Thus plaintiff could not claim the phone calls denied her benefits to which she was entitled. The court granted summary judgment on plaintiff's FMLA interference claim.

***Gunter v. Cambridge-Lee Indus., LLC*, No. CV 14-2925, 2016 WL 2735683 (E.D. Pa. May 11, 2016)**

Plaintiff brought suit under 29 U.S.C. § 2615(a)(1) through which he alleged that employer interfered with his FMLA rights, and discriminated and retaliated against him for exercising his rights under the FMLA. Plaintiff alleged that employer disciplined and terminated him for being absent on days that should have been protected by FLMA leave. Defendant filed a motion for summary judgment. Plaintiff was part of a collective bargaining unit whose terms and conditions of employment were governed by a collectively bargained agreement. Employer utilized an attendance policy under which employees are assessed various point levels for different types of attendance violations. Plaintiff was assessed points for absences that he claims were protected by FMLA. Employer claimed that plaintiff did not timely grieve the absences under the collectively bargained agreement and that plaintiff did not timely provide proof that the absences were covered by the FMLA. Plaintiff argued that employer did not timely send him FMLA paperwork or follow its own FMLA procedures. The court agreed with plaintiff that a dispute of material fact existed because there was no evidence that employee received the FMLA paperwork in a timely fashion and there was evidence that employer did not follow its own procedures. Thus, plaintiff was not at fault in failing to provide the requested medical certification. Consequently, the court denied the motion for summary judgment with respect to the interference claim. However, the court noted that the retaliation claim failed because the discharge was due to the neutral application of an attendance policy, which, even if in error, did not satisfy the element needing to be motivated by retaliatory *animus*.

***Fiorentini v. William Penn Sch. Dist.*, 150 F. Supp. 3d 559 (E.D. Pa. 2016)**

Plaintiff was a teacher at an elementary school in defendant school district. She alleged that she was demoted when defendant transferred her to another teaching position after she advised her principal that she had breast cancer. In her view, this constituted a demotion because her new position required less qualifications and fewer students for instruction. Defendant, however, explained that she was not demoted but instead reassigned to prepare students for an upcoming standardized test. Because plaintiff needed to recover from her breast cancer surgery, defendant granted plaintiff her full 12-week allotment of leave under the FMLA in addition to

further time off. Plaintiff returned to work at a different school in the district, but lost her job after a district-wide reorganization. Plaintiff sued defendant alleging that it violated FMLA's interference and retaliation provisions.

The court granted defendant's Motion for Summary judgment on both theories. An interference claim requires an employee to show that she was entitled to but did not receive his or her statutorily required FMLA leave. Plaintiff argued that defendant interfered with her FMLA rights when it demoted her after she informed the principal she would need to take FMLA leave. The court held that plaintiff's interference claim failed because she exhausted all of her FMLA leave and was therefore not deprived of any benefits under the FMLA. In doing so, it noted that her demotion theory was more properly characterized as a retaliation and not an interference claim.

The court also dismissed her retaliation claim, reasoning that she could not show that the demotion constituted an adverse employment action. While defendant did change her position, plaintiff's salary, reporting requirements and general duties remained the same. In addition, preparing students for standardized testing could be viewed as a more challenging task. While the reassignment resulted in a reduction of students she was to teach, that alone did not form the basis of an adverse employment action. The court also rejected a declaration submitted by a doctor opining that her different job title and change in her responsibilities "can be interpreted as a demotion." The doctor never offered his opinion whether those circumstances constituted a demotion, much less one because she took FMLA leave.

***Drumm v. Triangle Tech, Inc.*, No. 4:15-CV-0854, 2016 WL 6822422 (M.D. Pa. Nov. 18, 2016)**

In *Drumm v. Triangle Tech, Inc.*, the four plaintiffs were former employees of defendant, which is a technical school, alleging various claims arising out of their discharge. Collectively, plaintiffs claimed they were terminated in retaliation for having been involved in complaints made to the U.S. Department of Education that defendant had improperly received federal, Title IV funds. One plaintiff, the admissions representative, was discharged for poor performance, but alleged that it was because of his involvement in the complaint and due to his exercise of FMLA rights when he requested leave for the birth of his child. This plaintiff's request for a two-week block of FMLA leave was approved on September 26, 2014. His child was born on September 29, 2014 with medical complications that amounted to a "serious health condition." On September 30, 2014, this plaintiff informed defendant that he would need additional intermittent leave to care for his child. Defendant requested a certification form by October 13, 2014. On October 7, 2014, defendant advised this plaintiff's superior that this plaintiff would be terminated on October 13, 2014 for poor performance. On October 8, 2014, this plaintiff submitted his FMLA certification. On October 13, 2014, the day this plaintiff returned to work after the birth of his child, defendant terminated him.

In response to the complaint, defendant filed a motion to dismiss for failure to state a claim under Rule 12(b)(6). The court denied the motion, concluding that this plaintiff had sufficiently alleged an FMLA interference claim: "He has asserted that he was entitled to a second request for intermittent leave and was terminated the day he returned from his first request for leave and was about to begin the second leave request period."

***Mangel v. Graham Packaging Co.*, No. 14-CV-0147-BR, 2016 WL 1266257 (W.D. Pa. Apr. 1, 2016)**

Plaintiff employee worked for defendant employer as a label operator. In 2010, plaintiff was diagnosed with neuropathy, characterized by numerous, obvious physical symptoms. He also suffered from a degenerative bone disorder in his back. Plaintiff alleged that he made his supervisors aware of his health issues between May and October of 2013 and told them that he would need to take time off in the future due to his back and other health conditions. Plaintiff was terminated in October 2013 following a jam on the production line he was assigned. The details of the incident were disputed by plaintiff and the witnesses to the incident.

Following his termination, plaintiff filed suit alleging interference and retaliation claims under the FMLA, among others. Defendant employer unsuccessfully moved for summary judgment on both FMLA claims. On the interference claim, the court found sufficient evidence that employee brought his medical issues to employer's attention and even specifically invoked the FMLA. Employer in turn failed to provide employee information about the FMLA and may have discouraged plaintiff from taking FMLA leave. The court also rejected defendant's argument that plaintiff's interference claim fails because plaintiff did not provide specific dates he needed leave. The court held that a request for future anticipated FMLA leave is sufficient to invoke the statute. With respect to the retaliation claim, the district court held that plaintiff's evidence that he was terminated within a week of his final request concerning FMLA leave was "unduly suggestive" and therefore sufficient to create an inference of causality and to deny summary judgment.

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 4376610 (S.D. Tex. Aug. 17, 2016)**

Anthony Francisco ("Francisco"), a premises technician and installer for Southwestern Bell Telephone Company ("SWBT"), exercised leave rights to care for his ailing father. Employee was experiencing stress and depression in connection with his father's illness. Factual questions arose regarding employee's knowledge of and compliance with company reporting requirements during his leave periods, and regarding his ensuing termination due to noncompliance. In its initial ruling, the court concluded that "overwhelming evidence" supported employee's having been terminated for job abandonment and a ruling of summary judgment for employer on employee's retaliation claim. The court denied SWBT's motion for summary judgment as to Francisco's interference claim.

Upon defendant's motion for partial reconsideration, the court granted summary judgment for employer regarding employee's interference claim. The court concluded that the key was that there was "no evidence that Francisco was physically prevented from complying with SWBT's procedures" or that any employer action or inaction prevented employee compliance with the certification requirement. The court noted that employee's allegation that employer's use of the phrase "insubordination" in characterizing employee's dismissal was, at best, a weak issue of fact in establishing pretext, and that assertions of disparate treatment were unworthy of credence.

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 3974820 (S.D. Tex. July 25, 2016)**

(Defendant's motion for reconsideration granted, 2016 WL 4376610 (S.D. Tex. Aug. 17, 2016)

Summary for July 25, 2016 opinion:

In *Francisco v. Southwestern Bell Telephone Company*, Anthony Francisco ("Francisco"), a premises technician and installer for Southwestern Bell Telephone Company ("SWBT"), exercised leave rights to care for an ill relative, a father transitioning through progressive stages of cancer. Employee was experiencing stress and depression in connection with his father's illness. Factual questions arose regarding employee's knowledge of and compliance with company reporting requirements during his leave periods, and regarding his ensuing termination due to noncompliance. The court concluded that "overwhelming evidence" supported employee's having been terminated for job abandonment and a ruling of summary judgment for employer on employee's retaliation claim. However, one aspect of employee's noncompliance—employee's failure to respond to a certification claim - was sufficient for a jury question under the "unusual circumstances" exception on his interference claim. The court granted SWBT's motion for summary judgment as to Francisco's retaliation claim and denied SWBT's motion for summary judgment as to Francisco's interference claim.

***Moore v. Lowe's Home Ctrs., LLC*, No. 2:14-CV-01459-RJB, 2016 WL 3960025 (W.D. Wash. July 22, 2016)**

Plaintiff was initially hired as a department manager by defendant in 2002, and was promoted to a higher managerial position in 2004. In 2008, plaintiff took FMLA leave for the birth of her first child. Upon her return, plaintiff complained that she had been stripped of her managerial duties and subjected to negative comments about her pregnancy and leave. Employer refused to investigate plaintiff's complaint because she had no documentation supporting her claim. Plaintiff became pregnant again in 2010 and this time was formally demoted from a managerial position to receiving clerk, and became the alleged target of inappropriate comments and conduct from coworkers, and unwarranted scrutiny and discipline.

In 2012, plaintiff was approved for intermittent FMLA leave to seek treatment for acute stress disorder, dysthymic disorder and depression, all of which she attributed to her workplace environment. Later that year, a coworker filed a complaint about plaintiff alleging she was inappropriately copying confidential documentation, which plaintiff denied by insisting that the copying was related to her work as receiving clerk and was done only for legitimate reasons. Defendant eventually fired plaintiff as a result of the copying incident, and plaintiff brought suit for FMLA interference, as well state and federal employment discrimination claims.

The district court denied employer's motion for summary judgment on the FMLA interference claim. The court found that the negative comments about plaintiff, her use of leave, and the FMLA in general, made by individuals who were decision-makers on discipline issued to plaintiff, as well as on her discharge created a genuine issue of material as to whether plaintiff's FMLA use was a negative factor in those employment decisions. In addition, the court also relied on the fact that another coworker was involved in one incident of misconduct for which

plaintiff received discipline, but her coworker did not, to further support its decision that summary judgment was inappropriate.

***Wright v. Ada Cty.*, 376 P.3d 58 (Idaho 2016)**

Plaintiff was employed as the Director of the Department of Administration for the County when, in 2013, he was discharged as part of a departmental reorganization. Just prior to his discharge, he submitted requests for FMLA leave, to begin at the same time as his discharge and carry into the next month. The Commissioners who made the decision to eliminate plaintiff's job were not aware of his leave requests at the time but when they were subsequently informed, they extended his job until the date his leave was scheduled to end. Plaintiff subsequently filed suit in state court alleging, among other things, that the County interfered with his FMLA rights by discharging him. The trial court granted summary judgment to the County, concluding that there was no evidence that plaintiff's discharge was related to his FMLA leave requests, given that the decision makers were unaware of his requests until after the decision was made. Plaintiff appealed, and the Supreme Court of Montana affirmed for essentially the same reasons given by the trial court.

Summarized elsewhere:
***Yetman v. Capital Dist. Transp. Auth.*, No. 15-2683, 2016 WL 6242924 (2d Cir. Oct. 25, 2016)**

***Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415 (2d Cir. 2016)**

Siddiqua v. N.Y. State Dep't of Health, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)

Yazzie v. Cty. of Mohave, No. CV-14-08153-PCT-JAT, 2016 WL 3916213 (D. Ariz. July 19, 2016)

Thomas v. D.C., No. 14-CV-00335 (APM), 2016 WL 3919822 (D.D.C. July 18, 2016)

Elzeneiny v. D.C., No. CV 09-889 (JEB), 2016 WL 3647838 (D.D.C. July 1, 2016)

Percoco v. Lowe's Home Ctrs., LLC, No. 3:14-CV-01122-VLB, 2016 WL 5339569 (D. Conn. Sept. 22, 2016)

Craig v. UConn Health Ctr., No. 3:13-CV-0281 (VAB), 2016 WL 4536440 (D. Conn. Aug. 30, 2016)

Mendillo v. Prudential Ins. Co. of Am., 156 F. Supp. 3d 317 (D. Conn. 2016)

Cortese v. Terrace of St. Cloud, LLC, No. 6:15-cv-2009-Orl-40DAB, 2016 WL 1618069 (M.D. Fla. Apr. 22, 2016)

Jones v. Gulf Coast Health Care of Del., LLC, No. 8:15-CV-702-T-24EAJ, 2016 WL 659308 (M.D. Fla. Feb. 18, 2016)

Finch v. Morgan Stanley & Co., No. 15-81323-CIV, 2016 WL 4248248 (S.D. Fla. Aug. 11, 2016)

Saldana v. Pub. Health Tr. of Miami-Dade Cty., No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)

Grant v. Hosp. Auth. of Miller Cty., No. 1:15-CV-15 (WLS), 2016 WL 5791546 (M.D. Ga. Sept. 30, 2016)

Corbin v. Med. Ctr., Navicent Health, No. 5:15-CV-153 (CAR), 2016 WL 5724992 (M.D. Ga. Sept. 29, 2016)

McLaren v. Wheaton Coll., No. 14 C 9689, 2016 WL 3671448 (N.D. Ill. July 11, 2016)

Stallworth v. Loyola Univ. Chi., No. 14 C 7084, 2016 WL 3671426 (N.D. Ill. July 11, 2016)

Holland v. Methodist Hosps., No. 2:14-CV-88-PRC, 2016 WL 5724355 (N.D. Ind. Sept. 30, 2016)

Baer v. Wabash Ctr., Inc., No. 4:15-CV-00094-JEM, 2016 WL 1610590 (N.D. Ind. Apr. 21, 2016)

Feagans v. Carnah, No. 2:15-CV-00222-JMS-DKL, 2016 WL 7210944 (S.D. Ind. Dec. 13, 2016)

Knutson v. Air-Land Transp. Serv., Inc., No. C15-2076, 2016 WL 4649816 (N.D. Iowa Sept. 6, 2016)

Marshall v. Rawlings Co., No. 3:14-CV-359-TBR, 2016 WL 1389991 (W.D. Ky. Apr. 7, 2016)

Crain v. Schlumberger Tech. Co., No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)

Federico v. Town of Rowley, No. CV 15-12360-FDS, 2016 WL 7155984 (D. Mass. Dec. 7, 2016)

Daughenbaugh v. Macomb Residential Opportunities, Inc., No. 15-CV-12390, 2016 WL 7158648 (E.D. Mich. Dec. 8, 2016)

Ross v. Bayloff Stamped Prods. Detroit, Inc., No. 14-14324, 2016 WL 3743131 (E.D. Mich. July 13, 2016)

Denson v. Atl. Cty. Dep't of Pub. Safety, No. 13-5315 (JS), 2016 WL 5415060 (D.N.J. Sept. 27, 2016)

Shreve v. N.J. Motor Vehicle Comm'n, No. 15-7957 (MAS) (LHG), 2016 WL 5334661 (D.N.J. Sept. 22, 2016)

Arnold v. Research Found. for SUNY, No. 15–cv–05971 (ADS) (SIL), 2016 WL 6126314 (E.D.N.Y. Oct. 20, 2016)

Fuentes v. Cablevision Sys. Corp., No. 14-CV-32 (RRM) (CLP), 2016 WL 4995075 (E.D.N.Y. Sept. 19, 2016)

Ross v. State, No. 15-CV-3286 (JPO), 2016 WL 626561 (S.D.N.Y. Feb. 16, 2016)

Andreatta v. Eldorado Resorts Corp., No. 2:15–cv–00749–RFB–NJK, 2016 WL 5867413 (D. Nev. Oct. 5, 2016)

Lasher v. Medina Hosp., No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)

Dennis v. Nationwide Children's Hosp., No. 2:15-CV-688, 2016 WL 5468338 (S.D. Ohio Sept. 29, 2016)

Garner v. Phila. Housing Auth., No. CV 15-183, 2016 WL 4430639 (E.D. Pa. Aug. 22, 2016)

Deller v. Northampton Hosp. Co., No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)

Patterson v. Del. River Port Auth. of Pa. & N.J., No. CV 15-5405, 2016 WL 2744819 (E.D. Pa. May 9, 2016)

Farkas v. NRA Grp. LLC, No. 1:15-CV-356, 2016 WL 3997432 (M.D. Pa. July 26, 2016)

***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

***Wintz v. Cabell Cty. Comm'n*, No. CV 3:15-11696, 2016 WL 7320887 (S.D. W. Va. Dec. 15, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

***Mesmer v. Charter Commc'ns, Inc.*, No. 3:14-CV-05915-RBL, 2016 WL 1436135 (W.D. Wash. Apr. 12, 2016)**

B. Other Claims

***Dorr v. Woodlands Senior Living of Brewer, LLC*, No. 1:15-CV-00092-GZS, 2016 WL 3566202 (D. Me. June 27, 2016)**

Plaintiff alleged defendant denied her medical leave in violation of state and federal law when it terminated her employment after she left work due to a medical event and that she was retaliated against by defendant. On June 26, 2014, plaintiff was scheduled to begin work at 6:30 am as certified residential medication aide (CRMA). She performed a medication count with the overnight CRMA and attended to her other usual work duties. Shortly before 7:00 am, a coworker informed plaintiff that plaintiff's boyfriend, who was also a coworker, was cheating on

her with another one of defendant's employees. At the time, plaintiff was pregnant with her boyfriend's child and she was "emotionally overcome" by the news and experienced difficulty breathing. She stated that she felt like she was having a panic attack, feared a miscarriage, and due to her emotional condition that she was unable to care for the residents of the facility and she went home. Plaintiff had a long history of anxiety and panic attacks and was not on her anxiety medication because of her pregnancy. She had miscarried before and she knew that she needed to get to a "safe place" in order to recover. Before she left work, she turned over the keys to the medication cart to a coworker and requested that the coworker tell another CRMA to pass out the medication.

Per defendant's policy, whenever custody of the medication cart is transferred from one CRMA to another, both CRMAs must conduct a medication count together. When plaintiff left work she failed to perform the medication count with anyone and failed to find any other employees to perform the count in her place. After plaintiff left the building, she went straight home and used her inhaler and her breathing gradually returned to normal. She lived with her boyfriend, who was at home, and she waited approximately 45 minutes before confronting him. She was also visited by a coworker who gave her a cell phone to use. Plaintiff called her parents and a coworker, and then she called her employer at 9:57 am. Her supervisor was unavailable and she did not leave a voice message. Her employer also tried to contact her, but was unsuccessful. At 3:00pm that same day, plaintiff returned to work and met with management. Plaintiff alleges that she told them about her asthma, anxiety, and pregnancy. Employer stated that she never told them about her medical issues, and that the decision to terminate her was made before she spoke to them that day and was based on job abandonment. The next day, plaintiff was terminated.

Employer moved for summary judgment and argued that (1) plaintiff's alleged health condition did not qualify as "serious" because she did not seek medical assistance; (2) plaintiff did not provide them with notice "as soon as practicable under the facts and circumstances of the particular case"; and (3) defendant did not retaliate because it did not know about her medical conditions at the time the decision was made to terminate her employment. The magistrate judge recommended that summary judgment be denied because a genuine issue of material fact existed as to (1) whether plaintiff had a serious health condition; (2) whether employee notice requirements were fulfilled; and (3) when employer made the decision to terminate her employment.

Summarized elsewhere:
***Moore v. Def. Home Sec. Co.*, No. 15-10997, 2016 WL 3522305 (E.D. Mich. June 28, 2016)**

1. Discrimination Based on Opposition

***Brister v. Mich. Bell Tel. Co.*, No. 14-CV-11950, 2016 WL 74870 (E.D. Mich. Jan. 7, 2016)**

Former managers at a telecommunications service provider's call center alleged that they were constructively discharged for their refusal to target for discipline employees who used FLMA leave. Plaintiffs asserted claims of FMLA retaliation. The company argued it was entitled to summary judgment. The District Court for the Eastern District of Michigan denied summary judgment as to one plaintiff who had direct evidence of FMLA retaliation.

Employee resigned after her supervisor, in three consecutive performance reviews, told her she did not do a good job of targeting or removing people who had taken FMLA leave. A month after employee's last performance evaluation, her manager sent her an email giving her three job choices, one of which was to voluntarily resign as a result of the multiple conversations they had had over the last several weeks.

The court held that the performance evaluations and email were sufficient to establish direct evidence of retaliation. The court also held that the company failed to establish that it would have made the same decision absent the impermissible motive. Accordingly, employer was not entitled to summary judgment.

***Andreatta v. Eldorado Resorts Corp.*, No. 2:15–cv–00749–RFB–NJK, 2016 WL 5867413 (D. Nev. Oct. 5, 2016)**

Plaintiff, a sales director, alleged defendants (his employer and several supervisors) retaliated against him for refusing to target FMLA employees for "write ups." He claimed he was instructed to "target FMLA employees for 'write ups'" so defendants would have a basis to terminate FMLA employees. Plaintiff alleged his "positions, income and commissions were changed in ways that appeared to be promotions, but operated as demotions because they negatively impacted his income." Plaintiff also claimed FMLA interference. Plaintiff was hospitalized for high blood pressure. Plaintiff's doctor released him with orders not to work more than eight hours per day. He subsequently applied for FMLA leave. Plaintiff claimed defendant forced him to work more than eight hours per day. The District Court for the District of Nevada denied defendants' motions to dismiss the FMLA retaliation claim and denied in part and granted in part defendants' motion to dismiss the FMLA interference claim.

The court held plaintiff's FMLA interference claims provided sufficient detail to survive a motion to dismiss. The court concluded plaintiff established the elements of an FMLA interference claim by alleging: (1) he was eligible for FMLA leave; (2) he requested leave with sufficient notice; (3) defendants denied his requests and required him to work longer than permitted by his FMLA request; and (4) he was constructively discharged and his compensation was impacted as a result.

The court applied a three-year statute of limitations to the FMLA interference claim based on plaintiff's allegations that defendants' conduct was intentional and willful. The court dismissed the claims against all but two of the individual defendants, as the complaint lacked specific allegations as to the remainder of the defendants.

The court also denied defendants' motions to dismiss the FMLA retaliation claims. The court applied the burden-shifting framework to the FMLA retaliation claim, noting that the Ninth Circuit Court of Appeals has not determined the framework's applicability to FMLA retaliation cases. The court concluded plaintiff met the elements of his *prima facie* case by alleging he reported FMLA discrimination, he refused to participate in the discrimination, and defendants "made changes to his employment that negatively impacted his income." Plaintiff's FMLA retaliation allegations were nearly identical to those made in ***Arora v. Eldorado Resorts Corp.*, 2016 WL 5867415, 2016 U.S. Dist. LEXIS 139111 (D. Nev. Oct. 5, 2016),** and

***Azizi v. Eldorado Resorts Corp.*, 2016 WL 5867412, 2016 U.S. Dist. LEXIS 139108 (D. Nev. Oct. 5, 2016)**. In those cases, the court also allowed the FMLA retaliation claims to proceed.

<u>*Arora v. Eldorado Resorts Corp.*, No. 2:15–cv–00751–RFB–PAL, 2016 WL 5867415 (D. Nev. Oct. 5, 2016)</u>

Plaintiff, a sales director, alleged defendants (his employer and several supervisors) retaliated against him for refusing to target FMLA employees for "write ups." Plaintiff claimed he was instructed to "target FMLA employees for 'write ups'" so defendants would have a basis to terminate FMLA employees. Plaintiff allegedly refused to do so and his "positions, income and commissions were changed in ways that appeared to be promotions, but operated as demotions because they negatively impacted his income."

The court denied defendants' motions to dismiss the FMLA retaliation claim. The court applied the burden-shifting framework to the FMLA retaliation claim, noting that the Ninth Circuit Court of Appeals has not determined the framework's applicability. The court concluded plaintiff met the elements of his *prima facie* case by alleging he reported FMLA discrimination, he refused to participate in the discrimination, and defendants "made changes to his employment that negatively impacted his income." Plaintiff's FMLA retaliation allegations were nearly identical to those made in ***Andreatta v. Eldorado Resorts Corp.*, 2016 WL 5867413, 2016 U.S. Dist. LEXIS 139109 (D. Nev. Oct. 5, 2016), and *Azizi v. Eldorado Resorts Corp.*, 2016 WL 5867412, 2016 U.S. Dist. LEXIS 139108 (D. Nev. Oct. 5, 2016).** In those cases, the court also allowed the FMLA retaliation claims to proceed.

<u>*Azizi v. Eldorado Resorts Corp.*, No. 2:15–cv–00755–RFB–PAL, 2016 WL 5867412 (D. Nev. Oct. 5, 2016)</u>

Plaintiff, a sales director, alleged defendants (his employer and several supervisors) retaliated against him for refusing to target FMLA employees for "write ups." Plaintiff claimed he was instructed to "target FMLA employees for 'write ups'" so defendants would have a basis to terminate FMLA employees. Plaintiff allegedly refused to do so and his "positions, income and commissions were changed in ways that appeared to be promotions, but operated as demotions because they negatively impacted his income." Plaintiff also claimed he was threatened with loss of his job and physical harm.

The court denied defendants' motions to dismiss the FMLA retaliation claim. The court applied the burden-shifting framework to the FMLA retaliation claim, noting that the Ninth Circuit Court of Appeals has not determined the framework's applicability. The court concluded plaintiff met the elements of his *prima facie* case by alleging he reported FMLA discrimination, he refused to participate in the discrimination, and defendants "made changes to his employment that negatively impacted his income." Plaintiff's FMLA retaliation allegations were nearly identical to those made in ***Arora v. Eldorado Resorts Corp.*, 2016 WL 5867415, 2016 U.S. Dist. LEXIS 139111 (D. Nev. Oct. 5, 2016),** and ***Andreatta v. Eldorado Resorts Corp.*, 2016 WL 5867413, 2016 U.S. Dist. LEXIS 139109 (D. Nev. Oct. 5, 2016)**. In those cases, the court also allowed the FMLA retaliation claims to proceed.

***Burrer v. Boeing Co.*, No. C14-1676RSL, 2016 WL 1615433 (W.D. Wash. Apr. 22, 2016)**

Plaintiff filed suit against her former employer asserting claims under the FMLA. The district court granted defendant's summary judgment on plaintiff's FMLA interference and retaliation claims. Plaintiff failed to show that her use of FMLA leave was a negative factor defendant considered in its decision to terminate her employment. Defendant presented evidence that plaintiff's employment was terminated after she repeatedly failed to follow general policies that she inform her supervisor before leaving the work area. It is not a violation of the FMLA for an employer to discipline an employee for failing to comply with a generally applicable policy.

Moreover, plaintiff did not allege that she opposed practices made unlawful by the FMLA, only that she had used FMLA leave. FMLA retaliation claims make it unlawful for an employer to discriminate against any individual for opposing any practice made unlawful by the FMLA. FMLA retaliation claims are only applicable to an employer's discriminatory action taken in response to an employee who opposes a practice made unlawful by the FMLA. It does not cover an employee simply because he or she has used FMLA leave.

Summarized elsewhere:
***West v. Wayne Cty.*, No. 2:14-cv-11559-RHC-MKM, 2016 WL 880322 (E.D. Mich. Mar. 8, 2016)**

***Hockenjos v. Metro. Transp. Auth.*, No. 14-CV-1679 (PKC), 2016 WL 2903269 (S.D.N.Y. May 18, 2016)**

***Hice v. David J. Joseph Co.*, No. 1:15-CV-534, 2016 WL 1625824 (S.D. Ohio Apr. 25, 2016)**

***Ormsby v. Sunbelt Rentals, Inc.*, No. 6:15-CV-01403-AA, 2016 WL 4708537 (D. Or. Sept. 7, 2016)**

***Farkas v. NRA Grp. LLC*, No. 1:15-CV-356, 2016 WL 3997432 (M.D. Pa. July 26, 2016)**

***Holland v. Prot. One Alarm Monitoring, Inc.*, No. C15-259 RSM, 2016 WL 1449204 (W.D. Wash. Apr. 13, 2016)**

2. Discrimination Based on Participation

***Burnette v. Rategenius Loan Serv., Inc.*, No. 16-50878, 2016 WL 6902484 (5th Cir. Nov. 23, 2016)**

Plaintiff, proceeding in *pro se*, brought suit against his former employer, a loan servicing company all alleging interference and retaliation under the FMLA. Plaintiff appealed to the Fifth Circuit after the district court granted defendant's motion to dismiss. Plaintiff alleged that the FMLA retaliation occurred when defendant terminated plaintiff and explained that his termination was because he failed to provide requested documentation of his medical condition and had not been candid about how his injuries occurred. The court agreed with the district court's ruling that plaintiff did not request or take FMLA leave. As a result, he could not have retaliated against.

***White v. Beltram Edge Tool Supply, Inc.*, No. 8:13-CV-478-T-30MAP, 2016 WL 1458528 (M.D. Fla. Apr. 14, 2016)**

Plaintiff alleged his previous employer interfered with her FMLA rights and retaliated against her for requesting benefits under the FMLA. A jury rendered a verdict in favor of plaintiff and awarded her liquidated damages. Defendant moved for a judgment as a matter of law, or, in the alternative, for a new trial. Plaintiff moved for an award of liquidated damages under the FMLA.

Defendant argued that (1) the evidence at trial proved plaintiff failed to give proper notice of her need for FMLA leave; (2) that plaintiff received 12 weeks of leave and/or could not have returned to work within 12 weeks; and (3) that plaintiff failed to introduce evidence by which a reasonable jury could have found retaliation. However, the court denied defendant's motion. The court reasoned that: (1) because plaintiff informed her supervisor the day after her injury, and subsequently was provided with an FMLA Certification form, it sufficed as adequate evidence for a jury to find that she provided adequate notice of her need for FMLA leave; (2) testimony from plaintiff's doctor that she could have returned to work within 12 weeks sufficed as adequate evidence for a jury to find that plaintiff could have returned to work within 12 weeks; (3) evidence that defendant was fully informed of plaintiff's medical condition and fired her immediately after it received confirmation that plaintiff's leave would be prolonged sufficed as adequate evidence for a jury to find there was retaliatory pretext for her termination. Therefore, the court denied defendant's motion for a judgment as a matter of law, or, in the alternative, for a new trial.

Additionally, the court found plaintiff was entitled to liquidated damages. Liquated damages are awarded presumptively to an employee when an employer violates the FMLA, unless employer demonstrates that its violation was in good faith and that it had a reasonable basis for believing that its conduct was not in violation of the FMLA. Because the jury found defendant retaliated against plaintiff for requesting benefits under the FMLA, the court ruled that defendant could not argue it acted subjectively in good faith. Therefore, plaintiff was entitled to liquidated damages.

***Schroers v. Genco I, Inc.*, No. 1:15-cv-01970-RLY-TAB, 2016 U.S. Dist. LEXIS 55120 (S.D. Ind. Apr. 26, 2016)**

Plaintiff sued her former employer for retaliation under the FMLA, among other claims and defendant filed a motion to dismiss the complaint for failure to state a claim. Plaintiff alleged that employer granted her FMLA leave following the death of her husband. Defendant stated, however, that it did not grant plaintiff's request for leave, and, due to her absences while plaintiff claimed she was out on leave, defendant terminated plaintiff for failing to report to work. Defendant argued that plaintiff did not qualify for FMLA leave because FMLA leave to care for a family member terminates if that family member dies. The court denied defendant's motion to dismiss. Because plaintiff pled that defendant approved her FMLA leave and then fired her for using the sanctioned leave, the court found that these allegations sufficiently stated a plausible claim for relief under the FMLA.

***Miller v. Detroit Pub. Sch.*, No. 14-CV-12819, 2016 WL 3031381 (E.D. Mich. May 27, 2016)**

Plaintiff, a school teacher, brought suit against Detroit Public Schools, alleging she was retaliated against for exercising her rights under the FMLA. Plaintiff submitted an FMLA certification to cover her surgery and recovery period which, according to plaintiff, caused her to miss a total of 31 days. Upon returning from leave, plaintiff—like many DPS teachers—received a notice of layoff and was placed in a pool for recall. Recalls were covered by evaluation scores, whereby teachers were scored in five different categories, with a total possible score of 100. During her evaluation, all 31of her absences were counted as unexcused, which resulted in attendance score of 0 out of 15. Pursuant to DPS policy, approved medical/FMLA absences were not to be counted as unexcused. Because of the low score, plaintiff only received a total score of 64, which was lower than the cutoff score of 70 that was required to be eligible for recall.

Defendant argued that, at most, plaintiff was incorrectly charged for eight absences covered by the FMLA, and that even correcting for these absences plaintiff would still receive an evaluation score of zero for attendance. The district court rejected defendant's arguments and denied its motion for summary judgment. The court reasoned that plaintiff provided medical authorizations for her surgery and that, while she did not provide medical documentation for her other absences, defendants never requested such documentation. The court further found that the low evaluation score constituted an adverse action as it precluded her from being recalled for the following academic year.

***Barletta v. Life Quality Motor Sales Inc.*, No. 13-CV-02480 (DLI) (ST), 2016 WL 4742276 (E.D.N.Y. Sept. 12, 2016)**

Plaintiff, a Center Operator at a car dealership, sued his employer alleging both interference and retaliation after he was discharged before an upcoming cardiac appointment and four months after taking FMLA leave. The court found that there was no evidence to support a retaliation claim based on the upcoming appointment because plaintiff had already been attending medical appointments without retaliation. It also found that the four month's since the FMLA leave was too long a period to establish an inference of retaliation. The court also found that plaintiff failed to establish a *prima facie* case of FMLA interference because he had not requested, nor planned to request, more FMLA leave.

***Tiffany v. Dzwonczyk*, No. 3:15-cv-00108 (MAD/DEP), 2016 WL 3661410 (N.D.N.Y. July 5, 2016)**

Plaintiff, a former employee of the New York State Veterans Home, filed a lawsuit against his employer and various individual defendants for alleged violations of the FMLA. As of the time of this decision, only plaintiff's claim for FMLA retaliation against four of the individual defendants remained. These defendants filed a motion to dismiss the claims pursuant to Rule 12(b)(6) for failure to state a claim on which relief might be granted. The District Court for the North District of New York granted the motion and dismissed plaintiff's FMLA retaliation claim. In essence, the court concluded that plaintiff failed to plausibly allege retaliation for exercising FMLA rights because he was fired due to absences from work that were not FMLA-protected. Plaintiff had taken 12 weeks of FMLA leave and returned to work. After

returning to work and being counseled for engaging in threatening conduct, plaintiff left work and did not return. Several months later, he was terminated. In addition to the fact that he was not on an FMLA-protected leave at the time of his termination, plaintiff did not allege any facts to suggest that his FMLA leave was even a factor in the decision to terminate his employment. The court also concluded that plaintiff failed to plausibly allege that his termination occurred under circumstances giving rise to an inference of retaliation. The court noted that plaintiff had returned to work at the end of his FMLA leave, and plaintiff has not alleged that defendant failed to reinstate him to his position. Moreover, there was a significant lapse of time between plaintiff's FMLA leave and termination, which suggests there was no causal connection between the two events.

***Bellisle v. Landmark Med. Ctr.*, No. CV 14-266-M-LDA, 2016 WL 4987119 (D.R.I. Sept. 15, 2016)**

Plaintiff, a nurse, sued her employer alleging FMLA retaliation after she was fired following one-week of leave that she took due her daughter's father's death. The court found that employee had already received discipline for dying her hair while at work before taking leave. It also found that that employee was unable to establish a causal connection between that discipline and the leave or between the leave and additional discipline she received after returning, which included being written up for using a cell phone in violation of company policy and being fired for bringing a stun gun to work.

Summarized elsewhere:
***Siddiqua v. N.Y. State Dep't of Health*, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)**

***Watson v. Yavapai Cty.*, No. CV-14-08228-PCT-NVW, 2016 WL 3548765 (D. Ariz. June 30, 2016)**

***Taylor v. Ass'n of Ark. Counties*, No. 4:14CV00303-JM, 2016 WL 3014602 (E.D. Ark. May 24, 2016)**

***Andrews v. Pride Indus.*, No. 2:14-CV-02154-KJM-AC, 2016 WL 5661741 (E.D. Cal. Sept. 30, 2016)**

***Thomas v. D.C.*, No. 14-CV-00335 (APM), 2016 WL 3919822 (D.D.C. July 18, 2016)**

***Cortese v. Terrace of St. Cloud, LLC*, No. 6:15-cv-2009-Orl-40DAB, 2016 WL 1618069 (M.D. Fla. Apr. 22, 2016)**

***Saldana v. Pub. Health Tr. of Miami-Dade Cty.*, No. 15-cv-24150-KING, 2016 WL 452153 (S.D. Fla. Feb. 4, 2016)**

***Peterson v. Martin Marietta Materials, Inc.*, No. C14-3059-LTS, 2016 WL 2886376 (N.D. Iowa May 17, 2016)**

***Kimzey v. Metal Finishing Co.*, No. 15-1369-JTM, 2016 WL 7475744 (D. Kan. Dec. 29, 2016)**

***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

***Lopez v. City of Gaithersburg*, No. CV RDB-15-1073, 2016 WL 4124215 (D. Md. Aug. 3, 2016)**

***Sparenberg v. Eagle All.*, No. CV JFM-14-1667, 2016 WL 447831 (D. Md. Feb. 4, 2016)**

***Thomas v. Lighthouse of Oakland*, No. 12-CV-15494, 2016 WL 2344350 (E.D. Mich. May 4, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Corrado v. N.Y. Unified Court Sys.*, No. 12-CV-1748(DLI)(MDG), 2016 WL 660838 (E.D.N.Y. Feb. 17, 2016)**

***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

***Feistl v. Luzerne Intermediate Unit*, No. CV 3:14-0491, 2016 WL 1162325 (M.D. Pa. Mar. 24, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

***Jackson v. Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP*, 29 N.Y.S.3d 91 (N.Y. Civ. Ct. Jan. 12, 2016)**

III. Analytical Frameworks

A. Substantive Rights Cases

1. General

***Fraternal Order of Police, Lodge 1 v. City of Camden*, No. 15-1963, 2016 WL 6803036 (3d Cir. Nov. 17, 2016)**

In *FOP, Lodge 1 v. City of Camden*:

In 2008, defendant implemented a program called "directed patrols," requiring police officers to engage with city residents even though the residents are not suspected of wrongdoing. The purpose was to obtain information about the community while making police presence more visible. Encounters between police and citizens under the program were to last no more than 15-20 minutes. A group of officers sued, alleging that the new program was an illegal quota system in violation of New Jersey law. One plaintiff also included an FMLA interference claim, asserting that he was approved for FMLA leave in May 2009 to care for his seriously ill mother, but later warned on May 27, 2009 that he was using too much leave. In June 2009, plaintiff was placed in a "Chronic Sick Category," and subject to discipline. This, according to plaintiff,

discouraged him from taking leave in violation of the FMLA. However, the court rejected plaintiff's claim because he was never denied leave, and plaintiff conceded that he was able to take time off he needed to care for his mother.

Summarized elsewhere:
***Crane v. AHC of Glendale, LLC*, No. 2:14-CV-2415 JWS, 2016 WL 5363748 (D. Ariz. Sept. 26, 2016)**

2. No Greater Rights Cases

***Darden v. AT&T Corp.*, No. 4:14CV1198 RLW, 2016 WL 183908 (E.D. Mo. Jan. 14, 2016)**

Plaintiff, a call center worker, filed suit claiming defendant, her employer, retaliated against her for using FMLA leave by disciplining her and ultimately terminating her employment. Defendant argued that plaintiff was unable to establish an FMLA retaliation claim either by producing direct evidence or under the burden-shifting framework as set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The District Court for the Eastern District of Missouri granted summary judgment in favor of defendant, holding that although plaintiff demonstrated that she engaged in protected activity under the FMLA and she suffered an adverse employment action, she did not show a causal connection between taking FMLA leave and her termination. Rather, the court held that plaintiff was terminated for violating her employer's policy.

***McNelis v. Pa. Power & Light, Susquehanna*, LLC, No. 4:13-CV-02612, 2016 WL 4991440 (M.D. Pa. Sept. 19, 2016)**

Plaintiff brought FMLA interference and retaliation claims against defendant following his discharge. Plaintiff's discharge was the result of his failure to maintain unescorted access authorization ("UAA"), which is an essential qualification for an employee to work in the nuclear power industry. On defendant's motion for summary judgment, the court found that plaintiff could not show he was qualified for the position of nuclear safety officer because he could no longer perform an "essential function" of his job. The court held that possession of a UAA was an "essential function." Plaintiff's loss of UAA prior to his request for FMLA paperwork rendered him outside the protection of the interference clause.

With regard to the retaliation claim, the court found that plaintiff failed to show that employer's legitimate, nondiscriminatory reason for terminating him was a pretext.

***Kelley v. Shelby Cty. Bd. of Educ.*, No. 2:14-CV-2632-SHL-CGC, 2016 WL 4146186 (W.D. Tenn. Aug. 3, 2016)**

Plaintiffs were tenured teachers, who were laid off from the positions with defendant school district. Plaintiffs and their union filed suit in district court alleging multiple claims. One plaintiff claimed that the layoff interfered with her right to reinstatement because she was on an FMLA leave at the time of layoff. This case comes before the court on cross-motions for summary judgment. The court ruled on a "case-stated" basis, which means the parties waived trial by jury and asked the court to decide the legal issues. This case arose after defendants merged schools in a district and laid off teachers. Included in the layoff were all of the teachers

who worked at the same school where plaintiff, who was on FMLA leave, worked. Given that all of the teachers were laid off, the court found for defendants on the FMLA claim because the layoff was clearly unrelated to the FMLA leave, and an employer does not interfere with FMLA reinstatement rights when it discharges an individual for reasons unrelated to the FMLA leave.

Summarized elsewhere:
***Mendillo v. Prudential Ins. Co. of Am.*, 156 F. Supp. 3d 317 (D. Conn. 2016)**

B. Proscriptive Rights Cases

***Esler v. Sylvia-Reardon*, 46 N.E.3d 534 (Mass. 2016)**

Plaintiff, a nurse, brought suit under the FMLA, claiming that her employer terminated her in retaliation for taking FMLA leave. Employee had taken FMLA leave, was injured while she was on leave, and, although she had certain physical restrictions when she returned back to work, these restrictions would not interfere with her work performance. Employee's supervisor expressed dissatisfaction with employee taking leave, how employee spent her leave time, employee's injury and subsequent work restrictions. Employee was put on inactive status and replaced days before her leave expired.

Only plaintiff's FMLA retaliation claim survived to trial. After a jury awarded plaintiff back and front pay, the superior court granted defendants' motion for judgment notwithstanding the verdict and reversed the award of front pay, finding that this issue should not have been submitted to the jury and there was not enough evidence to support an award of front pay. The appeals court reversed the entry of judgment *non obstante veredicto* ("JNOV") for defendant but affirmed the judge's order with respect to front pay. Employee appealed. The evidence that employee could have sufficiently performed her duties, the supervisor's negative comments, and the close relationship in time between employee's FMLA leave and the date of termination would together permit a jury to conclude that employee was terminated in retaliation for taking leave. Therefore, the court affirmed the appeal court's reversal of the JNOV. The court also held that the issue of front pay in an FMLA retaliation case is reserved for the judge, and that the superior court judge did not abuse her discretion in reversing the award of front pay.

IV. Application of Traditional Discrimination Framework

***Sharif v. United Airlines, Inc.*, No. 15-1747, 2016 WL 6407391 (4th Cir. Oct. 31, 2016)**

Plaintiff brought suit against his former employer alleging that he was discharged in retaliation for taking leave under Family and Medical Leave Act ("FMLA"). The United States District Court for the Eastern District of Virginia granted employer's motion for summary judgment, and plaintiff appealed. Employee went on an extended trip (March 16 to April 4) overseas and ultimately had only one shift scheduled during that vacation time (March 30). Employee called off on that day to take FMLA leave, which raised employer's ire and suspicion. Employer ultimately notified plaintiff of its intention to discharge him for fraudulently taking FMLA leave and for making dishonest representations during the ensuing investigation. Such conduct was a violation of employer's written policy on honesty. Plaintiff, a union member, given a pre-termination hearing, after which the Union told plaintiff he was likely to be discharged and recommended that he retire. Plaintiff then retired under threat of termination.

The court focused on plaintiff's ultimate burden to prove pretext under the *McDonnell Douglas* burden shifting framework. Concerning pretext, the court concluded that while plaintiff took issue with the scope of employer's investigation into his use of FMLA leave, the key was whether employer made a reasonably informed and considered termination decision. The court noted that the failure to comply with established investigatory procedures could be evidence of improper motive; but, it was not *per se* sufficient to create a genuine fact issue on pretext. Absent such a material fact issue, court affirmed that plaintiff could not prove unlawful retaliation and the district court properly granted summary judgment to employer.

***Elzeneiny v. D.C.*, No. CV 09-889 (JEB), 2016 WL 3647838 (D.D.C. July 1, 2016)**

A former District of Columbia employee brought an action against her employer, alleging interference and retaliation in violation of the FMLA. Defendant moved for summary judgment on both claims. Employer claimed that there were ongoing problems with plaintiff's work performance, and that it issued a written reprimand criticizing her low productivity. The day after receiving the reprimand, plaintiff requested to take FMLA leave for her fibromyalgia, which defendant denied. Plaintiff took leave anyway, and employer later gave her a notice of termination, which plaintiff appealed. The company then reversed the termination, reinstated her employment and retroactively approved her FMLA leave. For a time span of around two months, plaintiff was without pay and did not return to her position. Upon reinstatement, plaintiff was assigned to a new position, ultimately resigned and filed her lawsuit. The District Court for the District of Columbia denied defendant's motion for summary judgment on plaintiff's FMLA claims, but granted summary judgment as to several legal issues.

Plaintiff alleged that employer violated the FMLA by interfering with her ability to exercise her right to take leave when she first requested it and by interfering with her right to return to work between the time of her termination and the time employer allowed her to return to work. The court found that, based on the evidence, a fact finder could conclude that plaintiff stayed home not out of choice as defendant argued, but because she was not allowed to return. The court also noted that there was insufficient evidence to establish plaintiff could not return earlier because she was not cleared by her doctor. Therefore, the court denied summary judgment on the interference claim. Plaintiff also alleged that defendant retaliated against her for taking FMLA leave by: (1) terminating plaintiff while she was out on FMLA leave; (2) not placing plaintiff in the same or a similar position upon reinstatement; and (3) refusing to provide necessary information to its disability insurance carrier so that plaintiff could be eligible for disability insurance. In analyzing her retaliation claims under the a Title VII framework, the court noted that after the Supreme Court recently rejected the use of the mixed-motive standard in Title VII retaliation claims, neither the Supreme Court nor the D.C. Circuit Court had addressed the viability of a mixed-motive claim under the FMLA. The court stated it would therefore consider plaintiff's claim under both the mixed-motive standard (motivating factor) and under the *McDonnell Douglas* three step analysis (requiring but-for causation). The court found that, because the temporary termination had not been fully cured, defendant could be held liable for retaliation, and denied summary judgment on that issue. However, the court did grant summary judgment for defendant on plaintiff's allegation of retaliation by reassignment because defendant provided abundant unrebutted evidence of a legitimate, non-discriminatory reason for reassignment: plaintiff was unable to do the essential functions of her job. The court also granted summary judgment to defendant on the argument that defendant retaliated against

plaintiff by not providing necessary disability insurance information, because plaintiff failed to provide evidence of any actual damages.

***Shoemaker v. Conagra Foods, Inc.*, No. 2:14-CV-153, 2016 WL 6639158 (E.D. Tenn. Nov. 9, 2016)**

Plaintiff sued her former employer for interference and retaliation under the Family Medical Leave Act ("FMLA") based on her discharge from employment. Defendant filed for summary judgment on those claims and the court denied employer summary judgment on both claims.

Concerning the retaliation claim, the court applied the *McDonnell Douglas* burden shifting framework and focused on the causation element of the *prima facie* case. Concerning the motive for the termination decision, employer stated that the decision was based solely on plaintiff's accumulated point total under the attendance policy (she needed 10 points total to reach termination level). But, employer admitted that it had told employee that if she got her medical paperwork in order by a certain date certain attendance points would be taken off her total and her total points would be below the 10-point termination level. The court noted that the interpretation of employer's statement to plaintiff concerning the date to fix her medical paperwork was for the trier fact to determine, and thus denied employer summary judgment on the retaliation claim.

Concerning the interference claim, the court applied the *McDonnell Douglas* burden shifting framework and focused on whether plaintiff was entitled to FMLA leave for a day that employer claimed was not the subject of a timely submitted health care certification. But, the court returned to employer's statement to employee concerning additional time to submit her paperwork. Employer asserted that it was within its rights not to allow FMLA leave for that day because plaintiff did not timely submit her supporting medical certification. But, because a reasonable fact finder could conclude that employer had granted employee an extension of time to submit her medical certification for that day and she met the extended deadline, the fact finder could also conclude that she was entitled to and was denied her FMLA leave for that day, which precluded summary judgment on the interference claim.

Summarized elsewhere:
***Knott v. Grede II, LLC*, No. CV 14-00287-CG-M, 2016 WL 375148 (S.D. Ala. Jan. 28, 2016)**

***Thompson v. Beacon Behavioral Hosp., Inc.*, No. CV 15-5455, 2016 WL 4720006 (E.D. La. Sept. 8, 2016)**

A. Direct Evidence

***Chumbley v. Bd. of Educ. for Peoria Dist. 150*, No. 14-1238, 2016 WL 7188093 (C.D. Ill. Dec. 9, 2016)**

Plaintiff, a Director of Research, Testing, and Assessment with defendant School District 150, brought suit alleging FMLA interference and retaliation and violation of his due process rights. Specifically, plaintiff alleged he took FMLA leave related to anxiety and that defendant reassigned him to different department two weeks after he returned from his leave.

Defendant argued it would have reassigned plaintiff regardless, claiming that during his leave it discovered he had guaranteed a payment without authorization and improperly granted a teacher access to a database. Plaintiff, in his complaint, sought damages related to the reassignment. Defendant moved for summary judgment and the court denied defendant's motion.

Regarding plaintiff's FMLA interference claim, the court held that a reasonable factfinder could find that plaintiff's FMLA leave was the cause of his reassignment. The court noted the School District's Superintendent's comments that she was "frustrated" with plaintiff and found that a reasonable juror could determine that such comments evidenced frustration with plaintiff for having taken FMLA leave. Similarly, the timing of the reassignment, while "not, by itself, a ticket to trial," could lead a reasonable factfinder to conclude that plaintiff was reassigned due to his FMLA leave. Plaintiff was placed on administrative leave the day he returned to work following his FMLA leave and reassigned two weeks later. Finally, a reasonable juror could credit plaintiff's testimony that he received authorization to make the payment guarantee and grant the teacher access and that the articulated justification for the reassignment was therefore pretextual. Accordingly, the court denied defendant's motion for summary judgment with respect to plaintiff's FMLA interference claim.

As to plaintiff's retaliation claim, the court first noted that the Seventh Circuit's recent decision in *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016) had held with respect to employment discrimination claims that district courts should stop separating "direct" and "indirect" evidence and proceedings as if they were subject to different legal standards. Instead, courts should determine whether a reasonable juror could conclude a plaintiff would not have suffered an adverse employment action but for a particular distinguishing factor. The court disagreed with the parties' interpretation of this holding that it eliminated the distinction between the direct and indirect methods of proving an FMLA retaliation claim. Rather, *Ortiz* stood for the proposition that both direct and indirect (or circumstantial) evidence can be used to prove retaliation under the direct method, and had no bearing on the indirect method of proving discrimination claims. The court held that the evidence discussed above would permit a reasonable factfinder to conclude that plaintiff's FMLA leave caused his reassignment. Accordingly, the court denied defendant's motion for summary judgment with respect to plaintiff's FMLA retaliation claim.

***Holland v. Methodist Hosps.*, No. 2:14-CV-88-PRC, 2016 WL 5724355 (N.D. Ind. Sept. 30, 2016)**

Plaintiff was a Patient Account Representative/Collector for the hospital's central business office. Plaintiff alleges interference with her FMLA rights because employer did not exclude leave time from time worked when calculating whether she met her quota and by violation the FMLA's recertification process. Plaintiff also alleged retaliation based on employer's refusal to grant more than two shift changes per month and two disciplinary write ups, including the one that resulted in her termination. The district court found a genuine issue of material fact as to whether plaintiff's leave time was included in calculating plaintiff's quotas, thereby making plaintiff's FMLA leave illusory. However, the district court found that because there is no independent claim for violation of the recertification process absent interference with or restraint of FMLA rights, of which there was no evidence, plaintiff's claim for interference based on the recertification process was due to be dismissed. The district court determined that

employer's denial of plaintiff's requests for shift changes so she could avoid taking FMLA leave did not amount to an interference claim because they were not requests for leave, all of which were granted. The district court granted summary judgment of plaintiff's retaliation claim based on the denial of excessive shift changes, because there was no evidence of a causal connection between leave and the decision to deny excessive shift changes. The district court also granted summary judgment on plaintiff's retaliation claim related to the first disciplinary write-up, because plaintiff did not raise FMLA complaints until after the date of the write-up. The district court denied employer's motion for summary judgment on plaintiff's claim that the second write-up resulting in her termination was retaliatory because it was the very conversation in which plaintiff was complaining about FMLA violations that was the basis for the termination, and that conversation followed plaintiff's e-mail opposing violation of her FMLA rights. This fact, in addition to her supervisor's demonstrated indifference to plaintiff's rights, was sufficient to survive summary judgment. Finally, because employer did not address plaintiff's allegations regarding her being forced to discuss FMLA issues where coworkers could overhear confidential health information in violation of 29 C.F.R. § 825.500(g), that claim remained pending.

***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 3548217 (E.D. Mich. June 30, 2016)**

Plaintiff sued his former employer and defendant, the county, in federal court under the FMLA and several other state and federal anti-discrimination laws. Plaintiff filed four evidentiary motions *in limine* related to his FMLA claims. First, plaintiff sought to exclude evidence challenging whether the content of plaintiff's doctor's note constituted sufficient notice under the FMLA to trigger defendant's responsibility to obtain additional information. The court denied this motion as this was "a matter for the jury to determine." Second, plaintiff argued that the fact his deputy chief asked to see his doctor's note was irrelevant. Again, the court denied the motion, finding that the request was relevant to whether defendant had or should have had notice that plaintiff was requesting leave pursuant to his FMLA rights. Third, plaintiff argued that evidence showing county personnel's propensity to give FMLA forms to employees who submit doctors' notes was impermissible character evidence. The court denied the motion without prejudice, noting that defendant had the burden at trial to prove the evidence demonstrated the county's habit and routine practice of providing forms, such that they acted in conformity with habit and custom. Finally, plaintiff asked the court to exclude any evidence relating to the paid services he performed for the county's football program because such evidence was irrelevant and would be onerous to rebut. In denying this motion, the court found that this evidence was relevant in determining whether defendant knew plaintiff requested FMLA leave because of a qualifying disability and in assessing whether defendant's belief that disciplining plaintiff for refusing to work overtime was legitimate and nondiscriminatory.

***Janczak v. Tulsa Winch, Inc.*, No. 13-CV-0154-CVE-FHM, 2016 WL 850809 (N.D. Okla. Mar. 1, 2016)**

Plaintiff took FMLA leave after a motorcycle accident, and was terminated by defendant on the day he returned from leave. Defendant claimed that it had decided to eliminate plaintiff's position under a corporate restructuring. Plaintiff sued defendant for interference with his FMLA rights. Through motions in limine, plaintiff and defendant each moved to exclude certain evidence relating to the circumstances surrounding the case and defendant's behavior toward other employees with FMLA claims. The district court held as follows: (1) whether defendant

failed to transfer plaintiff to a different position upon his return from leave was a question of fact and was relevant as to whether defendant interfered with plaintiff's FMLA rights by not placing plaintiff in an equivalent position after plaintiff's position had been eliminated; (2) since the parties did not dispute that plaintiff was entitled to FMLA leave, evidence of the circumstances or severity of plaintiff's injuries should be excluded because the issue was whether defendant interfered with plaintiff's FMLA rights; (3) plaintiff's involvement with and income from his family's businesses during his employment with defendant should not be excluded because it related to defendant's offset defense, and (4) evidence regarding defendant's actions toward other employees who had exercised FMLA rights was admissible because it was relevant as to whether defendant interfered with plaintiff's FMLA rights.

Summarized elsewhere:
***Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149 (8th Cir. 2016)**

***Ruckebeil v. Cancer Treatment Ctrs. of Am., Inc.*, No. 15 C 08259, 2016 WL 878585 (N.D. Ill. Mar. 8, 2016)**

***Leslie v. Mich. Bell Tel. Co.*, No. 15-11205, 2016 WL 4191736 (E.D. Mich. Aug. 9, 2016)**

***Brister v. Mich. Bell Tel. Co.*, No. 14-CV-11950, 2016 WL 74870 (E.D. Mich. Jan. 7, 2016)**

B. Application of *McDonnell Douglas* to FMLA Claims

***Moore v. Def. Home Sec. Co.*, No. 15-10997, 2016 WL 3522305 (E.D. Mich. June 28, 2016)**

Plaintiff brought suit against his former employer claiming he was demoted in retaliation for exercising FMLA protected leave. The district court denied defendant's motion for summary judgment, holding "[t]he timing of [p]laintiff's demotion—a week after he informed his supervisor that he likely needed leave to have major back surgery—is highly suggestive of a causal relationship."

The court reasoned that the evidence sufficiently established plaintiff's *prima facie* case of retaliation and supported his claim that defendant's purported legitimate reason for his demotion—poor performance—was pretext for discrimination. Specifically, plaintiff was able to show that he was singled out for removal from his position even though he performed better on several metrics than a number of his peers. Further, unlike other managers who demonstrated poor performance, plaintiff was not issued any coaching or discipline prior to removal from his position. Because plaintiff's evidence presented a genuine issue of material fact as to the reasons for his demotion, defendant's motion for summary judgment was denied.

***Farkas v. NRA Grp. LLC*, No. 1:15-CV-356, 2016 WL 3997432 (M.D. Pa. July 26, 2016)**

Plaintiff, a debt collector at a company providing debt collection services, asserted claims against her employer for FMLA interference and retaliation. The District Court for the Middle District of Pennsylvania granted defendant's motion for summary judgment on the interference claim. The court found that there was sufficient evidence to find that defendants discouraged plaintiff from using FMLA leave through several comments allegedly made to her by the human resources director and supervisor. However, the court noted that discouragement alone, absent

demonstrated prejudice, does not establish an interference claim. The court found plaintiff failed to allege any prejudice resulting from those comments or that they in fact discouraged her from taking leave. Her personal opinion that the comments caused her anxiety was insufficient.

Next, the court addressed the retaliation claims. Plaintiff asserted both a mixed-motive claim and a circumstantial evidence claim of retaliation. The court noted that the Supreme Court recently limited the availability of the mixed-motive framework in a number of employment discrimination contexts, but the court did not address the continued viability of a mixed-motive theory under the FMLA. Instead, the court focused on whether this was a direct evidence case (analyzed under mixed-motive theory) or a circumstantial evidence case (governed by *McDonnell Douglas*). The court granted defendant's motion for summary judgment as to plaintiff's direct evidence case because plaintiff offered no direct evidence that defendant demoted and relocated her because she took FMLA leave. Regarding plaintiff's circumstantial evidence claim, the court also granted summary judgment because plaintiff failed to establish a causal link between the FMLA leave and defendant's decision to demote and relocate her. The two month gap before the request for leave and the adverse action was not an unusually suggestive temporal proximity to show a causal connection, and plaintiff submitted no other evidence to support causation. Even if plaintiff could make a *prima facie* case, the court found that defendants offered legitimate non-discriminatory reasons for their actions: plaintiff's violations of both the Fair Debt Collection Practices Act and the company's policy. Plaintiff offered no evidence to discredit these reasons. Also, plaintiff asserted that defendant retaliated against her for opposing an FMLA violation. The court granted summary judgment again, finding plaintiff did not offer sufficient evidence for the court to determine "whether she delivered an unequivocal FMLA complaint to her employer" to trigger protection from retaliation.

Additionally, the court granted defendant's unopposed request to dismiss the company's training manager as a defendant. Plaintiff offered no evidence from which a fact finder could conclude the manager exercised "supervisory authority" over plaintiff, which was required for individual liability under the FMLA.

***Tigner v. Cal. Dep't of Corr. & Rehab.*, No. D068509, 2016 WL 335933 (Cal. Ct. App. Jan. 27, 2016)**

Plaintiff Lula Height Tigner was employed by defendant the California Department of Corrections and Rehabilitation as an office technician. Plaintiff claims defendant violated the FMLA by (1) not allowing her to take leave to care for her mother, and (2) by retaliating against her for taking leave to care for her mother. With regard to the first claim, the Superior Court of Riverside County held a jury trial, and the jury returned a verdict in favor of employer. For the retaliation claim, defendant contends it had legitimate, non-retaliatory reasons to impose a suspension on plaintiff because of plaintiff's insubordination, discourtesy, inappropriate behavior in front of prison inmates, and being absent without leave ("AWOL"). The Fourth District Court of Appeals affirmed the trial court's decision to grant defendant's motion for summary adjudication on the ground that defendant had offered a legitimate, non-retaliatory reason for the adverse employment action, and plaintiff had failed to show that the proffered reason was pretextual.

Summarized elsewhere:
***Battle v. Corizon, LLC*, No. 2:15-CV-403-WC, 2016 WL 3583812 (M.D. Ala. June 30, 2016)**

***Ethridge v. Nichols Aluminum – Ala., LLC*, No. 5:14-CV-02126-KOB, 2016 WL 4540907 (N.D. Ala. Aug. 31, 2016)**

***Frachiseur v. Graphic Packaging Int'l, Inc.*, No. 2:15-CV-02027, 2016 WL 3661560 (W.D. Ark. July 5, 2016)**

***Clark v. Stop & Shop Supermarket Co.*, No. 3:15-CV-00304 (JCH), 2016 WL 4408983 (D. Conn. Aug. 16, 2016)**

***Elzeneiny v. D.C.*, No. CV 09-889 (JEB), 2016 WL 3647838 (D.D.C. July 1, 2016)**

***Darden v. AT&T Corp.*, No. 4:14CV1198 RLW, 2016 WL 183908 (E.D. Mo. Jan. 14, 2016)**

***Woods v. Start Treatment & Recovery Ctrs., Inc.*, No. 13 Civ. 4719 (AMD) (SMG), 2016 WL 590458 (E.D.N.Y. Feb. 11, 2016)**

***Andreatta v. Eldorado Resorts Corp.*, No. 2:15–cv–00749–RFB–NJK, 2016 WL 5867413 (D. Nev. Oct. 5, 2016)**

***Arora v. Eldorado Resorts Corp.*, No. 2:15–cv–00751–RFB–PAL, 2016 WL 5867415 (D. Nev. Oct. 5, 2016)**

***Azizi v. Eldorado Resorts Corp.*, No. 2:15–cv–00755–RFB–PAL, 2016 WL 5867412 (D. Nev. Oct. 5, 2016)**

***Harris-Bethea v. Babcock & Wilcox Tech. Servs Y-12, LLC*, No. 3:13- CV-669-TAV-HBG, 2016 WL 4379232 (E.D. Tenn. Aug. 16, 2016)**

***Hartman v. Ohio Dep't of Transp.*, No. 16AP-222, 2016 WL 4093471 (Ohio Ct. App. Aug. 2, 2016)**

1. *Prima Facie* Case

***Williams v. Bd. of Supervisors Conewago Twp.*, 640 F. App'x 209 (3d Cir. 2016)**

The chief of police sued the township's board of supervisors and four individual members of the board alleging FMLA interference and retaliation. Plaintiff claimed that as a result of defendants' repeated abusive conduct, plaintiff suffered from chest pains and had to be hospitalized. Two days later, one defendant asked plaintiff for a doctor's note and stated plaintiff's sick time was a "big mystery." The district court granted defendants' motion to dismiss for failure to state a claim and plaintiff appealed dismissal of the retaliation claim. The Third Circuit affirmed the dismissal of plaintiff's claims. The could held that because nearly all of defendants' abusive conduct occurred before plaintiff was hospitalized, such abusive conduct could not have been in retaliation for FMLA leave. The court also stated an employer was

entitled to request a doctor's note, and the "big mystery" comment did not rise to the level of retaliation.

***Talley v. Triton Health Sys., LLC*, No. 2:14-CV-02325-RDP, 2016 WL 4615627 (N.D. Ala. Sept. 6, 2016)**

Plaintiff filed an action against employer, asserting claims of interference and retaliation under the FMLA. Plaintiff worked for employer as Director of Quality Improvement. One of plaintiff's primary functions was to manage the five employees working in her department. The two performance reviews that plaintiff received while working for employer reflected that plaintiff competently performed her substantive job duties. Despite the content of the reviews, from the first week of plaintiff's employment, her immediate supervisor held conversations with plaintiff about her style and approach to coworkers and subordinates, which she described as "very curt and rough." Plaintiff's behavior did not improve, and her supervisor continued to receive complaints from plaintiff's coworkers about plaintiff. Her supervisor did not address her concerns about plaintiff through written reprimands "out of respect to plaintiff and her position."

Plaintiff told her supervisor she was concerned about her husband's health. He suffered from neuropathy in his feet and had taken leave from his own job. Since the beginning of her employment, plaintiff had been aware of, and had agreed to comply with, employer's FMLA policy, where—in order to qualify for FMLA leave—an employee must complete and submit an application for leave to human resources, along with a certification of a serious health condition. Plaintiff tried unsuccessfully to meet with her supervisor to discuss taking FMLA leave. Plaintiff then contacted human resources about taking FMLA leave, and HR sent plaintiff the FMLA forms she would need to complete under employer's FMLA policy. Before she could obtain a certification of serious health condition and return her completed forms to human resources, plaintiff was terminated by employer for ineffective leadership.

Plaintiff filed suit against employer. Employer filed a motion for summary judgment. Plaintiff's interference claims included defendant's failure to advise her of her FMLA rights and to respond to her requests for FMLA leave. The court ruled that plaintiff's lack of success in meeting with her supervisor to discuss taking FMLA leave was inapposite. Plaintiff had known of, and agreed to comply with, employer's FMLA policy since the beginning of her employment. In accordance with employer's FMLA policy, plaintiff had communicated with human resources and received from human resources the appropriate FMLA forms.

Plaintiff claimed that employer retaliated against her by terminating her before she could take FMLA leave. Plaintiff said she could establish a *prima facie* case of retaliation due to the short temporal proximity (about a week) between the time when she asked for FMLA forms and when she was terminated. The court ruled that:

(1) The right to commence FMLA leave is not absolute. An employer can terminate an employee, preventing her from exercising her FMLA rights, without violating the FMLA, if employee would have been dismissed regardless of her request for FMLA leave. *Krutzig v. Pulte Home Corp.*, 602 F.3d 1231, 1236 (11th Cir. 2010).

(2) Despite her claims of temporal proximity, plaintiff had not established a *prima facie* case of retaliation, because she failed to demonstrate causation. The decisionmaker who terminated plaintiff was her supervisor. But the supervisor was unaware that plaintiff wanted to take FMLA leave. Plaintiff had communicated about FMLA leave only with human resources.

(3) Even had she established a *prima facie* case of retaliation, plaintiff had not shown that employer's reason for terminating her was pretextual. Employer offered a legitimate, non-discriminatory reason for terminating plaintiff: Employees were complaining about plaintiff's professional demeanor. Employer presented evidence of these complaints, although it had not engaged in the prudent practice of documenting its discipline in writing. Plaintiff provided no evidence showing that her inquiries about FMLA leave led to her termination.

For these reasons, the court granted employer's motion for summary judgment.

***Fritzler v. Royal Caribbean Cruises, Ltd.*, No. 6:15-CV-01193-JTM, 2016 WL 3422808 (D. Kan. June 22, 2016)**

In *Fritzler v. Royal Caribbean Cruises*, plaintiff, a cruise line call center employee, filed suit against defendant, claiming defendant terminated her in retaliation for her use of FMLA leave. In the summer of 2014, plaintiff took approved FMLA leave for hospitalization, treatment, and recovery due to a medical condition. Later that summer, plaintiff was approved for intermittent FMLA leave to manage her diabetes. At the end of the summer, plaintiff's new supervisor advised plaintiff she was terminated for recording time over her lunch break. But in his deposition, the supervisor testified that he terminated plaintiff because, in a meeting just prior to the termination meeting, she had come into his office and confessed to misusing the company credit card. Plaintiff denied that such a meeting ever took place. She admitted she had used the company credit card for personal purchases, but stated that later, she reimbursed the company for these expenditures.

The court analyzed plaintiff's FMLA retaliation claim under the *McDonnell Douglas* burden-shifting framework. In this case, defendant conceded that plaintiff established a *prima facie* case of retaliation, but defendant contended it had a legitimate reason for terminating her, and plaintiff failed to demonstrate this reason was pretextual. But the court concluded that plaintiff cited sufficient evidence from which a reasonable jury could find that defendant's reason was not entirely credible. There was a genuine issue of material of fact as to whether a meeting occurred where plaintiff confessed a multitude of sins to defendant. The court denied defendant's motion for summary judgment on plaintiff's FMLA retaliation claim.

***Dennis v. Nationwide Children's Hosp.*, No. 2:15-CV-688, 2016 WL 5468338 (S.D. Ohio Sept. 29, 2016)**

Plaintiff, a surgical operating room technician, brought suit against his employer, a hospital, alleging interference and retaliation under the FMLA. The defendant moved for summary judgment. Plaintiff had requested an FMLA leave, was granted an FMLA leave, used all 12 weeks of the FMLA leave, and employer extended that leave under a personal leave of absence policy. When plaintiff's doctor finally released him to return to work, his position was no longer available. The hospital determined that it no longer needed plaintiff's position because

there had been a significant decrease in surgeries and, therefore, it was adequately staffed. For that reason, it did not post plaintiff's position. Defendant offered assistance in finding other open positions for him, but he was not interested. Under employer's leave of absence policy, the maximum duration for a leave of absence was six months, so plaintiff was terminated effective on the date ending that six-month period.

The Ohio district court granted defendant's motion for summary judgment. The court first found that that plaintiff could not establish that defendant interfered with his FMLA rights. The court noted that in assessing an interference claim, the issue is whether employer provided employee his FMLA entitlements. Here, it was undisputed plaintiff requested and was granted the full 12 weeks of FMLA leave, and plaintiff was unable to return to work at the conclusion of the FMLA leave. Under Sixth Circuit law, an employer does not violate the FMLA when it fires an employee who is indisputably unable to return to work at the conclusion of the 12-week period of statutory leave. The court stated that the plaintiff's claim was better characterized as an "involuntary-leave claim." However, the plaintiff did not have an involuntary leave claim because he had a serious health condition that precluded him from working, and there is no requirement under the FMLA that an employer accommodate an employee by allowing him to return to work in a light-duty assignment or in some other capacity to avoid having to take an FMLA leave. Thus, employer never forced him to take leave absent a serious health condition. Furthermore, even if plaintiff could establish an involuntary leave claim, the claim was not ripe because such a claim ripens only if and when an employee seeks an FMLA leave at a later date, which was no longer available to plaintiff because he was wrongfully forced to use FMLA leave in the past. Plaintiff never sought FMLA leave at a later date. Finally, the court rejected plaintiff's argument that employer's failure to post his position (i.e., decide that they did not need anyone in the position, such that it was not available when he could finally return to work) interfered with his FMLA leave. When his FMLA had expired, he could have been reinstated to his position if he was cleared to work, but he was not. Employer made the decision that they no longer needed the position two months later when plaintiff had no FMLA protection. Considering these findings, the court granted defendant's motion for summary judgment on the FMLA interference claim.

The court also found defendant was entitled to summary judgment on the retaliation claims. Plaintiff alleged that employer retaliated against him for taking an FMLA leave by: (1) forcing him to take an FMLA leave instead of working with an accommodation; (2) placing him on contingency status (meaning the leave was not job-protected) after his FMLA leave had expired; (3) not posting his former job position; and (4) terminating his employment. All four theories failed. First, as discussed above, the court stated employer never forced plaintiff to take involuntary leave; thus, there was no adverse action. Second, plaintiff was granted extended leave in addition to an FMLA leave when he was placed on contingent status. The court found that providing such additional leave is not an adverse action or retaliatory, and plaintiff's contingent status had no effect on his FMLA rights. Third, although plaintiff's termination was indisputably an adverse action, there was no other evidence of causation other than temporal proximity. Temporal proximity between protected activity and an adverse employment action may not give rise to a finding of causal connection unless it is "coupled with other indicia of retaliatory conduct." Finally, assuming plaintiff could establish a *prima facie* case of retaliation with respect to the failure to post his former position, plaintiff could not provide any evidence to

rebut employer's proffered legitimate business purpose for the decision. Accordingly, the court granted summary judgment to employer as to all FMLA retaliation claims.

***Johnson v. Fortune Plastics of Tenn.*, No. 3:14-CV-01310, 2016 WL 6249181 (M.D. Tenn. Oct. 26, 2016)**

Plaintiff employee sued employer for retaliation under the FMLA when he received a job reassignment and later terminated after taking FMLA leave. A district court in Tennessee granted summary judgment for employer after finding employee could not establish a *prima facie* case. It first found that the alleged job reassignment was not an adverse employment action since the new position had commensurate supervisory responsibilities and pay, shift and hours as his previous position. It also reaffirmed that timing alone was not sufficient to establish causation. It then discussed the "modified honest-belief doctrine." It determined it was reasonable for employer to rely on safety concerns and a lack of training in reassigning plaintiff's job.

***Wheeler v. Jackson Nat'l Life Ins. Co.*, 159 F. Supp. 3d 828 (M.D. Tenn. 2016)**

Plaintiff, an internal wholesaler employed by defendant annuity wholesaler, alleged, *inter alia*, claims of retaliation and interference under the FMLA. Plaintiff had taken intermittent FMLA leave for a number of months, and defendant had required that he document those days on which he was unable to work in defendant's time and attendance system. On June 19, 2013, defendant issued plaintiff an FMLA eligibility notice reflecting that he was both eligible for FMLA leave and had 240 hours of such leave available. However, defendant subsequently learned that plaintiff had failed to accurately document his use of FMLA leave at all in May or June of 2013 and, upon reconciling his absences with his available FMLA leave, determined that he had in fact exhausted his available intermittent FMLA leave as of July 5, 2013. Defendant subsequently issued another FMLA eligibility notice to plaintiff on July 16, 2013 that made no reference to the number of hours of FMLA leave to which plaintiff was entitled, and notified plaintiff of his exhaustion of FMLA leave via a July 25, 2013 letter. Defendant refused to provide plaintiff with additional FMLA leave or a general leave of absence thereafter, and his employment was terminated effective August 9, 2013.

Plaintiff claimed that defendant had interfered with his right to take FMLA leave because it denied his request for FMLA leave despite having issued him an eligibility notice reflecting that he had FMLA leave available at the time that the request was made. Plaintiff further claimed that defendant had retaliated against him for taking FMLA leave when it terminated his employment after his use of FMLA leave. Defendant moved for summary judgment on all of plaintiff's claims.

The district court granted defendant's motion. With regard to the interference claim, the court found that defendant's reconciliation of plaintiff's undocumented leave with his available FMLA leave was proper, and that he was therefore not entitled to FMLA leave after July 5, 2013. With regard to the retaliation claim, the court found that plaintiff had not established a *prima facie* case of retaliatory discharge under the FMLA, as he had not alleged retaliatory intent on the part of defendant's decision to discharge him. The court further held that, even assuming that plaintiff had established a *prima facie* case of retaliation, he had not

overcome the legitimate and nondiscriminatory reason –plaintiff's inability to perform an essential requirement of his position—articulated by defendant for its decision to terminate his employment and determined that the record lacked any evidence of a causal connection between plaintiff's use of FMLA leave and his termination.

***Caldwell v. UPS, Inc.*, No. 7:15-CV-00358, 2016 WL 4250496 (W.D. Va. Aug. 10, 2016)**

Pro se plaintiff (former loader for UPS) was absent from work for five days due to the flu and various other health problems. Plaintiff texted his supervisor each day, but his supervisor failed to inform management of the reason for his absences, and he was discharged four days later for failure to notify the company of his absences. After having twice granted defendant's motions to dismiss, the district court denied plaintiff's motion to file a second amended complaint as futile. Even pursuant to liberal construction principles for *pro se* plaintiffs, the district court found that the three documents and exhibits plaintiff filed as part of his second amended complaint failed to state a plausible claim under the FMLA. Plaintiff did not allege he was an eligible employee, that he suffered from a serious health condition, that he was denied leave, or that he was discouraged from or terminated for seeking or taking leave. Additionally, one of plaintiff's own supporting exhibits suggested plaintiff was not suffering from a serious medical condition.

***Wilson v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, No. 2014 CA 0074, 2016 WL 1394237 (La. App. 1st Cir. Apr. 8, 2016)**

Plaintiff alleged her employer unlawfully discriminated against her because of a back injury in violation of the FMLA and other statutes. The district court sustained a peremptory exception in which employer raised the objection of prescription and dismissed the suit as untimely.

On appeal, the court remanded the district court's holding with respect to plaintiff's FMLA claims, finding that plaintiff should be given the opportunity to amend her petition in the event that she is able to state a cause of action against defendant in these proceedings. However, the court noted that plaintiff did not factually allege a *prima facie* case of retaliatory discrimination for exercising her rights under the FMLA, because plaintiff only claims that she was discriminated against due to her physical disability, not for exercising any FMLA rights. Despite this, the court remanded plaintiff's FMLA claim to the district court with instructions to issue an order granting plaintiff an opportunity to amend her petition to state a cause of action.

Summarized elsewhere:
***Ferrari v. Ford Motor Co.*, 826 F.3d 885 (6th Cir. 2016)**

***Bere v. MGA Healthcare Staffing, Inc.*, No. C 16-01346 WHA, 2016 WL 3078871 (N.D. Cal. June 1, 2016)**

***Miller v. Detroit Pub. Sch.*, No. 14-CV-12819, 2016 WL 3031381 (E.D. Mich. May 27, 2016)**

***Kohler v. TE Wire & Cable LLC*, No. CV 14-3200 (JLL), 2016 WL 1626956 (D.N.J. Apr. 25, 2016)**

***Donahue v. Asia TV USA Ltd.*, No. 15 CIV. 6490 (NRB), 2016 WL 5173381 (S.D.N.Y. Sept. 21, 2016)**

***Hockenjos v. Metro. Transp. Auth.*, No. 14-CV-1679 (PKC), 2016 WL 2903269 (S.D.N.Y. May 18, 2016)**

***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

***Farkas v. NRA Grp. LLC*, No. 1:15-CV-356, 2016 WL 3997432 (M.D. Pa. July 26, 2016)**

***Puckett v. Yates Servs., LLC*, No. 3-15-0083, 2016 WL 741938 (M.D. Tenn. Feb. 24, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

a. Exercise of Protected Right

***Alexander v. Bd. of Educ. of City of N.Y.*, 648 F. App'x 118 (2d Cir. 2016)**

Plaintiff sued defendant, her former employer, for retaliation under the FMLA. After the district court granted defendant's motions to dismiss and for summary judgment, plaintiff appealed to the Second Circuit. The court, however, affirmed the court's decisions. For one thing, plaintiff failed to allege a plausible claim of retaliation. For another thing, plaintiff did not show a *prima facie* case of retaliation. Nor did she prove that the reason for her termination was pretext.

An employee must show some protected activity to make a plausible claim of retaliation under the FMLA. But, the FMLA does not protect employees who misuse FMLA leave or fraudulently obtain it. In particular, plaintiff did not use her FMLA leave for its intended purpose. Her complaint showed that she misused her FMLA leave (i.e., she used FMLA leave for non-FMLA reasons). So, the FMLA did not protect her. Plaintiff thus could not make a plausible claim of retaliation. Moreover, the amount of time between plaintiff exercising her FMLA leave and her discharge made it implausible that defendant was motivated by retaliatory intent. Also, the timing of the adverse action on which plaintiff based her complaint made it implausible. Because defendant terminated plaintiff after discovering her misuse of the leave, it was implausible that defendant terminated her for requesting or taking FMLA leave for its intended purpose. Therefore, the Second Circuit agreed with the district court's dismissal. In her complaint, plaintiff made attenuated allegations that were contradicted by more specific allegations also in the complaint. The court added that defendant's investigation into plaintiff's leave did not suggest retaliation. Nothing in the FMLA prevents an employer from ensuring that employees do not abuse their leave. Fraud or dishonesty is a lawful reason for termination.

The Second Circuit also agreed with the district court's summary judgment. For the same reasons as above, plaintiff failed to make a *prima facie* case of retaliation. Plaintiff also could not prove pretext. In short, there were no circumstances that gave rise to an inference of retaliation. And even assuming plaintiff established a *prima facie* case, she would still not succeed. That plaintiff misused her FMLA leave was a legitimate non-discriminatory reason for her termination. Further, plaintiff did not identify any inconsistencies, implausibilities,

weaknesses, or contradictions in defendant's reason. Though management personnel negatively remarked about plaintiff's request and use of FMLA leave, the fact remained that defendant did not take any adverse action until after it discovered plaintiff's misuse of FMLA leave. This intervening event, the court explained, made it implausible that plaintiff's termination was in retaliation for requesting or taking leave for its intended purpose.

***Tolbert v. Ean Servs., LLC*, No. 15-CV-735-GKF-TLW, 2016 WL 796096 (N.D. Okla. Feb. 26, 2016)**

Plaintiff employee alleged, *inter alia*, a claim of retaliation under the FMLA based upon her termination six days after she requested FMLA leave; while she was not eligible for FMLA leave at the time that she made the request, the leave was to be used at a point in the future when she would be eligible to take such leave. Defendant public employer moved to dismiss plaintiff's FMLA claims, asserting that plaintiff's requested leave was set to begin before she would have been eligible to take FMLA leave. The district court dismissed the retaliation claim without prejudice, finding that plaintiff had failed to allege a plausible claim of FMLA retaliation, as she had not alleged any facts that would allow for an inference that defendant had discriminated against her for requesting post-eligibility leave (e.g., she had not alleged when she began working for defendant, how many hours per week she had worked, and when her requested FMLA leave would have commenced and ended) or whether she would have been eligible to take such leave.

Summarized elsewhere:
***Finch v. Morgan Stanley & Co.*, No. 15-81323-CIV, 2016 WL 4248248 (S.D. Fla. Aug. 11, 2016)**

***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

***Scott v. Valley Elec. Contractors, Inc.*, No. 15-CV-14281, 2016 WL 7100250 (E.D. Mich. Dec. 6, 2016)**

***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 1366442 (E.D. Mich. Apr. 6, 2016)**

***Dement v. Twp. of Haddon*, No. 15-6107 (RBK/KMW), 2016 WL 6824362 (D.N.J. Nov. 17, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Hahn v. Office & Prof'l Emps. Int'l Union, Local 153*, No. 13-CV-946 (JGK), 2016 WL 4120517 (S.D.N.Y. July 22, 2016)**

***Ross v. State*, No. 15-CV-3286 (JPO), 2016 WL 626561 (S.D.N.Y. Feb. 16, 2016)**

***Gonzalez v. Carestream Health, Inc.*, No. 12-CV-6151-CJS, 2016 WL 2609808 (W.D.N.Y. May 6, 2016)**

***Hightower v. Savannah River Remediation, LLC*, No. 1:13-CV-03558-JMC, 2016 WL 1128022 (D.S.C. Mar. 23, 2016)**

***Alexander v. Kellogg USA, Inc.*, No. 2:15-cv-02158-STA-tmp, 2016 WL 1058110 (W.D. Tenn. Mar. 14, 2016)**

b. Adverse Employment Action

***Fiorentini v. William Penn Sch. Dist.*, No. 16-1565, 2016 WL 7338428 (3d Cir. Dec. 16, 2016)**

Plaintiff worked for the William Penn School District as a literacy coach and reading specialist. Although she was certified as a reading specialist, she did not possess a Pennsylvania elementary teaching certificate. In 2009, an officer of the teacher's union advised plaintiff that the School District was experiencing funding problems, and she might be laid off due to her lack of a teaching certificate. At the end of 2009, plaintiff informed her school principal that she would need time off for a breast biopsy. She alleged that the principal, on learning plaintiff would need to take leave, "yelled at her about impending deadlines." The biopsy yielded a diagnosis of breast cancer. Shortly after plaintiff informed the principal of the diagnosis, the principal told plaintiff that the description of her position would change. The grades of children she would deal with and her responsibilities would change, but her job title and salary would remain the same. Plaintiff filed an action against employer for retaliation in violation of the FMLA. Employer filed a motion for summary judgment. The district court granted employer's motion, and plaintiff appealed. The court of appeals ruled that plaintiff had failed to satisfy the second element of retaliation. Although plaintiff maintained that her change of duties in 2009 had been a demotion, the court of appeals contended that the reassignment did not constitute an adverse employment action. "[A]n adverse employment action is one which is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001) (internal citation and quotation marks omitted). The court of appeals affirmed the district court's decision to grant summary judgment.

***Belk v. Branch Banking & Tr. Co.*, No. 16-80496-CIV, 2016 WL 4216675 (S.D. Fla. Aug. 10, 2016)**

Plaintiff, a bank employee since 1973 who rose up the ranks to become branch manager, stepped down from that position 2010 to become a customer service manager when she was diagnosed with breast cancer. After plaintiff took FMLA leave for multiple surgeries and chemotherapy to treat her cancer, she alleged that the attitudes of her supervisor and colleagues changed for the worse, including negative comments about her productivity, a demotion to a bank teller position, a pay cut, and requests for additional documentation about why plaintiff's chemotherapy was affecting her work. Plaintiff sued her employer for disability discrimination under the Florida Civil Rights Act (the "FCRA"), alleging a hostile work environment, constructive discharge and retaliation under the FCRA, and for retaliation in violation of the FMLA. The district court granted defendant's motion to dismiss with leave to amend the complaint, holding that plaintiff failed to plead sufficient facts alleging that she suffered an adverse employment action so intolerable that it amounted to a constructive discharge. The court noted that the standard for proving constructive discharge is higher than for proving a hostile work environment, as an increase in an employee's workload, reporting requirements and supervision by itself does not constitute an adverse employment action unless it is accompanied by tangible harm, such as a decrease in salary or a change in job title. The court found that

plaintiff had not set forth a *prima facie* case of retaliation under the FLMA, which is analyzed under the same framework as Title VII retaliation cases, but permitted plaintiff to amend her complaint to allege facts regarding adverse employment action resulting from engaging in a protected activity. The court also permitted plaintiff to allege facts regarding hostile work environment, finding that the complaint lacked sufficient facts regarding the severity or pervasiveness of the supervisor's comments towards her.

***Freelain v. Vill. of Oak Park*, No. 13 CV 3682, 2016 WL 6524908 (N.D. Ill. Nov. 3, 2016)**

Plaintiff police officer sued the municipality for which he worked for FMLA interference and retaliation. During the municipality's investigation of his reports that he was sexually harassed and battered by a female sergeant on the police force, plaintiff became anxious and stressed and developed debilitating migraine headaches for which he sought treatment and was absent from work. Plaintiff told his supervisor that because the continued presence of the alleged harasser caused his headaches, he wanted the absences to be designated as arising from a work-related injury. After three consecutive absences from work, the human resources director sent plaintiff an FMLA certification form, explaining that until it was returned, the absences would be classified as "self sick" for payroll purposes, and explained that plaintiff needed certification from his doctor that plaintiff was clear to return to work and to submit to a fitness for duty exam with a designated doctor. Plaintiff's doctor timely returned his FMLA certification for intermittent leave due to migraines. The police chief advised plaintiff that his fitness for duty exam would occur on two separate dates, seven days apart. The following day, plaintiff submitted a fitness for duty release from his own doctor, stating the absences resulted from a sleep disorder and "workplace stressors." Plaintiff appeared for both the fitness for duty exams, but it took more than a month for the municipal director to receive the results of the exams. It took several additional weeks for the municipality to designate plaintiff's time off while awaiting the results as administrative (paid) leave. The district court granted the municipality's motion for summary judgment, finding that plaintiff's myriad complaints of retaliation, taken as a whole evidenced an unfortunate series of administrative errors and delays, but did not affect plaintiff's job, nor were they tied to plaintiff's protected activity. Additionally, because the municipality granted each of plaintiff's requests for FMLA leave, it was entitled to summary judgment on plaintiff's FMLA interference claim.

***Marcum v. Smithfield Farmland Corp.*, No. 6: 16-180-DCR, 2016 WL 6780311 (E.D. Ky. Nov. 15, 2016)**

Plaintiffs, former employees at Smithfield's ham packaging facility, alleged their supervisors retaliated against them for taking intermittent FMLA leave by reassigning them to the most rigorous job at the facility. Plaintiffs were unable to perform the duties of the cardboard room and both resigned. Plaintiffs also alleged that Smithfield interfered with their FMLA rights by requiring them to recertify their leave after each absence. Defendant filed a Rule 12(b)(6) motion to dismiss these claims.

The court first examined whether plaintiffs had sufficiently alleged they were eligible employees under the FMLA. Plaintiffs had not alleged that they worked for employer for at least 1,250 hours during the previous 12-month period or that they worked at a worksite which had at least 50 employees. Despite this, the court held that plaintiffs had sufficiently established they

were eligible employees by alleging that they applied and were approved for FMLA leave. The court then reviewed and dismissed plaintiffs' interference claim, reasoning that an employer may require employees to submit re-certifications of a serious health condition on a reasonable basis, and that plaintiffs alleged no facts showing defendant's request for re-certification was unreasonable. Finally, the court refused to dismiss plaintiffs' retaliation claim, rejecting defendant's argument that reassignment to the cardboard room (allegedly the most rigorous job in the facility) could not constitute an adverse employment action. The court reasoned that while reassignments without changes in salary, benefits, title, or work hours typically do not constitute adverse employment actions, courts should still examine other indices that might be unique to a particular situation. The court also refused to dismiss plaintiffs' allegation of constructive discharge because there was a close enough temporal proximity between plaintiffs' exercise of their FMLA rights and the alleged retaliatory conduct where the conduct occurred "immediately upon returning from intermittent leave approved under the FMLA."

***Norring v. Pace Indus. Casting, LLC*, CV 15-3715 (RHK/ KMM), 2016 WL 6078289 (D. Minn. Oct. 14, 2016)**

Plaintiff brought suit against defendant claiming interference with her rights under the FMLA and termination in violation of the statute.

With regard to the interference claim, plaintiff was approved to take intermittent FMLA leave due to a back condition. He claimed that employer interfered with his FMLA rights by assessing him points under its no-fault attendance policy on days when he was tardy or missed work because of his back condition. The court rejected plaintiff's claim, because plaintiff could not show any tangible impact the assessment of points had on his employment, and therefore could not show that he was prejudiced by defendant's conduct.

With regard to the discrimination claim, the court held that plaintiff satisfied the requirements of a *prima facie* case by showing (1) he engaged in protected activity under the FMLA, (2) he suffered an adverse employment action, and (3) a causal connection existed between the two. Defendant claimed that it terminated plaintiff's employment for insubordination and failure to perform work assignments, conduct which allegedly "came to a head" when plaintiff refused to remove a hat he was wearing in the company office space. The court found "significant evidence" that defendant's proffered reason was a pretext with no basis in fact. The evidence included employer's treatment of other employees, changing reasons, and deviation from policy. Consequently, the court denied defendant's motion for summary judgment on the discrimination claim.

***Stephenson v. Potterfield Grp. LLC*, No. 2:15-CV-04180-NKL, 2016 WL 5030377 (W.D. Mo. Sept. 19, 2016)**

Plaintiff took FMLA leave from the company in 2013 and 2015 due to cancer treatments. In 2013, after returning from FMLA leave, plaintiff believed that employer was giving him additional reporting requirements. addressing him with an increasingly negative tone, and ceased giving him bonuses. In 2015, after returning from FMLA leave, plaintiff was terminated. Following his termination, plaintiff filed suit against employer, alleging interference and retaliation in violation of the FMLA relating to the leaves he took in 2013 and 2015. The court

granted employer's motion for summary judgment on plaintiff's interference claim, ruling that nothing in the record demonstrated that the negative consequences that plaintiff alleged took place after he returned from his first FMLA leave seemed to have any deterrent effect on plaintiff's taking FMLA leave again. But the court denied employer's motion for summary judgment on plaintiff's retaliation claim. Regarding plaintiff's allegation that employer ceased giving him bonuses after his return from his first FMLA leave, the court said that a reasonable jury could find that defendants' actions constituted a materially adverse employment action. Regarding plaintiff's allegation that employer had increased plaintiff's reporting requirements after his return from his first FMLA leave, the court said that a reasonable jury could find that a pattern of adverse activity stemmed from a retaliatory motive. Regarding plaintiff's attempt to establish causation through temporal proximity, the court said that standing alone, temporal proximity does not result in a finding of causation unless it is "very close." But other of employer's behaviors, such as offering contradictory (and possibly pretextual) reasons for why it had to downsize plaintiff after his return from his second FMLA leave, in conjunction with temporal proximity, could lead to a finding of retaliation by employer against plaintiff in violation of the FMLA.

***Rizzo v. Health Research, Inc.*, No. 1:12-CV-1397, 2016 WL 632546 (N.D.N.Y. Feb. 16, 2016)**

Plaintiff filed suit in the District Court for the Northern District of New York against her former employer, a private non-profit corporation, claiming discrimination, retaliation, and interference in violation of the FMLA. The district court granted defendant's motion for summary judgment. The court found that plaintiff did not suffer an adverse employment action when her participation in manager meetings was no longer required after she was transferred to a different position upon her request and preclusion from planning and participating in a site visit when her participation was specifically requested. The court also found defendant presented a legitimate, nondiscriminatory reason for plaintiff's termination when the grant that funded her position ended and the department where she worked was restructured.

As to her interference claim, the court found that plaintiff's arguments that her supervisor attempted to interfere with her request for FMLA leave were immaterial. Plaintiff could not establish that defendant denied her benefits under the FMLA because defendant granted each of her requests for FMLA leave.

***Checa v. Drexel Univ.*, No. 16-108, 2016 WL 3548517 (E.D. Pa. June 28, 2016)**

Plaintiff sued her employer for FMLA retaliation. She claimed that the retaliation started at a meeting on her "first day back" from an FMLA leave of absence. Her coworkers, plaintiff claimed, did not exchange pleasantries with her or welcome her back. They also were unfriendly and did not offer condolences for plaintiff's loss of her mother. In addition, plaintiff claimed that she received increasingly harsher and voluminous criticism. As a result, during the meeting, plaintiff resigned abruptly. She tried to retract her resignation the next day.

In dismissing plaintiff's FMLA case, the District Court for the Eastern District of Pennsylvania noted that plaintiff failed to establish a *prima facie* case of retaliation. First, there was no materially adverse employment action. Second, there was no causal link between the FMLA leave and any employment action. Plaintiff, however, argued that employer's refusal to

accept her retraction, the treatment she received at the "first day back" meeting, and the increasingly harsh criticism amounted to materially adverse employment actions. Under a cat's paw theory, she tried to impute on employer the treatment from her coworkers that she felt was retaliatory. But the court disagreed. In so doing, it examined the standard in Title VII and the *Burlington* standard announced by the U.S. Supreme Court. In that case, the Supreme Court imposed a material requirement to separate significant from trivial harms. So, the adverse employment action must be material, the Supreme Court explained. At the same time, the district court recognized that its circuit court of appeals had not applied the *Burlington* standard to FMLA claims. Regardless, the district court found that plaintiff could not show a materially adverse employment action under *Burlington*, or an adverse employment action under Title VII. The manner in which coworkers treated plaintiff at the "first day back" meeting was insufficient. Likewise, the escalating criticism and employer's refusal to accept her retraction were not enough. They would not have dissuaded a reasonable worker from engaging in protective activity. And they did not alter the terms or conditions of plaintiff's employment, or significantly impact her ability to work or advance her career. Moreover, she did not suffer a negative performance evaluation or disciplinary action, nor a change in job title with less prestige, a suspension of pay, or a change in work schedule.

The court also noted the lack of a causal link. To establish a causal link between an FMLA leave and an adverse employment action, a plaintiff must show either: (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing. Temporal proximity alone would not be sufficient, unless it was unusually suggestive. Rather, the court explained that a "broad array of evidence" is used to determine whether a sufficient causal link exists. Factors such as intervening antagonism, retaliatory animus, inconsistencies in employer's reasons for the employment action, or temporal proximity can support the inference of causation. But these factors did not exist in plaintiff's case. Contrary to plaintiff's argument, her complained-about criticism does not constitute intervening antagonism. Of course, an intervening event (which is different from intervening antagonism), such as plaintiff quitting, can break a causal link. So even if there was a causal link between plaintiff's leave and the decision not to accept her retraction, plaintiff's resignation severed the causal link.

***Blair v. Rutherford Cty. Bd. of Educ.*, No. 3-12-0735, 2016 WL 494191 (M.D. Tenn. Feb. 9, 2016)**

Plaintiff, a high school teacher, took FMLA leave in August of 2011. While plaintiff was on leave, defendants offered training to all teachers on a new instruction system. After plaintiff returned to work in October, she was given a make-up training which she contended was not the same as the training that other teachers had received during the first session. Plaintiff also tendered her retirement with the school district in December. After unsuccessfully attempting to rescind her retirement, plaintiff sued. She alleged retaliation for her FLMA leave, claiming that her inferior training and later retirement constituted adverse employment actions. Defendants moved for summary judgment, arguing that plaintiff did not suffer an adverse employment action, and that she was not discriminated against on the basis of her FLMA leave. The district court agreed, and granted summary judgment for defendants. The court found that there was no evidence that plaintiff's training was inferior to that of the other teachers, and found that plaintiff

had voluntarily retired before participating in any sort of evaluation which could have given rise to an adverse employment action.

***Sowards v. Toyota Motor Mfg.*, No. CV 3:15-13029, 2016 WL 3211441 (S.D. W. Va. June 9, 2016)**

Plaintiff Adrian Sowards moved to amend his complaint by adding a retaliation claim under the Family Medical Leave Act ("FMLA") against defendant, Manpower of West Virginia, Inc. Plaintiff alleged that defendant violated the FMLA anti-retaliation provision by repeatedly threatening to bring against him and his counsel a lawsuit for malicious prosecution and a motion for sanctions unless plaintiff withdrew his FMLA claim against Manpower. To state a claim for FMLA retaliation, a plaintiff must allege: (1) he or she engaged in a protected activity; (2) defendant took a materially adverse action against employee; and (3) there was a causal link between the two events. Defendant argued that plaintiff's retaliation claim was frivolous because the threat to bring a malicious prosecution action and a motion for sanction did not constitute an adverse action.

The court recognized that there was no authority on whether the FMLA anti-retaliation provision applied to adverse actions outside the workplace, for instance during FMLA litigation. However, the Supreme Court held Title VII's anti-retaliation provision is not confined to retaliatory actions related to employment or occurring at the workplace in *Burlington N. & Santa Fe Ry. Co v. White*, 548 U.S. 53 (2006). "FMLA retaliation claims are analogous to those brought under Title VII." *Adams v. Anne Arundel Cty. Pub. Sch.*, 789 F.3d 422, 429 (4th Cir. 2015). Therefore, the court adopted the *Burlington Northern* analysis of "materially adverse," which includes those actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern* at 69. As such, whether an action is materially adverse depends on context and courts reviewing retaliation claims should look at the challenged retaliatory conduct, not the conduct forming the basis for the underlying discrimination claim.

The court reasoned that based on these standards, and construing the facts in a light most favorable to plaintiff, there was no futility in adding the proposed FMLA retaliation claim to the complaint. By threatening to sue employee for filing an FMLA claim, defendant could reasonably be found to have placed plaintiff and other workers who dare exercise his or her FMLA rights on notice that they will be subject to the possibility of burdensome malicious prosecution. In turn, these threats have a chilling effect on an employee's willingness to exercise FMLA rights.

Summarized elsewhere:
***Williams v. Bd. of Supervisors Conewago Twp.*, 640 F. App'x 209 (3d Cir. 2016)**

***Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702 (5th Cir. 2016)**

***Gaydos v. Sikorsky Aircraft, Inc.*, No. 14-CV-636 (VAB), 2016 WL 4545520 (D. Conn. Aug. 31, 2016)**

***Vick v. Brennan*, No. 14-CV-2193 (TSC), 2016 WL 1225857 (D.D.C. Mar. 28, 2016)**

***Ciesielski v. JP Morgan Chase & Co.*, No. 14 C 10073, 2016 WL 3406399 (N.D. Ill. June 21, 2016)**

***Barren v. Ne. Ill. Reg'l Commuter R.R. Corp.*, No. 13 CV 4390, 2016 WL 861183 (N.D. Ill. Mar. 7, 2016)**

***Thompson v. Beacon Behavioral Hosp., Inc.*, No. CV 15-5455, 2016 WL 4720006 (E.D. La. Sept. 8, 2016)**

***Crain v. Schlumberger Tech. Co.*, No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)**

***Miller v. Rd. Comm'n for Oakland Cty.*, No. 15-13976, 2016 WL 7210712 (E.D. Mich. Dec. 13, 2016)**

***Scott v. Valley Elec. Contractors, Inc.*, No. 15-CV-14281, 2016 WL 7100250 (E.D. Mich. Dec. 6, 2016)**

***Cisneros v. Firstmerit Corp. & LPL Fin., LLC*, No. 14-CV-14893, 2016 WL 465480 (E.D. Mich. Feb. 8, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Donahue v. Asia TV USA Ltd.*, No. 15 CIV. 6490 (NRB), 2016 WL 5173381 (S.D.N.Y. Sept. 21, 2016)**

***Fernandez v. Windmill Distrib. Co.*, No. 12-CV-01968, 2016 WL 452154 (S.D.N.Y. Feb. 4, 2016)**

***Carter v. PNC Bank, N.A.*, No. 1:15 CV 1817, 2016 WL 5338014 (N.D. Ohio Sept. 23, 2016)**

***Knight v. Barry Callebaut USA Serv. Co.*, No. CV 15-6450, 2016 WL 7338759 (E.D. Pa. Dec. 19, 2016)**

***Garner v. Phila. Housing Auth.*, No. CV 15-183, 2016 WL 4430639 (E.D. Pa. Aug. 22, 2016)**

***Fullerton v. Pottstown Hosp. Corp.*, No. CV 15-5329, 2016 WL 3762811 (E.D. Pa. July 13, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

***Fiorentini v. William Penn Sch. Dist.*, 150 F. Supp. 3d 559 (E.D. Pa. 2016)**

***Sopinski v. Lackawanna Cty.*, No. 3:16-CV-00466, 2016 WL 6826166 (M.D. Pa. Nov. 18, 2016)**

***Johnson v. Fortune Plastics of Tenn.*, No. 3:14-CV-01310, 2016 WL 6249181 (M.D. Tenn. Oct. 26, 2016)**

***Drechsel v. Liberty Mut. Ins. Co.*, No. 3:14-CV-162-KS-BN, 2016 WL 6139097 (N.D. Tex. Oct. 20, 2016)**

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 4376610 (S.D. Tex. Aug. 17, 2016)**

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 3974820 (S.D. Tex. July 25, 2016)**

c. Causal Connection

***Wheat v. Fla. Par. Juvenile Justice Comm'n*, 811 F.3d 702 (5th Cir. 2016)**

Plaintiff, who previously held an exempt supervisory position at her employer—a Juvenile Corrections facility, filed an action alleging that her employer retaliated against her for exercising her rights under the FMLA. Plaintiff took leave under the FMLA and employer terminated her employment after she failed to return to work once her FMLA leave had expired. Employee filed suit under the FMLA, the suit was settled, and employee resumed employment in a lower ranking position because her. After being rehired, newly available supervisory positions were offered to plaintiff but she turned down both offers because she wanted to remain non-exempt. Plaintiff later engaged in two instances of excessive force against juvenile inmates, and placed on leave without pay and then shortly thereafter was discharged. Plaintiff then brought the current action alleging she was discharged for asserting her FMLA rights. Employee stated that employer retaliated against her by assigning her janitorial duties, denying her a raise and other requests, and ultimately terminating her employment. The trial court granted defendant's motion for summary judgment and plaintiff appealed.

Analyzing plaintiff's claims under the *McDonnell Douglas* framework, the court found that none of the alleged retaliatory activities were materially adverse, with the exception of plaintiff's termination. In examining whether there was a causal link between plaintiff's taking of leave and her termination, the court found that there was a disputed issue of material fact as to whether employee was discharged because of her FMLA leave or her work performance because other employees, including plaintiff, had been previously disciplined for using excessive force against inmates but not necessarily terminated. Thus, the "mixed record constitute[d] substantial evidence of a genuine issue of material fact as to whether [plaintiff's] discharge would have occurred "but for" exercising her protected rights." The Court vacated summary judgment for employer on plaintiff's retaliatory termination claim.

***Ferrari v. Ford Motor Co.*, 826 F.3d 885 (6th Cir. 2016)**

Plaintiff, an employee at Ford Motor Company and member of the United Auto Workers (UAW), alleged that his employer's decision to temporarily bypass him for a skilled trades apprenticeship was unlawful retaliation under the FMLA. After plaintiff suffered a neck injury at work, plaintiff applied for and received four FMLA leaves related to his neck injury or to his stress and major depression. A doctor had placed worked restrictions on plaintiff, and he was temporarily bypassed for the apprenticeship because the restrictions precluded his ability to perform the essential functions of the job. Plaintiff alleged the work restrictions and decision to bypass him were in retaliation for taking FMLA leave. The district court granted summary

judgment to employer on this claim, concluding that plaintiff could not establish a *prima facie* case of FMLA retaliation because he had not presented evidence that: (1) the doctor or apprenticeship decision-makers knew about his FMLA leave; or (2) a causal connection existed between FMLA and the apprenticeship decision. The Sixth Circuit affirmed. The court first found that plaintiff had merely speculated that the doctor based her decision on FMLA leave. Plaintiff pointed to several instances in which the doctor's notes mention that he had been on psychiatric medical leave, but this did not evidence knowledge of any FMLA activity. Also, plaintiff presented no evidence the doctor had access to his personnel file or that the doctor reviewed it. Second, plaintiff presented no evidence of a causal connection between his FMLA leave and the adverse employment action. Plaintiff did not even argue this point in his opening brief or reply brief. Therefore, the circuit court affirmed the district court's grant of summary judgment.

***Arrigo v. Link*, 836 F.3d 787 (7th Cir. 2016)**

Plaintiff, a gas station employee, alleged her former employer terminated her for taking or requesting FMLA leave. Plaintiff's claim proceeded to a jury trial, and the jury found no FMLA violation. Plaintiff appealed the jury verdict to the United States Court of Appeals for the Seventh Circuit, arguing the trial court wrongfully excluded her supervisor's handwritten notices from a meeting he requested before she returned from leave. The notes details plaintiff's medical condition and medications. However, there was no reference to her leave. The district court concluded the notes were irrelevant to plaintiff's FMLA claim. The court of appeals held the district court did not abuse its discretion when it excluded the notes. The court emphasized that the notes did not discuss the leave "or anything that foresees the potential for future leave." With regard to plaintiff's argument the notes demonstrated defendant's bias against plaintiff's condition, the court held the relevant inquiry was whether defendant has a bias toward the use of leave. The court also affirmed the district court's decision to exclude evidence regarding plaintiff's job performance. The district court limited such discussion to the opinions that were communicated to the decision maker. The court held the appropriate focus was on what was the decision maker honestly believed, not what others believed.

***Olson v. Penske Logistics, LLC*, 835 F.3d 1189 (10th Cir. 2016)**

Plaintiff commenced work for employer as a dispatcher, but, over a 10-year period, was promoted three times, eventually becoming an operations manager. Initially, his performance in this position seemed adequate, earning him "3" grades on a 5-point scale in his performance reviews. But over time, disciplinary action was taken against him by employer, including placing him on an action plan. Plaintiff requested FMLA leave, which was eventually approved for July 18, 2013. July 18 was his first day out on leave, his last day on the job, and Day One of an inventory crisis that cost plaintiff his job. One of plaintiff's duties had been inventory control. On July 18, plaintiff's supervisor discovered that the warehouse inventory was riddled with discrepancies. On conducting a detailed investigation, plaintiff's supervisor also discovered that plaintiff had been lying to him, including creating an imaginary storage location. Supervisor advised plaintiff in writing that when he returned from leave, he would be terminated.

Plaintiff filed suit under the FMLA, alleging employer had interfered with his FMLA rights. Employer filed a motion for summary judgment, claiming plaintiff would have been

terminated due to his poor job performance, even if he had not taken leave. Plaintiff contended that his termination was causally connected to his taking leave. But for his leave, he would have had a chance to defend himself. Moreover, a reasonable jury could find he was really fired for taking leave when he was urgently needed at work. As to plaintiff's first argument, the court said there was no evidence that plaintiff would have been given a chance to defend himself or that any defense he offered could have succeeded. As to plaintiff's second argument, that he was fired because there was an inventory crisis at work and others were forced to fly to Denver to do his job, the court said no evidence in the record showed that other personnel resented flying to Denver or that any inconvenience caused by their flying to Denver contributed to a recommendation that plaintiff be terminated. The district court granted employer's motion for summary judgment, and the court of appeals affirmed.

***Lopez v. City of W. Miami*, No. 15-14645, 2016 WL 6068822 (11th Cir. Oct. 17, 2016)**

The Eleventh Circuit Court of Appeals affirmed a district court's grant of summary judgment in favor of the City, defendant, on plaintiff's FMLA interference and retaliation claims and affirmed the court's denial of plaintiff's motion for reconsideration. In July 2014, an internal affairs investigation implicating plaintiff, a former police sergeant with the City, began. In August 2014, plaintiff filed a grievance and submitted a doctor's note regarding her permanent medical condition; neither specified the need, timing, or duration of plaintiff's potential FMLA leave. In October 2014, plaintiff submitted a WH 380–E Certification, which specified that she needed one to two days of medical leave per month, to the City Manager. Seven days after she submitted her WH 380–E Certification, plaintiff was placed on paid administrative leave pending the resolution of the internal affairs investigation. In January 2015, plaintiff's employment was terminated due to the results of the internal affairs investigation.

The district court found that neither the grievance nor doctor's note provided adequate notice of plaintiff's need to take FMLA leave, but that the WH 380–E Certification did provide such notice. The district court granted summary judgment for defendant on the interference claim because it found that plaintiff was placed on paid administrative leave, which was more generous than unpaid FMLA leave, and plaintiff's termination was the result of an internal affairs investigation, not her request for FMLA leave. The district court granted summary judgment for defendant on the retaliation claim on the grounds that there was no temporal proximity between plaintiff's notification to the City of her need for FMLA leave in October 2014 and plaintiff's termination in January 2015 and even if there were temporal proximity, there was no evidence that the decision-maker in plaintiff's termination was aware of the notification. Plaintiff's motion for reconsideration was held to constitute an improper amendment of her complaint, given that it introduced facts inconsistent with plaintiff's prior representations and a new theory of liability, and was consequently denied.

***Jones v. Allstate Ins. Co.*, No. 2:14-CV-1640-WMA, 2016 WL 4259753 (N.D. Ala. Aug. 12, 2016)**

Plaintiff sued alleging violations of the Americans with Disabilities Act, the FMLA, Title VII (sexual harassment), and Title VII (retaliation). Employer moved for summary judgment, which the court granted.

The court noted that it was presented with multiple "but-for" claims, and would have to decide how these claims interacted. While Rule 8 of the Federal Rules of Civil Procedure permitted such multiple claims as alternative pleadings to avoid a motion to dismiss, the court stated that a party ultimately may not recover separately on inconsistent theories when one theory precludes the other or is mutually exclusive of the other.

In regard to plaintiff's FMLA retaliation claim, the court held that such a claim requires a heightened level of causation—that is, application of the but-for standard. The court reached this conclusion based on several reasons, although noting that the Eleventh Circuit declined to address this issue in a prior case, *Coleman v. Redmond Park Hosp., LLC*, 589 F. App'x 436, 438-39 (11th Cir. 2014). First, the court noted that while the FMLA itself does not use the precise phrase "because of," its use of the word "for" is within the range of phrases whose ordinary meaning indicates a "but-for" causal relationship. Second, in addition to the choice of words used in the statute, the structure of the FMLA supported a but-for requirement. This is based on the fact that when Congress adopted the FMLA, it modeled FMLA retaliation after Title VII retaliation. Third, within the last year, the Eleventh Circuit summarily rejected an FMLA retaliation claim for the "same reasons as [the] Title VII retaliation claim." In other words, the Eleventh Circuit has analyzed FMLA retaliation congruently with Title VII retaliation by borrowing applicable case law. In response to the argument that the U.S. Department of Labor does not support a but-for analysis, the court noted that the Department of Labor's position is rooted in its own regulations and not the statute itself. The regulation however was not entitled to *Chevron* deference because, among other reasons, the statute specifically addressed the issue (as compared to be silent or ambiguous).

Applying the but-for analysis, the court found no evidence of causation given that plaintiff was arguing that the adverse actions taken against her also were taken against her based on her disability (ADA), based on sexual harassment in violation of Title VII, and based on retaliation in violation of Title VII. These other causes of action meant that the FMLA could not have been the but-for cause of her termination. In addition, as to the issue of being able to take breaks during the day, plaintiff could not recall one instance when she was not permitted to take a break.

***Corbin v. Med. Ctr., Navicent Health*, No. 5:15-CV-153 (CAR), 2016 WL 5724992 (M.D. Ga. Sept. 29, 2016)**

Plaintiff, a laboratory phlebotomist, brought this case against her former employer, a medical center, alleging, *inter alia*, FMLA interference and retaliation. Plaintiff worked for defendant for over 10 years before being fired. Defendant had an attendance policy that permitted disciplinary action when an employee accrued enough points. Defendant used an outside company to manage its employees' FMLA leave. Near the end of 2013, plaintiff's daughter began getting sick and plaintiff received a verbal warning for her absences and tardiness related to caring for her daughter. In June 2014, plaintiff received a written warning and three months' probation. From October 20-27, 2014, plaintiff's daughter was hospitalized, and on October 23, plaintiff applied to the outside company for an FMLA-approved leave for that period. The company approved her request and also approved future intermittent FMLA leave. Four days later, plaintiff received a second written warning and three months' probation for points accumulated that did not relate to her daughter. At this time, plaintiff informed her

supervisor that she had requested and was approved for leave to care for her daughter and, thereafter, he always considered the absences and tardies excused and did not assess any attendance points. Even so, plaintiff's supervisor appeared to become frustrated with her absences and tardies. Plaintiff missed December 31st, and January 1st, 3rd and 4th, all of which were approved by the outside company; however, plaintiff took off December 31st and January 1st only after she had requested them off as vacation but was denied. Plaintiff was fired on January 19, 2015 after accruing three more unexcused tardies.

The court denied defendant's motion as to plaintiff's FMLA claims. With respect to retaliation, the court rejected defendant's request that it use the "but-for" rather than "motivating factor" standard that was being used in the Eleventh Circuit. Defendant's only argument for its use was the decision rendered in *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), which required but-for causation in the Title VII context. There was a genuine issue of material fact as to whether defendant's explanation for plaintiff's termination constituted a pretext. With respect to interference, plaintiff argued that defendant interfered with her FMLA benefits when it terminated her employment while she was under the protections of approved intermittent FMLA leave. The court found that a genuine issue of material fact existed as to whether plaintiff's FMLA leave was the proximate cause of her termination.

***Piburn v. Black Hawk-Grundy Mental Health Ctr., Inc.*, No. C15-2045, 2016 WL 1464570 (N.D. Iowa Apr. 13, 2016)**

Among other claims, plaintiff, a psychiatrist, filed FMLA interference and retaliation claims against his former employer, a mental health center. The district court granted summary judgment on both claims. Plaintiff suffered from bipolar disorder, depression, sleep apnea, Parkinsonism, and neuropathy. His sleep apnea, in particular, caused him to be tired and sluggish throughout the day. After a series of complaints that he fell behind on his daily appointments, he took FMLA leave for treatment. His physicians recommended he work a new schedule, only seeing one patient per hour, allowing him not to fall behind with appointments. Employer ultimately denied this request and terminated plaintiff's employment. Plaintiff's interference claim, based on employer failing to reinstate him to his former position failed because plaintiff wanted to work a new schedule and the FMLA does not impose a duty of reasonable accommodations. Plaintiff's retaliation claim failed because the evidence did not show a causal connection between plaintiff's exercise of his FMLA rights and his termination. Rather, the facts surrounding his termination related to the inability of plaintiff and defendant to agree upon a reasonable accommodation for his disability. Therefore, the court granted defendant's motion for summary judgment on the FMLA claims.

***Fountain v. First Data Merch. Servs.*, No. 14-CV-121-LM, 2016 WL 344520 (D.N.H. Jan. 27, 2016)**

Plaintiff, a sales employee, brought suit against defendant, her former employer, for retaliation claiming she was discharged for taking FMLA leave. Defendant moved for summary judgment arguing it discharged defendant for a legitimate nondiscriminatory reason, specifically that plaintiff failed to meet certain performance criteria. The District Court for the District of New Hampshire denied defendant's motion, holding that defendant's discharge of plaintiff less than a month after she requested FMLA leave as well as a supervisor's emails discussing

plaintiff's performance in light of her FMLA leave and how many hours she was authorized to miss under the FMLA demonstrated that plaintiff had shown a sufficient causal connection to avoid summary judgment. Further, the court held that plaintiff's assertion that defendant failed to support plaintiff by helping generate new business and that her performance goals were not adjusted to reflect her time away on leave was enough to demonstrate trial-worthiness of plaintiff's pretext theory.

***McMasters v. Hendrickson USA, LLC*, No. 3:14CV-329-CRS, 2016 WL 5796908 (W.D. Ky. Sept. 30, 2016)**

Plaintiff sued former employer alleging he was fired in retaliation for taking FMLA leave. Defendant-employer counterclaimed, alleging violations of state and federal law regarding misuse of computer information. The parties cross-moved for summary judgment, and the court granted summary judgment in favor of defendant with respect to plaintiff's FMLA claims. Regarding plaintiff's FMLA claim, the court held that plaintiff failed to show a *prima facie* case because he relied solely on temporal proximity. Plaintiff asserted he was terminated 11 days after returning from leave and that he was replaced while on leave. The court rejected plaintiff's argument that he was replaced, noting the additional employee was hired at plaintiff's request. Further, it noted plaintiff admitted the reason he was terminated was because, despite multiple requests by defendant, he failed to return a computer disk with valuable source code. The court observed it was undisputed that the disk was defendant's property and plaintiff's arguments about its value did not change the fact that he was unable to show his termination was related to his FMLA leave.

Assuming *arguendo* that plaintiff established a *prima facie* case, the court additionally observed he failed to show pretext. Defendant asserted plaintiff was fired as a result of his failure to return the company's computer disk. The court noted the only evidence plaintiff identified in support of pretext was temporal proximity. It observed defendant undertook new computer security measures prior to plaintiff's leave and that a third-party security auditor determined defendant should maintain all copies of its source code in a single, in-house location. Plaintiff did not dispute these assertions and did not contend defendant had a dishonest reason for terminating him. Thus, the court held the only evidence plaintiff presented in support of pretext was the 11-day termination window, which by itself was insufficient. Finally, the court rejected plaintiff's arguments that defendant's counterclaims were further retaliation for his FMLA leave, because defendant had shown a reasonable belief the claims were valid, and plaintiff offered no evidence other than temporal proximity.

***Frazier v. Southwise Co.*, No. 4:14-CV-00125-CRS, 2016 WL 2869792 (W.D. Ky. May 16, 2016)**

A district court in Kentucky granted employer's motion for summary judgment. Employee was injured at work in September 2011 and worked in a light duty role until May 2012 when he took FMLA leave. Employee remained on FMLA leave for almost two years until February 2014 when employer terminated employment. Employee alleged interference with his FMLA rights and retaliation. The court determined that employee waived his interference claim and only addressed his claim for retaliation.

The parties agreed that employee engaged in protected FMLA conduct when he took 12 weeks of unpaid leave for his serious health condition and that his employer was aware of the leave. The parties also agreed that the termination qualified as an adverse employment action. The Court determined that there was no causal connection between the protected activity and the employment termination, because employer provided employee with an additional eighteen months of unpaid leave after the expiration of his FMLA leave.

***Young v. Town of Bar Harbor*, No. 1:14-CV-00146-GZS, 2016 WL 3561944 (D. Me. June 27, 2016)**

Plaintiff was the police chief of municipal defendant, the Town of Bar Harbor. Plaintiff suffered from alcoholism and was the subject of an investigation. He was placed on administrative leave, during which he sought and took leave under the FLMA. Upon the conclusion of the investigation and his subsequent termination, plaintiff sued defendant for retaliation for engaging in a protected activity. Defendant brought a motion for summary judgment, arguing that plaintiff failed to establish a causal connection between the protected leave and the termination. The court found that plaintiff's evidence did not support a causal connection between the protected leave and the termination, but rather established that defendant had a preexisting and lawful desire to terminate plaintiff. Accordingly, the court granted defendant's motion for summary judgment.

***Russell v. CSK Auto, Inc.*, No. 14-14230, 2016 WL 5906089 (E.D. Mich. Oct. 11, 2016)**

AMENDED OPINION AND ORDER (1) DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [ECF NO. 34], (2) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [ECF NO. 35], AND (3) DISMISSING WITH PREJUDICE PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff filed suit against defendant, alleging that defendant retaliated against and constructively discharged plaintiff in violation of the FMLA. While employed by defendant, plaintiff injured his ankle in 2010 and subsequently took FMLA leave. Plaintiff endured another injury in 2012 and again went on FMLA leave. Plaintiff's compensation was based on "assurance pay." Assurance pay ensures that an employee will receive a certain minium level of income if store-based commissions were not higher than the assured amount. Twice plaintiff was taken off the assurance plan. Plaintiff alleged his first removal occurred while he was on his 2010 FMLA leave, and it was motivated by the fact that he had taken leave. Defendant argued that it advised plaintiff he would be removed from the assurance plan before he commenced leave. Plaintiff sent a letter to the regional manager complaining of his reduction in pay, and he was restored to the plan. He was notified that as long as his sales continued to grow, he would not be removed from the plan. Plaintiff alleged his second removal occurred while he was on his 2012 FMLA leave, and it was motivated by the fact that he had taken leave. Defendant argued that plaintiff's second removal was due to his poor sales. Plaintiff threatened to quit his job if his income did not increase. After seven months with no changes in his salary, plaintiff resigned.

Plaintiff filed a motion for partial summary judgment relating to his constructive discharge. The court denied this motion, contending that plaintiff's constructive discharge claim

rested solely on his reduction in salary, and that there were factual disputes as to why his salary was reduced and by what amount. Defendant filed a motion for summary judgment on plaintiff's FMLA retaliation claim. Defendant stated plaintiff could not establish a causal connection between his FMLA leave and removal from the assurance plan. The court denied this motion, contending that the timings of various events, relating to plaintiff's taking of leave and employer's decision to remove him from the plan, were in dispute.

***McGuigan v. Appliance Replacement Inc.*, No. 14-7716 (RBK/JS), 2016 WL 5380927 (D.N.J. Sept. 26, 2016)**

Plaintiff sued former employer, alleging, *inter alia*, that his employment was terminated in retaliation for plaintiff's taking FMLA leave. Defendant-employer moved for summary judgment on all claims. For the *prima facie* case, plaintiff contended he established a causal relationship between his taking FMLA leave and his firing because: (1) he was replaced by another employee immediately upon taking leave and (2) defendant decided to terminate plaintiff about 10 days after the FMLA leave began. The court held that plaintiff satisfied his burden of establishing a *prima facie* case. Although defendant presented evidence that the individual who allegedly replaced plaintiff did not perform all of plaintiff's job duties, and therefore could not have been a replacement, the court held the question of whether the new employee was hired effectively to replace plaintiff was a credibility issue appropriate for a factfinder to decide. Additionally, the court noted it was undisputed that plaintiff's supervisor stated he wished to terminate plaintiff within 10 days of plaintiff's taking leave. Defendant asserted the supervisor lacked authority to terminate plaintiff; however, the court held a genuine issue of material fact existed as to his firing power, due to statements by defendant's human resources representative and its owner, which seemed to recognize such authority.

Plaintiff asserted that defendant's claim that he was fired for performance issues was pretext because defendant was aware of those performance issues prior to plaintiff's taking leave but never took serious disciplinary action. Defendant contended it did not discover the extent of plaintiff's mistakes until he took leave. The court held that a genuine issue of material fact existed as to pretext because defendant was aware of plaintiff's previous errors and took no action beyond a formal reprimand. Additionally, it noted that defendant offered contradictory reasons for plaintiff's firing, at times arguing plaintiff was fired for poor performance and at other times asserting his termination was due to the elimination of his position. Thus, the court denied summary judgment on the FMLA retaliation claim.

***Woods v. Start Treatment & Recovery Ctrs., Inc.*, No. 13 Civ. 4719 (AMD) (SMG), 2016 WL 590458 (E.D.N.Y. Feb. 11, 2016)**

In anticipation of trial, both plaintiff and defendant asked the court to determine what plaintiff must show to prove an FMLA retaliation claim. Plaintiff alleged she was barred from taking medical leave and that she was terminated shortly after taking FMLA leave. Plaintiff argued that she need only demonstrate that her taking FMLA leave was a *motivating factor* in defendant's decision to terminate her. Defendant argued that plaintiff must prove that she would not have been terminated *but for* her taking protected FMLA leave.

The court determined that under the *McDonnell Douglas* burden shifting framework and the language of the FMLA statute, plaintiff must prove that she would not have been terminated *but for* her taking protected FMLA leave. The court also looked to anti-retaliation provisions of Title VII and the ADEA and subsequent interpretation. The court also noted that there is somewhat of a split amongst courts on this issue, and that the Second Circuit has not directly addressed the question, but it has noted that the FMLA's anti-retaliation provision has the same underlying purpose as Title VII and almost identical wording.

***Jurczyk v. Coxcom, LLC*, No. 14-CV-454-TCK-FHM, 2016 WL 3248417 (N.D. Okla. June 10, 2016)**

Plaintiff, a customer service representative, suffered from chronic migraines that sometimes rendered her unable to work. During the 14 years that she worked for employer, there was no dispute that plaintiff performed her job very well. Beginning in 2005, plaintiff received certification for intermittent FMLA leave due to her migraines, and routinely exhausted her leave each year. After her request for leave was approved by employer in 2013, plaintiff only had 48 minutes of FMLA leave remaining. Despite only having 48 minutes of FMLA leave remaining, plaintiff left work early to be hospitalized for a severe migraine. Normally, that absence would have resulted in her termination under employer's absentee policy, but plaintiff was able to obtain an exemption from the company's vice president. After receiving that exemption, several human resources managers met to discuss plaintiff's absences and noted a pattern whereby plaintiff would request FMLA leave the day before and the day after her normally scheduled off-days. The human resources managers requested that plaintiff provide recertification from her physician for a two month leave that had previously been approved, for an explanation as the pattern of her absences. Plaintiff resubmitted a certification from her doctor that explained she had migraines about 4-5 days per month lasting 1-3 days per flare up, and that the timing of the migraines was unpredictable. The two month leave was again approved, but plaintiff was terminated for two days of absence that occurred prior to that two month period of approved FMLA leave.

Plaintiff sued her employer for retaliation and interference with her use of FMLA leave, and for discrimination under the Americans with Disabilities Act ("ADA"). The district court denied defendant's motion for summary judgment on the FMLA claims, rejecting defendant's claim that its request for recertification from plaintiff, seeking an explanation of her pattern of absences, was a reasonable, non-retaliatory request. The court held that a jury could find that request for recertification to be a pretext for retaliation because the human resources managers met after plaintiff obtained the exemption from the vice president. That evidence could show that defendant became unhappy with plaintiff's use of FMLA leave, interfered with her use of leave by unreasonably requesting and denying leave, despite the explanation from her doctor about the frequency and unpredictability of plaintiff's flare-ups and then terminating her for a technical violation of employer's absentee policy after she had already been approved for FMLA leave.

***Russell v. Phillips 66 Co.*, No. 15-CV-0087-CVE-PJC, 2016 WL 1651820 (N.D. Okla. Apr. 25, 2016)**

Plaintiff worked for defendant for over 24 years prior to his termination. In the last years of his employment, he was assigned to perform various accounting functions. Plaintiff's position caused him immense stress, and he had conflicts with one of his supervisors. In September 2012, plaintiff experienced a nervous breakdown and was granted FMLA leave to address his medical condition. His leave expired in December 2012, but he did not return to work. While on FMLA leave, plaintiff's treating physician recommended to defendant that plaintiff be moved to a different position. Defendant declined to move plaintiff, but it provided him with a laptop computer and access to all open job postings. Plaintiff was unsuccessful in obtaining another position, and his employment was terminated in September 2013. Plaintiff filed suit and alleged, among many other claims, that defendant retaliated against him for taking FMLA leave. The court granted defendant's motion for summary judgment, finding that plaintiff had failed to establish a causal connection and citing the gap of nearly a year between plaintiff's FMLA leave and his termination.

***Kercher v. Reading Muhlenberg Career & Tech. Ctr.*, No. CV 15-06674, 2016 WL 7048961 (E.D. Pa. Dec. 5, 2016)**

Plaintiff, a Business Office Supervisor at the Reading Muhlenberg Career and Technology Center (RMCTC), brought suit in district court under the Family and Medical Leave Act, 29 U.S.C. § 2612(a) and §2615(a)(1)-(2), for interference, discrimination and retaliation claims against RMCTC. Plaintiff's claim alleged defendant discriminated against her while taking intermittent leave for a disability-related illness when it assigned her more responsibilities. Plaintiff was subsequently terminated after returning from leave for failing to fulfill the responsibilities. Defendant argued and the court agreed that a disability discrimination claim is not proper under the FMLA because leave was granted. The court dismissed the FMLA discrimination claim allowing plaintiff the opportunity to re-file under the relevant disability laws. Plaintiff's second claim was brought as a wrongful discharge claim under the FMLA. The court held that in order for a wrongful discharge claim to be brought under the FMLA it must be brought under an interference or retaliation theory. Plaintiff failed to do so and the court dismissed this claim as well.

Plaintiff's third and fourth claims, for retaliatory discharge and violation of the FMLA, allege that defendant retaliated against her for using FMLA leave. Defendant allegedly did so by adding responsibilities that defendant knew she could not perform, due to her disability, in order to make the case for her later termination. The court held that plaintiff provided enough facts to support her retaliation claim and denied defendant's motion to dismiss. That she was unable to perform the added duties and was discharged for this failure was sufficient facts to support a retaliation claim that her termination was ultimately a result of her exercise of her FMLA rights.

***Wells v. Retinovitrous Assocs.*, No. CV 15-5675, 2016 WL 3405457 (E.D. Pa. June 21, 2016)**

Plaintiff was a medical technician suffering from multiple sclerosis. As a result of her disease, she requested and took FMLA leave intermittently between January 2013 and October 2014. In February of 2015, plaintiff filed a lawsuit alleging, among other things, that

defendant retaliated against her in response to her requests for FMLA leave. Twenty days after filing the lawsuit, plaintiff received a verbal written warning for failing to follow management procedures. She received a second warning in March and was subsequently suspended for gross misconduct. Plaintiff received a final written warning in May 2015 and was terminated on July 10, 2015.

Plaintiff's FMLA retaliation claim was analyzed under the *McDonnell Douglas* burden-shifting framework. The parties agreed plaintiff engaged in protected activity, and suffered an adverse employment action (the court found that only her termination and not the written warnings constituted adverse actions because warnings did not cause a significant change in benefits). Plaintiff, however, argued she could prove a *prima facie* case of retaliation because there was a causal connection between her lawsuit and her termination. To demonstrate a causal connection, a plaintiff must show "either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." First, the court found that the April 2015 employment action as well as the July termination fell beyond the period typically recognized as unduly suggestive. Second, the court found that plaintiff did not dispute the underlying conduct giving rise to defendant's adverse employment actions and therefore failed to establish a pattern of antagonism. Further, plaintiff could not demonstrate that her work performance prior to the filing of her lawsuit was at the level of gross misconduct which would have warranted discipline.

Because employer terminated plaintiff for multiple policy violations, it also found that employer had demonstrated a legitimate, nondiscriminatory reason for terminating plaintiff and plaintiff failed to give the court any reason to (1) disbelieve defendants articulated reasons for termination, or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of employer's action. Therefore, defendant's motion for summary judgment was granted.

***Quattlebaum v. Boeing Co.*, No. 2:14-CV-3664-DCN-MGB, 2016 WL 3746578 (D.S.C. June 20, 2016)**

Plaintiff, a mechanic and assembler, brought an FMLA retaliation action against his former employer. Plaintiff was suffering from anxiety stemming from his relationship with his team leader. Due to this anxiety, he was experiencing anger and thoughts of harming his team leader, such as choking her or hitting her. He reported the conflict to his supervisors and to human resources. Plaintiff then met with the company's onsite clinical psychologist who referred him to a mental health clinic. Plaintiff requested and was granted FMLA leave for his anxiety. The human resource employee who approved his requested told him, "Great. I'm 100 percent behind you, and I'll be here, you know, to support and help you." Following the expiration of his FMLA leave, defendant offered plaintiff additional time off as he was not ready to return to work. His physician wrote a letter to the company informing it that plaintiff failed to attend the recommended anger management course and that he should only return to work after undergoing a "fitness to work evaluation." Despite receiving several letters about medical certifications plaintiff was supposed to submit, he never submitted any. Plaintiff was supposed to return to work on January 14, 2013, but did not return. He never requested any additional leave or any extensions to submit paperwork. Defendant terminated his employment on January 24, 2013. The court granted summary judgment for defendant because there was no evidence

that the exercise of plaintiff's rights under the FMLA was related to his termination. Specifically, the court relied on human resources' statement about supporting plaintiff through his FMLA leave. The court also looked to the fact that defendant granted him additional leave time, beyond the FMLA obligation. Further, plaintiff had requested and received FMLA leave on two previous occasions without any problem.

Even if plaintiff met his burden of proving a *prima facie* case, which he did not, the court held that plaintiff could not show the company's legitimate reason for terminating him was a pretext. Plaintiff failed to submit the necessary medical certification and he failed to report for work for several days. Accordingly, the court granted summary judgment in defendant's favor.

***Johnson v. Wal-Mart Stores E., L.P.*, No. 3-15-0485, 2016 WL 4160971 (M.D. Tenn. Aug. 5, 2016)**

Plaintiff sued alleging FMLA interference. Plaintiff also alleged she was constructively discharged from her job in retaliation for attempting to exercise FMLA rights. Employer moved for summary judgment, which the court granted.

In regard to the interference claim, when plaintiff requested FMLA leave to care for her husband, she had worked only 1,058.04 hours in the 12-month period preceding her request. As such, plaintiff was not eligible for FMLA leave and thus employer did not deny FMLA benefits to which plaintiff was entitled. Plaintiff attempted to argue that she "believed" employer cut her hours purposefully so as to disqualify her from attaining FMLA leave. The court rejected this belief as there was no record evidence that her hours actually were cut.

In regard to the retaliation claim, the court found there was no evidence of a causal connection. First, there was no evidence of statements by her managers or decision makers relating to her FMLA leave as a reason for any decisions with regard to her employment. Second, plaintiff admitted that she was not treated differently as a result of requesting FMLA leave. Third, the two coachings and one negative performance evaluation plaintiff received did not constitute adverse employment actions. Specifically, plaintiff did not receive a change in pay, position, or employment status as a result of the documents issued.

Summarized elsewhere:
***Talley v. Triton Health Sys., LLC*, No. 2:14-CV-02325-RDP, 2016 WL 4615627 (N.D. Ala. Sept. 6, 2016)**

***Hayes v. Voestalpine Nortrak, Inc.*, No. 2:14-CV-2322-AKK, 2016 WL 2587971 (N.D. Ala. May 5, 2016)**

***Reif v. Shamrock Foods Co.*, No. EDCV 15-636-VAP (SPx), 2016 WL 1171543 (C.D. Cal. Mar. 9, 2016)**

***Lance v. Bd. of Educ. of the City of Chi.*, No. 14 C 8709, 2016 WL 4417074 (N.D. Ill. Aug. 19, 2016)**

***Consedine v. Willimansett E. SNF*, No. 13-30193-MGM, 2016 WL 6774242 (D. Mass. Sept. 30, 2016)**

***Farha v. Cogent Healthcare of Mich., P.C.*, No. 14-14911, 2016 WL 795882 (E.D. Mich. Feb. 29, 2016)**

***Gardner v. Andersen Eye Assocs., PLC*, 150 F. Supp. 3d 860 (E.D. Mich. 2016)**

***Ross v. State*, No. 15-CV-3286 (JPO), 2016 WL 626561 (S.D.N.Y. Feb. 16, 2016)**

***Douglas v. City of Cleveland*, No. 14-CV-00887, 2016 WL 1110258 (N.D. Ohio Mar. 22, 2016)**

***Connearney v. Main Line Hosps., Inc.*, No. CV-15-02730, 2016 WL 6440371 (E.D. Pa. Oct. 28, 2016)**

***Deller v. Northampton Hosp. Co.*, No. CV 16-0674, 2016 WL 3405484 (E.D. Pa. June 21, 2016)**

***Sopinski v. Lackawanna Cty.*, No. 3:16-CV-00466, 2016 WL 6826166 (M.D. Pa. Nov. 18, 2016)**

***Bellisle v. Landmark Med. Ctr.*, No. CV 14-266-M-LDA, 2016 WL 4987119 (D.R.I. Sept. 15, 2016)**

***Wheeler v. Jackson Nat'l Life Ins. Co.*, 159 F. Supp. 3d 828 (M.D. Tenn. 2016)**

***Moore v. Lowe's Home Ctrs., LLC*, No. 2:14-CV-01459-RJB, 2016 WL 3960025 (W.D. Wash. July 22, 2016)**

i. Temporal Proximity

***Menekse v. Harrah's Chester Casino & Racetrack*, 649 F. App'x 142 (3d Cir. 2016)**

Plaintiff brought suit against her employer, claiming unlawful retaliation for taking FMLA leave. Plaintiff had been disciplined for missing days of work (she had not been approved for a requested leave) and being outside of her work area, and had also recently threatened a coworker. She was terminated one week after she had requested FMLA leave. Employer stated that plaintiff was not terminated for requesting FMLA leave but instead because she had threatened a coworker. Plaintiff argued retaliation was evident because she was terminated shortly after requesting leave under the FMLA, but the court found that she had failed to establish pretext as she could not show that employer's reason for her termination "was so weak as to be disbelieved." The district court granted defendant's summary judgment motion and plaintiff appealed.

On appeal, plaintiff argued that pretext was evident because: (1) her statement was not a threat; (2) the temporal proximity between her request for leave and her termination was sufficiently small; and (3) in the past, employer had repeatedly denied her FMLA requests for leave. The Third Circuit found that plaintiff's personal view as to how her statement was interpreted did not establish pretext and that temporal proximity and repeated denials of FMLA

requests, without more, also could not establish pretext. Thus, the Third Circuit affirmed the judgment of the district court.

***Law v. Kinross Gold U.S.A., Inc.*, 615 F. App'x 645 (9th Cir. 2016)**

Plaintiff filed suit against his former employer alleging that he was wrongfully denied FMLA leave for a serious health condition. The district court granted summary judgment in favor of defendant, and the court of appeals affirmed. The court of appeals agreed that plaintiff failed to establish that he was eligible for FMLA leave because he never provided his employer with the necessary forms to substantiate his application for leave. Furthermore, the court of appeals concluded that plaintiff's reliance on temporal proximity between his request for FMLA leave and termination was insufficient to overcome defendant's evidence that it had intended to terminate plaintiff's employment long before plaintiff's request for leave. In short, the timing of plaintiff's request for FMLA leave and defendant's notice of termination was mere coincidence.

***Montoya v. Hunter Douglas Window Fashions, Inc.*, No. 14-1491, 2016 WL 285057 (10th Cir. Jan. 25, 2016)**

Plaintiff was a fabrication supervisor with defendant, Hunter Douglas Window Fashions, Inc. Plaintiff appealed the district court's grant of summary judgment to her employer on her claim of FMLA retaliation. Under the Sixth Circuit's standard, a plaintiff is required to make a *prima facie* case of retaliation. If plaintiff makes a *prima facie* case, defendant has to offer a legitimate, non-retaliatory reason for the termination. The burden then shifts back to plaintiff to show the reason given is pretextual. Plaintiff alleged she was fired in retaliation for requesting FMLA leave. Plaintiff first took three weeks of FMLA leave in 2009 and requested additional FMLA leave in 2012, a request that was denied by her insurance company. Plaintiff was fired roughly two weeks after her request. Defendant claimed that plaintiff frequently spent working hours on personal business to the point where she was negligent in her duties. The court here held that employer offered a legitimate reason for plaintiff's termination and that plaintiff failed to disprove it as pretext. Plaintiff could only point to the "temporal proximity" between her FMLA request and the termination of employment, which by itself was insufficient to "raise a genuine issue of material fact," and to her personal opinion that employer "subtly discouraged" FMLA leave, which was inadmissible evidence. The Sixth Circuit Court of Appeals affirmed the district court's judgment that plaintiff failed to meet her burden of creating a "genuine issue of material fact as to pretext" for her FMLA retaliation claim.

***Brisk v. Shoreline Found., Inc.*, No. 15-13028, 2016 WL 2997122 (11th Cir. May 25, 2016)**

The Eleventh Circuit affirmed the order of the District Court for the Southern District of Florida granting summary judgment to plaintiff's employer for plaintiff's claims of FMLA retaliation and interference. Plaintiff's claims for FMLA retaliation were based on his demotion upon return from FMLA leave and discharge four months later. The Eleventh Circuit agreed with the district court's determination that plaintiff's demotion for failing to give employer its own bank account password was a legitimate non-retaliatory reason, and there was no causal connection with plaintiff's discharge because the four-month period between the leave and discharge was tenuous, and plaintiff's poor performance was an intervening cause.

The Eleventh Circuit affirmed the district court's summary judgment granting plaintiff's interference claim, because one was not plead in the complaint, and plaintiff never sought leave to amend the complaint. The Eleventh Circuit also noted that a plaintiff's complaint cannot be amended through argument in a brief opposing summary judgment.

***Nettles v. Hytrol Conveyor Co.*, No. 3:15-CV-00123-KGB, 2016 WL 6089873 (E.D. Ark. Sept. 9, 2016)**

Plaintiff filed suit against defendant, claiming she was fired for taking FMLA leave. The undisputed evidence showed that plaintiff had requested and was granted FMLA leave, including an extension that she requested, and returned to work at her same job without restriction. Two months after she went on her FMLA leave and 11 days after her return to work, plaintiff committed a serious safety violation that could have caused her death or serious bodily injury. The individual who terminated plaintiff's employment was not aware that plaintiff had recently taken FMLA leave when he terminated her.

Plaintiff asserted she could show causation between her use of FMLA leave and her termination through the use of comparators and temporal proximity. With regard to the alleged comparators, the court found they were not similarly situated to her in all material respects. With regard to temporal proximity, the court noted that the interval is appropriately measured from the time employee went on leave rather than the time the leave ended. While questioning whether an almost two-month interval was too long to support a finding of causation, the court concluded that even if plaintiff satisfied the requirements for a *prima facie* case, she failed to meet her burden of showing pretext for her FMLA retaliation claim.

***Johnson v. Golden Empire Transit Dist.*, No. 1:14-CV-001841-JLT, 2016 WL 3999996 (E.D. Cal. July 25, 2016)**

On December 26, 2013, plaintiff, a bus driver, suffered a knee injury while helping a customer. Employer's doctor took plaintiff off work for two weeks to recover; although there was a request made for plaintiff to return to a modified duty assignment, which would accommodate the knee injury. In the interim, plaintiff received a fifth disciplinary action, which under employer's policy would result in employment termination. This fifth disciplinary action arose out of events that took place on December 26—the same day that plaintiff injured her knee. The disciplinary action noted that plaintiff parked her bus in front an apartment complex (that of her fiancé's sister) to conduct activities of a personal nature (eat lunch and smoke a cigarette). Employer alleged that plaintiff left the bus unattended for over an hour. Following a disciplinary proceeding, plaintiff's employment was terminated under employer's policy that five policy violations in one year will result in termination.

Plaintiff sued employer alleging FMLA interference and retaliation. Employer moved for summary judgment. In regard to plaintiff suing her supervisor individually, the court noted that individuals may be found liable and the determination of such liability is based on the same test employed under the Fair Labor Standards Act. The court granted summary judgment finding that the supervisor was not an employer. At most, the evidence demonstrated that the supervisor submitted the final disciplinary action to a manager and it was that manager who made the ultimate decision to terminate plaintiff after finding plaintiff committed five violations in a

12-month period. Further, the evidence did not show that the supervisor was responsible for hiring or firing plaintiff, that he supervised the day-day-operations for bus drivers, determined plaintiff's rate of pay, or was responsible for maintaining plaintiff's employment records.

In regard to employer's liability, there was no dispute that plaintiff took protected FMLA leave and she suffered an adverse employment action. Employer argued that plaintiff could not establish that the protective leave was a "negative factor" in the decision to terminate plaintiff's employment (i.e., causal connection). In this regard, employer argued that four of the five violations occurred up to eight months before the FMLA leave, and thus it did not have to cease pursuing a disciplinary course of action that began before plaintiff took leave. The court noted that in regard to one pre-leave action, plaintiff was told she could have the disciplinary action removed if she attended a safety meeting. But once plaintiff got injured, plaintiff could not take the make-up safety meeting. In addition, the evidence suggested that employer was no longer contending that plaintiff left the bus unattended, which was the basis for the fifth violation. Employer did argue that there was no liability because plaintiff would have been unable to return to work following knee surgery. The court found this argument to be irrelevant because the issue of whether to restore plaintiff had no bearing on whether employer interfered with the taking of protected leave. Accordingly, given the disputed facts and the close temporal proximity between the leave and the termination decision, summary judgment was denied.

***Percoco v. Lowe's Home Ctrs., LLC*, No. 3:14-CV-01122-VLB, 2016 WL 5339569 (D. Conn. Sept. 22, 2016)**

Plaintiff, a human resources manager, was terminated by employer and sued for FMLA interference and retaliation. The district court granted employer's motion for summary judgment on both FMLA claims, though an appeal has been filed to the Second Circuit. The district court found that temporal proximity sufficed to raise a material fact dispute at the *prima facie* stage, but that even under the plaintiff-friendly motivating-factor standard employer had indisputedly fired plaintiff for delaying a complaint from getting to employee relations investigators, unrelated to any FMLA-qualifying leave she took. The district court held that, because her retaliation claim failed, her interference claim necessarily failed as a matter of law as well because without prejudice from her retaliation she could not show interference with an FMLA benefit.

***Clark v. Stop & Shop Supermarket Co.*, No. 3:15-CV-00304 (JCH), 2016 WL 4408983 (D. Conn. Aug. 16, 2016)**

Plaintiff, a full-time produce clerk, sued his grocer employer for both retaliation and interference under the FMLA (along with discrimination and failure-to-accommodate claims under the ADA). He claimed that employer terminated him five months after the expiration of his FMLA-protected leave. During this leave, a doctor informed employer that plaintiff could return with restrictions. First, plaintiff could only work a single night shift per week. Before taking FMLA leave, plaintiff generally worked all night shifts from 1:30 P.M. to 10:00 P.M. (though he was officially scheduled for 3:00 P.M. to midnight). Second, plaintiff had to transfer to a store closer to his home. But when employer failed to meet his restrictions, plaintiff did not return. According to employer, plaintiff abandoned his job because he failed to return after his leave expired. And though a full-time produce clerk position opened in the interim, employer

argued that it did not meet plaintiff's restrictions. Employer classified its positions such that some full-time clerks worked only nights (i.e. 3:00 P.M. to midnight). The position that opened in the interim was such a position. It was closer to plaintiff's home, but it did not meet his time restriction. Plaintiff would have had to work a schedule that was the same as his pre-leave schedule from 3:00 P.M. to midnight. So employer did not notify plaintiff about the opening. Nevertheless, plaintiff argued that no position required this schedule. Employer therefore failed to restore plaintiff to his former position or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment as required by the FMLA.

In consideration of employer's motion to dismiss, the district court initially explained that the Second Circuit analyzes FMLA retaliation claims under the *McDonnell Douglas* burden-shifting framework. Once a plaintiff makes a *prima facie* case, the burden of production shifts to employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. If employer produces evidence of such a reason, plaintiff must show that employer's reason is merely pretext for discrimination. Further, the court added that "close temporal proximity" between an employee's exercise of his FMLA rights and his termination "can give rise to an inference of retaliation." But the five-month period in plaintiff's case was too long. The court noted that the Second Circuit has found that a three-month gap is insufficient. Given the lack of any other evidence giving rise to an inference of retaliation claim, plaintiff could not establish the fourth element of his *prima facie* case for FMLA retaliation. The court dismissed plaintiff's retaliation claim.

The court, however, did not dismiss plaintiff's interference claim. Under the FMLA, an employee has the right "on return from [FMLA] leave . . . to be restored" to his former position or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." The Second Circuit, the court explained, recently clarified that to prevail on an FMLA interference claim, a plaintiff establish: (1) his eligibility under the FMLA, (2) FMLA coverage of his employer, (3) an entitlement to leave, (4) that he gave proper notice of his intention to take leave, and (5) that employer denied him the benefits to which he was entitled. In plaintiff's case, the fifth element was at issue. Plaintiff argued that employer failed to restore him to his former position. Notes from plaintiff's doctor, which released plaintiff to return to work during days only, arguably requested that plaintiff be reinstated to his former position. Also, plaintiff argued that employer failed to restore him to an equivalent position, despite being medically released to work. Plaintiff claimed that a position that met his restrictions existed. Because of a fact issue "relevant to the resolution of plaintiff's interference claim" (i.e. whether plaintiff's former job was open, how employer classified its positions, and the existence of an equivalent position), the court refused to dismiss the FMLA interference claim.

***Palmer v. Liberty Mut. Grp.*, No. 3:14-CV-00953-WWE, 2016 WL 4203375 (D. Conn. Aug. 9, 2016)**

Insurance claims specialist who alleged she was terminated for taking FMLA leave brought FMLA retaliation and interference claims against her employer. The court awarded summary judgment to employer on the interference claim because plaintiff did not allege that she was denied any FMLA benefits to which she was entitled. The court denied summary judgment on the retaliation claim. Although plaintiff had a history of poor performance, plaintiff's

performance improved to the point where she received a raise and bonus. A month after receiving the raise and bonus, she notified employer of her need for FMLA leave. When employer learned of plaintiff's need for FMLA leave, it withdrew plaintiff's authority over her files. When plaintiff returned to work, she received multiple negative performance reviews and, three months later, was terminated for poor performance.

Although employer proffered plaintiff's poor performance as a legitimate, non-discriminatory reason for plaintiff's termination, the brief interlude between plaintiff's return to work and her termination created an issue of fact as to whether a causal connection existed between plaintiff's taking FMLA leave and her termination. The court concluded that a factfinder could infer discrimination based on plaintiff's presentation of a *prima facie* case and the apparent falsity of employer's explanation for plaintiff's termination.

***Jones v. Gulf Coast Health Care of Del., LLC*, No. 8:15-CV-702-T-24EAJ, 2016 WL 659308 (M.D. Fla. Feb. 18, 2016)**

Former activity director for a skilled nursing home alleged FMLA interference and retaliation against the nursing home. Defendant nursing home filed a motion for summary judgment on both claims which the District Court for the Middle District of Florida granted. An appeal was filed to Eleventh Circuit on March 15, 2016.

Employee applied for and was granted FMLA leave for shoulder surgery from September 26, 2014 through December 18, 2014. On December 18, 2014, employee's doctor reported that employee would not be able to return to work on December 19, 2014 because he required additional shoulder therapy. Employee asked employer if he could return to work on light duty and employer told him that it required a fitness for duty certificate in order to return to work, which he was unable to obtain. Employer then granted employee an additional 30 days of non-FMLA medical leave until January 18, 2015. While on FMLA leave, employee twice visited Busch Gardens theme park and posted pictures on his Facebook page. During his 30 day non-FMLA medical leave, employee visited the island of St. Martin for three days and again posted pictures to his Facebook page. In January 2015 employee completed the FMLA fitness for duty certification and returned to work on January 19th. When he returned he was confronted about the Facebook pictures and employer suspended him pending an investigation. His employment was terminated on January 23rd.

The court determined that employee's interference claim failed because he forfeited his rights to be reinstated under the FMLA when he failed to return to work on December 19th and he was given his requisite 12-week leave. Employee argued that other similarly situated employees were not required to produce a fitness for duty certification, but the court determined that he failed to show that the other employees were similarly situated and found that employer had a uniform policy. Regarding the retaliation claim, the court noted that in order to prevail, employee must prove that (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment decision; and (3) the decision was causally related to the protected activity. Only the third prong was at issue. The court outlined that in the Eleventh Circuit, employee only has to demonstrate that "the protected activity and the adverse action were not wholly unrelated." It continued, stating that an employee can satisfy this element by producing sufficient evidence that employer became aware of the protected conduct and that there was a close temporal

proximity between this awareness and the adverse employment action. Employee argued that the temporal proximity was measured between the *end* of his FMLA leave and the dates of his suspension and termination. Employer argues that it is instead measured from the *beginning* of his FMLA and the date of termination. The court agreed with employer and determined that four months was too long to be considered "very close" temporal proximity. The court also pointed out that employee was suspended for abusing his FMLA leave, not for taking it.

***Grant v. Hosp. Auth. of Miller Cty.*, No. 1:15-CV-15 (WLS), 2016 WL 5791546 (M.D. Ga. Sept. 30, 2016)**

Plaintiff first began working as a Certified Nursing Assistant at the inpatient and outpatient non-profit medical facility operated by defendants after leaving high school and over many decades, worked his way up to housekeeping supervisor. The district court granted summary judgment to employer on plaintiff's interference claim based on employer's alleged failure to provide general and specific notice of plaintiff's FMLA rights because plaintiff admitted he received notice of his FMLA rights in the employee handbook and on an FMLA poster. The district court also found that because plaintiff was removed from work by his treating physician for more than 12 weeks, intermittent leave was not an option. The district court also noted that employer's failure to continue to pay plaintiff after 22 weeks of paid leave did not amount to harassment, and because plaintiff was not entitled to be restored to his position beyond the 12-week protected period, his interference claim for failure to restore him to his position was due to be denied. The district court also dismissed plaintiff's retaliation claim because the date of plaintiff's termination was too attenuated from both the date the leave began (over five months) and the date the 12-weeks of FMLA leave expired (almost three months).

***Ciesielski v. JP Morgan Chase & Co.*, No. 14 C 10073, 2016 WL 3406399 (N.D. Ill. June 21, 2016)**

Plaintiff sued his employer for retaliation under the FMLA. Specifically, plaintiff argued that he was terminated for requesting FMLA leave. Although plaintiff could prove retaliation under a direct or indirect method of proof, plaintiff chose the direct method only. Under the direct method, the court explained, a plaintiff must show: (1) a protected activity, (2) an adverse employment action, and (3) a causal connection between them. To do so, a plaintiff may rely on either direct evidence (such as an admission by the decision-maker) or circumstantial evidence, which would allow for an inference of retaliation. But, the court noted that performance-improvement plans and negative-performance reviews do not constitute an adverse employment action. In plaintiff's case, the court explained that temporal proximity and progressively worse reviews did not prove causation. Temporal proximity or suspicious timing is rarely sufficient, without more, to find retaliation. This is especially true in plaintiff's case where the decision-maker did not know about plaintiff's potential need for FMLA benefits when she placed plaintiff on a PIP. Likewise, PIPs and increasingly negative performance reviews are not sufficient to prove retaliation. Nor are they adverse employment actions. Also, less-than-positive feedback and increasingly harsher and voluminous criticism do not support an inference of retaliation. In addition to the evidence of plaintiff's longstanding pattern of poor performance, the court noted that plaintiff failed to improve after the PIP. While it might be argued that PIPs and negative reviews leading up to a termination could constitute evidence of discrimination or pretext, this was not the case with plaintiff.

***Bush v. Compass Grp. USA, Inc.*, No. 3:14-CV-167-DJH, 2016 WL 3827546 (W.D. Ky. July 13, 2016)**

Plaintiff was a chef manager for his employer, a food service provider. Plaintiff sent an e-mail to several employer managers stating that he had been diagnosed with a progressive and treatable, but uncurable, chronic medical condition and he wanted to transfer to another position that was less physically demanding, but felt his direct supervisor would oppose and try to prevent the transfer. Plaintiff was denied the position because he failed to notify his immediate supervisor, as part of the "initial prescreen" stage of the application process. Plaintiff applied for a total of 10 positions, none of which he received for various reasons. Because of his progressing medical condition, plaintiff became increasingly restricted in his ability to perform his job and stated he was no longer able to do the job. Employer began moving forward to fill plaintiff's position. Employer's human resources representative recommended that plaintiff be sent paperwork for a leave of absence, if he wanted/needed it, and that if this continued for more than six to eight weeks, employer would look at enhanced severance with a release of claims. The following day, plaintiff abruptly left work and called later in the day to say he was going to the hospital and was hospitalized for the next week, and received outpatient treatment for several weeks thereafter. Plaintiff was granted leave, but when he was released to return, his chef manager position had been filled. Plaintiff applied for another job for which he lacked the necessary experience. Less than a month later, plaintiff was notified he was "laid off due to lack of work" but "eligible for rehire."

Because plaintiff's complaint failed to state an FMLA interference claim, the district court did not consider the parties' arguments regarding whether plaintiff should have been reinstated to his position upon return from FMLA leave. The court held that plaintiff established that he exercised a protected right and suffered an adverse employment action. However, despite that, plaintiff was discharged approximately one month after returning to work from FMLA leave, because the wheels were in motion to discharge plaintiff prior to his taking FMLA leave, including the recommendation to offer him severance pay within six to eight weeks. Because the human resources representative continued to help plaintiff look for a job after his FMLA leave ended, the court could not conclude that the timing of the discharge established the causal connection required to make out a *prima facie* case.

***Ross v. Bayloff Stamped Prods. Detroit, Inc.*, No. 14-14324, 2016 WL 3743131 (E.D. Mich. July 13, 2016)**

Plaintiff worked as an operations manager for defendant and was responsible for overseeing several plant locations. In 2014, plaintiff was diagnosed with cancer and took time off for treatment. Defendant did not provide plaintiff with FMLA leave at the time, but it did approve intermittent FMLA leave in August 2014 for plaintiff's chemotherapy treatments. Two days after approving the intermittent leave, defendant informed plaintiff that, based on an outside consultant's review of the company's financial situation, plaintiff's role would be changed and he would have to resign immediately or take a lesser role in the company. Plaintiff did not officially accept either option, but he continued to report to work. A week later, defendant terminated plaintiff for failing to report to work on a Saturday, a requirement of the new, lesser position offered to plaintiff. Plaintiff filed suit, alleging FMLA retaliation and interference. Both parties filed summary judgment motions, and the court denied both, finding that the

circumstances surrounding plaintiff's demotion and subsequent termination raised a sufficient issue of material fact that should be decided by a jury. The court noted that plaintiff was able to present evidence that the outside consultant had not recommended his demotion or termination, and that the timing between defendant's approval of leave and plaintiff's termination was relevant to both the interference and retaliation claims.

***Rutherford v. Country Fresh, L.L.C.*, No. 15-11700, 2016 WL 2998105 (E.D. Mich. May 25, 2016)**

Plaintiff brought claims against his employer for, among other allegations, discrimination and retaliation under the FMLA. Plaintiff, who worked as a sales representative, was terminated by defendant the day he returned from a medical leave because, during his leave, defendant downsized plaintiff's department and eliminated his position. Defendant moved for, and the district court granted, summary judgment. The court held that plaintiff failed to establish all four elements of the *McDonnell-Douglas* burden-shifting test because he did not present any evidence that suggested his termination was based on his medical leave. The court found that even though plaintiff was discharged on the day he returned to work, the temporal proximity between leave and discharge, without more, was not sufficient to establish the pretext required under *McDonnell-Douglas*. Further, even if a *prima facie* case was made, plaintiff failed to demonstrate why his employer's explanation for his termination was pretextual. Therefore, the court granted summary judgment for defendant on plaintiff's FMLA claim.

***Levaine v. Tower Auto. Operations USA I LLC*, No. 15-CV-11084, 2016 WL 2894482 (E.D. Mich. May 18, 2016)**

Plaintiff brought suit against his former employer under the FMLA for interference and retaliation after plaintiff was terminated from his production worker position for threatening his supervisor in violation of the company's anti-harassment policy. The district court subsequently granted summary judgment in favor of defendant on both counts. Plaintiff alleged that he was fired after he requested FMLA leave. But the court held that plaintiff did not properly inform human resources of his FMLA absence prior to the start of his shift (as required by his union labor agreement), so plaintiff could not make out a *prima facie* case of FMLA interference. Additionally, plaintiff could not satisfy the causation element for his retaliation claim because he was fired for threatening his supervisor and the temporal proximity between plaintiff's FMLA request and termination could not overcome the company's legitimate reason for terminating plaintiff's employment.

***Jaskiewicz v. St. Mary's of Mich.*, No. 15-CV-10265, 2016 WL 627730 (E.D. Mich. Feb. 17, 2016)**

After the court granted summary judgment on plaintiff's FMLA retaliation claim, plaintiff filed a motion for reconsideration. The court denied plaintiff's motion. Plaintiff, a nurse, injured her back. Her physician released her to work with a restriction that she not lift anything over 20 pounds. She sought intermittent FMLA leave, hoping other nurses could perform her lifting duties when necessary. Defendant hospital denied intermittent leave because lifting was an essential function of the position and, instead, permitted her to take a full 12-week leave under the FMLA. Plaintiff then took an additional year of personal leave. When she was

thereafter unable to return to her position because of her lifting restriction, and a new restriction that she not work longer than eight hours per day, defendant terminated her employment.

In her motion for reconsideration, plaintiff claimed the court committed two palpable defects in its order granting summary judgment. First, she claimed the court erred when applying Sixth Circuit law governing when a temporal nexus between protected activity and an adverse employment action can, without more, establish causation. Plaintiff contended a temporal nexus existed because, during her personal leave, she applied for other jobs with defendant and was rejected. On her applications, she reasoned, she stated she was on medical leave for a period, so there was a temporal nexus between the time the decision makers who chose not to hire her discovered she had been on FMLA leave and the time they rejected her application. The court determined, however, the decision makers for these other positions never knew she had been on FMLA leave and the mere mention of a medical leave on an application was insufficient for them to know she had engaged in protected activity. Plaintiff also claimed the court incorrectly evaluated her claims related to defendant's decision to deny her intermittent FMLA leave. But the court held that her doctor's restrictions rendered her unable to perform the duties of her position—so intermittent leave would not have helped her. In March 2016, plaintiff appealed the court's order denying reconsideration to the Sixth Circuit. As of the time of this writing, the appeal is pending.

***Jaskiewicz v. St. Mary's of Mich.*, No. 15-CV-10265, 2016 WL 465481 (E.D. Mich. Feb. 8, 2016)**

Plaintiff, who had worked as a registered nurse for defendant's nonprofit hospital, filed suit against defendant alleging that her employment was improperly terminated in violation of the FMLA. Plaintiff first hurt her back in 2011 when she suffered a herniated disk, and later reinjured it in April 2013 when she was lifting a box at home. Plaintiff requested an accommodation due to her back issues, but defendant denied her request and instead advised plaintiff to go out on FMLA leave. Plaintiff went out on FMLA leave and began taking personal leave when her FMLA leave ended because she was still unable to work without an accommodation. Plaintiff thereafter requested additional accommodations from defendant in October 2013, which defendant again denied. Defendant then informed plaintiff that she should seek a new position with defendant. For the following 10 months, plaintiff applied for roughly three other positions with defendant, but for a variety of proffered reasons, plaintiff was not selected. Then, on August 12, 2014, defendant issued plaintiff a letter stating that plaintiff had exhausted all of her leave and, as a result, her employment was being terminated.

Defendant moved for summary judgment on plaintiff FMLA claim, which the district court granted. The court reasoned that plaintiff could not establish a *prima facie* case of FMLA retaliation because the adverse employment action was not sufficiently connected to her FMLA leave. The only connection between plaintiff's protected activity and her termination was temporal proximity, which in this case, was not sufficiently strong. Moreover, plaintiff did not plead an "FMLA interference" claim, so her assertions that defendant did not adequately apprise her of her FMLA rights was irrelevant.

***Disbrow v. Oticon, Inc.*, No. 4:15 CV 308 CDP, 2016 WL 427946 (E.D. Mo. Feb. 4, 2016)**

Plaintiff, a technical support audiologist, alleged that her employer violated the FMLA in retaliation for taking leave due to a back injury. Plaintiff had been working a reduced schedule since returning from maternity leave when her employer requested that she resume a 40-hour work week. After informing her employer that she could not find suitable childcare, plaintiff was given an additional six additional months before she would be required to return to full-time work. About six weeks before she was to return to full-time work, plaintiff told her supervisor that she would be going on vacation near the end of her leave. Employer had approved a Monday through Wednesday vacation schedule but denied plaintiff's request for two additional vacation days, Thursday and Friday. About one month prior to her scheduled return, plaintiff went out on disability leave for one week, for which she was only able to provide a doctor's note to support three days. During both weeks that plaintiff was out, first on disability and then on vacation, she did not have authorization or a doctor's note for Thursday and Friday. When plaintiff reported for work after her vacation, she was fired for insubordination and unexcused absences.

The district court granted employer's motion for summary judgment, finding that plaintiff failed to make a *prima facie* case that her discharge was pretextual because she did not present any evidence for a reasonable jury to infer that there was a causal connection between her use of FMLA leave and her termination more than one month later. The court noted that Eighth Circuit courts do not use a "definitive line" when determining temporal proximity, but rather look at when employer first learned of the request for FMLA leave and discharge, not when the leave occurs.

***Fuentes v. Cablevision Sys. Corp.*, No. 14-CV-32 (RRM) (CLP), 2016 WL 4995075 (E.D.N.Y. Sept. 19, 2016)**

Plaintiff was an Inbound Retention Representative for a company that provided cable, internet and phone services to residential and business customers. Plaintiff took FMLA leave for one week following the birth of his child, and on the day he returned, his team leader met with him to discuss performance issues on six recorded customer calls. The same day, plaintiff's supervisor made the decision to terminate plaintiff's employment and the following day, prepared a termination request. Plaintiff claims that three weeks later he requested another week of FMLA leave, but while he was out, he was notified that he was sent a letter to contact his employer to explain his absence. When plaintiff called and notified the human resources coordinator he was on FMLA leave, he was told that he must return to work the following day, before the expiration of the week of leave he allegedly requested. Plaintiff worked for approximately three hours on the day he returned to work, then was terminated for mishandling calls the prior month and possible job abandonment was also discussed. The district court denied plaintiff's and employer's motions for summary judgment, finding that the temporal proximity of the initial termination decision and the implementation of the decision, coupled with the discussion of job abandonment related to days for which plaintiff alleged to have requested FMLA leave, and questions about why plaintiff's calls were selected for review while he was out of FMLA leave raised genuine issues of material fact as to both the interference and retaliation claims.

***Padilla v. Yeshiva Univ.*, No. 15-CV-9203 (VEC), 2016 WL 6584485 (S.D.N.Y. Nov. 7, 2016)**

Plaintiffs, two carpenters terminated during a reduction in force, failed to state a plausible claim for FMLA discrimination and retaliation. Plaintiffs' first amended complaint alleged that their terminations were within a few weeks of requesting FMLA leave, but temporal proximity alone is insufficient, and employer had previously granted FMLA leave. The first amended complaint also alleged that employer gave inconsistent explanations for the terminations and retained other employees but failed to include sufficient details to state a plausible claim. Plaintiffs' second amended complaint alleged that the inconsistent explanations for the terminations were budget cuts and a merger, but the court said these were not sufficiently inconsistent to state a claim. Nor were the second amended complaint's allegations that a supervisor yelled at plaintiffs for missing work, even for illness, sufficient to state a plausible claim for relief.

***Gonzalez v. Carestream Health, Inc.*, No. 12-CV-6151-CJS, 2016 WL 2609808 (W.D.N.Y. May 6, 2016)**

Plaintiff filed suit alleging that employer discharged him in retaliation for taking FMLA leave. Employer argued that employee was discharged solely due to performance deficiencies. In order to plead a case of retaliation under the FMLA, a plaintiff must plead that: "(1) he exercised rights protected under the FMLA; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent." The court analyzed the retaliation claim under the *McDonnell Douglas* burden shifting analysis. Defendant argued that plaintiff failed to prove the first prong because he did not complete any FMLA forms. The court rejected this argument because the implementing regulations do not require a person to specifically cite the Act in order to request FMLA leave. The court found that plaintiff provided sufficient information to show that he was off of work for an FMLA-qualifying event. The court noted that the threshold for establishing a *prima facie* case is quite low and that plaintiff met the threshold. Plaintiff attempted to rely on temporal proximity to rebut defendant's legitimate reasons for discharge and the fact that comments related to his leave of absence were noted in documentation. The court rejected this argument because the first disciplinary action did not occur until six months after plaintiff returned from leave and the termination did not occur for another two months after the initial discipline. The court also noted that the comments in the documentation were not sufficiently connected to the adverse employment actions to rebut the legitimate reasons for discharge. The court granted defendant's motion for summary judgment.

***Jones v. Nev.*, No. 2:14-CV-01930, 2016 WL 4707987 (D. Nev. Sept. 7, 2016)**

Plaintiff, the director of continuing education for a university dental school, sued defendant university for reassigning him to an assistant professor position three months after he took FMLA leave. The district court in Nevada granted defendant summary judgment. It found plaintiff could not establish a causal link between his FMLA leave and job reassignment by relying only on temporal proximity. It also found defendant had established it would have made the same decision regardless of plaintiff's FMLA leave because he had received unfavorable performance evaluations, acted unprofessionally and could be removed without cause from his position.

***Lightner v. CB&I Constructors, Inc.*, No. 14-CV-2087, 2016 WL 6693548 (S.D. Ohio Nov. 14, 2016)**

Plaintiff was a long term employee in the construction and solid waste industries. Defendant's motion for summary judgment regarding plaintiff's interference claim was granted due to plaintiff's failure to allege that defendant ever denied or otherwise interfered with plaintiff's rights under the FMLA. Defendant's motion for summary judgment on plaintiff's retaliation claim was denied. Plaintiff's furlough merely two business days after notifying defendant that he might need to take medical leave was sufficient evidence to submit to a fact finder to determine whether there was a causal connection between plaintiff's termination and his notifying defendant of his intent to exercise his FMLA rights. The fact that plaintiff's position was the only furloughed position, that defendant failed to produce any documentation discussing the need to eliminate this position or any other position, that defendant never recommended that other positions be eliminated, that defendant posted a listing of plaintiff's position, and that plaintiff's work performance was uniformly good to excellent supported the view that the elimination of plaintiff's position was a pretext.

***Connearney v. Main Line Hosps., Inc.*, No. CV-15-02730, 2016 WL 6440371 (E.D. Pa. Oct. 28, 2016)**

Plaintiff sued her former employer for retaliation under the FMLA. In response to employer's motion to dismiss, the court explained that plaintiff must make a *prima facie* case of retaliation: (1) she invoked her FMLA right to leave; (2) she suffered an adverse employment action; and (3) the adverse action was causally connected to her invoking her right to FMLA leave. Plaintiff must present sufficient evidence to create an inference that a causal link exists between her FMLA leave and her termination. Temporal proximity alone can create an inference of causality and defeat a motion for summary judgment when it is unduly suggestive. This can be measured by the time between either the start or end of the leave (i.e. protected leave) and the adverse action. The court recognized that there is "no bright line rule as to what constitutes unduly suggestive temporal proximity." Indeed, the Third Circuit has been "reluctant to infer a causal connection based on temporal proximity alone." So to determine whether a causal link exists, courts must use a "careful eye to the specific facts and circumstances encountered." And where the temporal proximity is not unusually suggestive, courts must ask "whether the proffered evidence, looked at as a whole, may suffice to raise the inference." That an employee was terminated shortly after she took FMLA leave for events occurring before she took leave is not unduly suggestive of causation.

In plaintiff's case, while it may be successfully argued that seven days is unduly suggestive, the circumstances surrounding plaintiff's termination rule it out. The court explained that plaintiff's termination, seven days after returning from leave, is not unduly suggestive because the reasons for termination arose before her leave. Plaintiff requested and took leave after she allegedly falsified records; after she was removed from the schedule pending an investigation; and after the supposedly pre-textual investigation started. Furthermore, plaintiff's claim that employer conducted an incomplete and biased investigation into her alleged wrongdoing does not explain how her subsequent FMLA leave is related to her termination. The court therefore concluded that there was no evidence (e.g., emails, documents, or testimony) suggesting that plaintiff's termination was connected to her FMLA leave.

***Darby v. Temple Univ.*, No. CV 15-4207, 2016 WL 6190560 (E.D. Pa. Oct. 24, 2016)**

Plaintiff employee worked for defendant university as a housekeeper. The case revolved around three incidents and the University's response to them. In the first two incidents, Muslim employees allegedly victimized plaintiff, a Baptist. Plaintiff was diagnosed with depression following the second incident and took FMLA leave. While on FMLA leave and the day after requesting an extension of his FMLA leave, he encountered a University employee in public who claimed plaintiff threatened him. The University fired plaintiff following the public incident between plaintiff and the University employee. Plaintiff filed suit against the University asserting multiple claims, including a claim for retaliatory discharge under the FMLA. Defendant moved to dismiss the FMLA claim. The court denied the motion to dismiss reasoning that the complaint plausibly alleged retaliation because plaintiff was fired immediately after requesting an extension of his FMLA leave. The court found defendant's argument that it willingly allowed plaintiff to take FMLA leave by twice approving his requests before unpersuasive. The court also rejected defendant's reliance on the public incident, noting that plaintiff argued the incident was a pretense for his discharge and other employees who were not on FMLA leave also made threats but were not fired. The court found this was enough to state a claim.

***Darby v. Temple Univ.*, No. 15-4207, 2016 WL 3762742 (E.D. Pa. July 12, 2016)**

Plaintiff alleged a coworker inappropriately touched his "left buttock." He sought and received FMLA leave due to his mental distress about the incident. He also claimed he suffered depression, anxiety, insomnia, high blood pressure, and heart palpitations because of the incident. Plaintiff alleged that when he confronted the man who allegedly touched him,the man offered no response and then "falsely claimed to [defendant] that [p]laintiff had threatened him." Upon plaintiff's return from FMLA leave, defendant investigated and ultimately sent a termination letter to plaintiff indicating he had violated defendant's rules of conduct due to his threatening behavior. The court granted defendant's motion to dismiss the FMLA claim because, even with a temporal proximity, plaintiff did not allege sufficient facts showing there was a causal connection between his exercise of FMLA rights and his termination.

***Kunsak v. Wetzel*, No. CV 15-1648, 2016 WL 6601574 (W.D. Pa. Nov. 7, 2016)**

Plaintiff, a former employee of the Pennsylvania Department of Corrections ("DOC") brought an action claiming retaliation under the FMLA, pursuant to 29 U.S.C. § 1210, against various officials of the DOC. Defendants moved to dismiss, alleging that plaintiff failed to plead sufficient facts regarding causation. The court granted defendants' motion based on plaintiff's failure to plead the exact date that she last took FMLA leave. According to the court, when the temporal proximity between a plaintiff's invocation of her right to FMLA leave and her termination are not unduly suggestive, the court must review the evidence as a whole to determine whether it raises an inference that a causative link exists between plaintiff's FMLA leave and her termination. In the instant case, plaintiff failed to allege facts that could support a reasonable inference that discovery would reveal circumstantial evidence regarding causation.

***Sterrett v. Giant Eagle, Inc.*, No. CV 14-235, 2016 WL 3166268 (W.D. Pa. Apr. 27, 2016)**

Plaintiff Richard A. Sterrett, filed an action against defendants Giant Eagle, Inc., and OK Grocery Company, Inc., alleging that defendants violated the FMLA when they terminated plaintiff's employment. Defendants responded by filing a motion for summary judgment. The record demonstrates that plaintiff was a maintenance mechanic at defendants' warehouse facility. The record also demonstrates that plaintiff had been previously discharged from his job with defendants on an earlier occasion in July 2011 for dishonesty. Plaintiff, however, entered into a Last Chance Agreement ("LCA") with defendants and the union. The LCA provided that plaintiff would be afforded one more opportunity to reform his conduct, but if plaintiff committed any dishonest act, defendants would have the right to discharge plaintiff for cause without any prior warning.

The record also demonstrates that plaintiff suffered from migraine headaches. Beginning May 18, 2010, plaintiff began taking intermittent FMLA leave and did so throughout the remainder of his employment with defendants. On October 11, 2013, plaintiff was scheduled to work his normal shift. Several hours into the shift, however, plaintiff informed his supervisor that he was experiencing a migraine and needed to leave work early on FMLA leave. Plaintiff left without punching out. In order to determine when plaintiff left work, defendant's payroll manager reviewed the security video from the previous night. The payroll manager discovered that plaintiff did not perform his work, but rather spent most of his shift in the break room. Defendants performed an investigation. On October 18, 2013, defendants terminated plaintiff based on the conclusion that he violated the LCA by not performing his duties while at work.

FMLA retaliation claims based on circumstantial evidence are subject to the burden shifting analysis of the McDonnel Douglas framework. Plaintiff has the initial burden of establishing a *prima facie* case of retaliation which, under the FMLA, requires that plaintiff demonstrate that: (1) he or she invoked a right under the FMLA; (2) he or she suffered an adverse employment decision, and (3) the adverse action was causally related to the invocation of rights. A causal connections between a right under the FMLA and an adverse employment decision may be established where plaintiff can prove either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. A temporal proximity between plaintiff taking FMLA leave on October 11-12 and the decision to fire him on October 18 are sufficiently close in time to suggest a causal connection between the two events. The court, therefore, found that plaintiff satisfied his initial burden of demonstrating a *prima facie* case of retaliation.

Accordingly the burden shifts to defendants to articulate legitimate, nondiscriminatory reasons for their employment decision. Defendants' contention that the decision to terminate plaintiff's employment was based on plaintiff's failure to perform his job responsibilities during his October 11-12, 2013 shift, which violated the LCA, satisfies their burden in this regard. Thus, the only question remaining is whether there is evidence in the record that defendants' proffered reasons were pretextual. In order to meet this burden, plaintiff must provide evidence that a reasonable factfinder could reasonably either: (1) disbelieve employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of employer's action. Because plaintiff did not offer any

evidence from which pretext could be inferred, the court found that plaintiff was unable to sustain his claim for retaliation.

***Sloan v. Tate & Lyle Ingredients Ams. LLC*, No. 3:14-CV-406-TAV-HBG, 2016 WL 4179959 (E.D. Tenn. Aug. 5, 2016)**

A technician with a food ingredient manufacturer claimed that the company terminated him in retaliation for taking FMLA leave. Defendant argued it was entitled to summary judgment, because it terminated plaintiff based on his excessive absenteeism. The United States District Court for the Eastern District of Tennessee agreed with employer and granted summary judgment on the FMLA retaliatory discharge claim.

Upon plaintiff's return from FMLA leave, he missed 10 consecutive shifts at work and was not terminated until three months after the expiration of FMLA leave. After the fourth absence, employer gave plaintiff a final warning. Plaintiff conceded he missed his next five shifts without providing notice to employer. In addition, the evidence supported that plaintiff's absences actually motivated employer's decision to terminate. Employer sent plaintiff a letter after he missed three shifts and a termination letter explaining the lack of communication from plaintiff about his failure to show up for work. The court held that plaintiff failed to establish that defendant's reason for terminating him—his excessive absenteeism—was pretext.

***Crumpley v. Anderson Cty., Tenn.*, No. 3:14-CV-559-PLR-CCS, 2016 WL 614693 (E.D. Tenn. Feb. 16, 2016)**

Plaintiff public works inspector alleged, *inter alia*, claims of interference and retaliation under the FMLA based upon her termination six days after she requested FMLA leave. Defendant public employer moved for summary judgment on plaintiff's FMLA claims on the basis of a lack of causal connection between plaintiff's protected activity and the alleged retaliation and/or interference with her entitlement to benefits under the FMLA. The district court denied employer's motion as to the FMLA claims, asserting that the temporal proximity between plaintiff's request for FMLA leave and her termination was sufficient to state claims for retaliation and interference under the FMLA.

***Jones v. Sharp Mfg. Co. of Am.*, No. 2:14-cv-03020-STA-tmp, 2016 WL 2344228 (W.D. Tenn. May 3, 2016)**

Plaintiff, who had worked for defendant for 23 years, suffered a knee injury in 2010 when a forklift hit the assembly line where she was working. Plaintiff was examined by defendant's medical staff, who recommended that plaintiff be restricted to 100% sitting work, so she was reassigned to another line. Plaintiff eventually required surgery for her injured knee, resulting in restrictions on her ability to stand for long hours, and to lift, push and pull certain weights. Plaintiff brought a note to work asking that her reassigned position be made permanent, and that when the line was down, that she be reassigned to another position. Plaintiff continued to use FMLA leave and additional leave under the terms of her union's collective bargaining agreement ("CBA") until 2013, when defendant informed her that she had exhausted all available FMLA leave and CBA leave, and requested that she return to work. When plaintiff did not return on the day requested by defendant, she was terminated for unexcused absences.

Plaintiff brought claims of interference and retaliation under the FMLA, and discrimination in violation of the Americans with Disabilities Act (the "ADA"), alleging that defendant denied her request for reasonable accommodation and firing her because she had filed an EEOC charge and workers' compensation claim arising out of her injury on the job. The district court denied defendant's motion for summary judgment on the FMLA claims, finding that genuine issues of material fact existed as to whether defendant purposely miscounted the number of days that plaintiff was entitled to leave in order to terminate her in retaliation for exercising her FMLA rights. Plaintiff had argued that, contrary to defendant's usual practice, defendant included holidays and weekends in counting the number of days she was on CBA leave, thus charging plaintiff with leave that was already accounted for under the FMLA. The court also found that plaintiff had established a causal connection between her request to be reassigned to a position suitable for her physical restrictions and the temporal promixity to her termination. The court also found that a genuine issue of material fact existed as to whether defendant acted in good faith when it informed plaintiff that there was no open position available within her physical restrictions, when there was evidence that there was an open position suitable for plaintiff that had been filled by a casual worker after plaintiff was injured.

***Vincent v. Coll. of the Mainland*, No. CV G-14-048, 2016 WL 5791197 (S.D. Tex. Sept. 30, 2016)**

Plaintiff, a computer lab assistant, brought claims for discrimination and retaliation under Title VII and the ADA, and a claim for retaliation under the FMLA. Plaintiff took FMLA leave in 2008 and 2009 due to personal tragedies, and developed severe depression as a result of those tragedies. When plaintiff returned to work, her supervisor noticed that she struggled with tardiness and confronted her with the issue. Plaintiff explained that she was experiencing personal issues and was under a doctor's care, but did not disclose her depression. Plaintiff's tardiness persisted from 2010 into 2012. After plaintiff's supervisor asked her about the tardiness again in February 2012, plaintiff filed a grievance alleging that her supervisor was "racist" for confronting her in the hallway and accusing her of "stealing time." During the investigation into plaintiff's grievance, she disclosed her depression diagnosis and informed defendant that it impacted her ability to arrive on time to work each day. After engaging in the interactive process, defendant accommodated plaintiff by reassigning her to a different lab, altering her work schedule, and requiring plaintiff to report to her manager when she would be late to work.

In June 2012, plaintiff missed three consecutive days of work and ultimately requested, and was granted, FMLA leave for surgery to remove a facial lesion. On June 28, plaintiff returned to work in her same position with the same pay and benefits, and defendant reiterated that she was expected to notify her supervisor if she would be late. Plaintiff, however, only sporadically provided notice of tardiness. As a result, defendant placed plaintiff on a series of conduct correction plans. In November 2012, plaintiff filed a grievance and an EEOC charge alleging claims of discrimination and retaliation. Defendant investigated the grievance and, in January 2013, determined there was insufficient evidence to support her claims. In June 2013, defendant placed plaintiff on another conduct correction plan, citing (among other performance deficiencies) plaintiff's absence or tardiness on every work day from January through April 2013, and her failure to provide the requested notice when she was late. Because plaintiff's tardiness and failure to provide notice continued, defendant terminated her

employment in July 2013. In her subsequent EEOC charge and lawsuit, plaintiff alleged that defendant terminated her in retaliation for taking leave in violation of the FMLA.

Defendant moved for summary judgment on all claims. The court analyzed plaintiff's FMLA claim under the *McDonald-Douglas* burden-shifting framework, noting that mixed-motive analysis still applies to FMLA retaliation cases in the Fifth Circuit. Defendant conceded that plaintiff engaged in protected activity and was terminated, but argued that there was no causal link between plaintiff's leave and her termination. The court agreed, finding that the one year time period between plaintiff's FMLA leave and her termination was insufficient to support a causal connection between the two events. Additionally, the court found that even if plaintiff had established a *prima facie* case, defendant provided a legitimate, non-discriminatory reason for her termination—plaintiff's failure to comply with her supervisor's directives—and plaintiff presented no evidence that this reason was pretextual. Thus, the court granted defendant's motion for summary judgment on plaintiff's FMLA claim.

Summarized elsewhere:
***Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415 (2d Cir. 2016)**

Rodriguez v. Eli Lilly & Co., 820 F.3d 757 (5th Cir. 2016)

Tennial v. UPS, 840 F.3d 292 (6th Cir. 2016)

Hartman v. DOW Chem. Co., No. 15-2318, 2016 WL 4363161 (6th Cir. Aug. 16, 2016)

Lopez v. City of W. Miami, No. 15-14645, 2016 WL 6068822 (11th Cir. Oct. 17, 2016)

Thomas v. Dolgencorp, LLC, No. 15-13399, 2016 WL 1008622 (11th Cir. Mar. 15, 2016)

Miles v. Howard Univ., No. 15-7027, 2016 WL 3545192 (D.C. Cir. June 14, 2016)

Battle v. Corizon, LLC, No. 2:15-CV-403-WC, 2016 WL 3583812 (M.D. Ala. June 30, 2016)

Talley v. Triton Health Sys., LLC, No. 2:14-CV-02325-RDP, 2016 WL 4615627 (N.D. Ala. Sept. 6, 2016)

Ethridge v. Nichols Aluminum – Ala., LLC, No. 5:14-CV-02126-KOB, 2016 WL 4540907 (N.D. Ala. Aug. 31, 2016)

Frachiseur v. Graphic Packaging Int'l, Inc., No. 2:15-CV-02027, 2016 WL 3661560 (W.D. Ark. July 5, 2016)

Black v. Valley Behavioral Health Sys., LLC, No. 2:15-CV-02130, 2016 WL 3406137 (W.D. Ark. June 17, 2016)

Kalestian v. Performing Arts Ctr. of L.A. Cty., No. 2:16-CV-05928, 2016 WL 6155904 (C.D. Cal. Oct. 21, 2016)

Steckmyer-Stapp v. PetSmart, Inc., No. 15-CV-00025-RM-STV, 2016 WL 6962874 (D. Colo. Nov. 29, 2016)

Poitras v. ConnectiCare, Inc., No. 3:14-CV-0981 (VAB), 2016 WL 3647313 (D. Conn. June 30, 2016)

Thomas v. D.C., No. CV 13-1551 (RDM), 2016 WL 7496720 (D.D.C. Dec. 30, 2016)

Cortese v. Terrace of St. Cloud, LLC, No. 6:15-cv-2009-Orl-40DAB, 2016 WL 1618069 (M.D. Fla. Apr. 22, 2016)

Corbin v. Med. Ctr., Navicent Health, No. 5:15-CV-153 (CAR), 2016 WL 5724992 (M.D. Ga. Sept. 29, 2016)

Landry v. Howell, No. 5:14-CV-00167 (LJA), 2016 WL 5387629 (M.D. Ga. Sept. 26, 2016)

Tibbs v. Ill. Admin. Office of Ill. Courts, 149 F. Supp. 3d 1015 (C.D. Ill. 2016)

Ruggio v. Tyson Foods, Inc., No. 3:14-CV-1916 JD, 2016 WL 1660484 (N.D. Ind. Apr. 26, 2016)

Peterson v. Martin Marietta Materials, Inc., No. C14-3059-LTS, 2016 WL 2886376 (N.D. Iowa May 17, 2016)

Marcum v. Smithfield Farmland Corp., No. 6: 16-180-DCR, 2016 WL 6780311 (E.D. Ky. Nov. 15, 2016)

McMasters v. Hendrickson USA, LLC, No. 3:14CV-329-CRS, 2016 WL 5796908 (W.D. Ky. Sept. 30, 2016)

Nowlin v. Novo Nordisk, Inc., No. 3:14-CV-612-DJH-LLK, 2016 WL 3566248 (W.D. Ky. June 27, 2016)

Crain v. Schlumberger Tech. Co., No. 15-1777, 2016 WL 2942417 (E.D. La. May 20, 2016)

Consedine v. Willimansett E. SNF, No. 13-30193-MGM, 2016 WL 6774242 (D. Mass. Sept. 30, 2016)

Archambault v. Kindred Rehab. Servs., Inc., No. 14-CV-11675-ADB, 2016 WL 4555590 (D. Mass. Aug. 31, 2016)

Kempton v. Delhaize Am. Shared Servs. Grp. LLC, No. 2:14-CV-00494-JDL, 2016 WL 1069647 (D. Me. Mar. 17, 2016)

Cote v. T-Mobile USA, Inc., No. 1:14-CV-00347-JAW, 2016 WL 865222 (D. Me. Mar. 2, 2016)

Daughenbaugh v. Macomb Residential Opportunities, Inc., No. 15-CV-12390, 2016 WL 7158648 (E.D. Mich. Dec. 8, 2016)

Moore v. Def. Home Sec. Co., No. 15-10997, 2016 WL 3522305 (E.D. Mich. June 28, 2016)

Britko v. Bay Reg'l Med. Ctr., No. 15-CV-12219, 2016 WL 3213387 (E.D. Mich. June 10, 2016)

Thomas v. Lighthouse of Oakland, No. 12-CV-15494, 2016 WL 2344350 (E.D. Mich. May 4, 2016)

Cisneros v. Firstmerit Corp. & LPL Fin., LLC, No. 14-CV-14893, 2016 WL 465480 (E.D. Mich. Feb. 8, 2016)

Stephenson v. Potterfield Grp. LLC, No. 2:15-CV-04180-NKL, 2016 WL 5030377 (W.D. Mo. Sept. 19, 2016)

Shell v. Tyson Foods, Inc., No. 5:15-CV-00037-RLV-DCK, 2016 WL 4490716 (W.D.N.C. Aug. 25, 2016)

Denson v. Atl. Cty. Dep't of Pub. Safety, No. 13-5315 (JS), 2016 WL 5415060 (D.N.J. Sept. 27, 2016)

McGuigan v. Appliance Replacement Inc., No. 14-7716 (RBK/JS), 2016 WL 5380927 (D.N.J. Sept. 26, 2016)

Dinardo v. Medco Health Sols., Inc., No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)

Barletta v. Life Quality Motor Sales Inc., No. 13-CV-02480 (DLI) (ST), 2016 WL 4742276 (E.D.N.Y. Sept. 12, 2016)

Hill v. N.Y. City Hous. Auth., No. 15 CIV. 8663 (CM), 2016 WL 6820759 (S.D.N.Y. Nov. 14, 2016)

Cruz v. Wyckoff Heights Med. Ctr., No. 13 CIV. 8355 (ER), 2016 WL 5339540 (S.D.N.Y. Sept. 23, 2016)

Hahn v. Office & Prof'l Emps. Int'l Union, Local 153, No. 13-CV-946 (JGK), 2016 WL 4120517 (S.D.N.Y. July 22, 2016)

Hockenjos v. Metro. Transp. Auth., No. 14-CV-1679 (PKC), 2016 WL 2903269 (S.D.N.Y. May 18, 2016)

Miller v. N.Y. State Police, No. 14-CV-00393A(F), 2016 WL 2868840 (W.D.N.Y. May 17, 2016)

Tablizo v. City of Las Vegas, No. 2:14-cv-00763-APG-VCF, 2016 WL 3583798 (D. Nev. June 30, 2016)

Lynn v. True N. Mgmt., LLC, No. 15-CV-2650, 2016 WL 6995290 (N.D. Ohio Nov. 30, 2016)

Mikan v. Arbors at Fairlawn Care, LLC, No. 5:15 CV 250, 2016 WL 5463056 (N.D. Ohio, Sept. 29, 2016)

Dennis v. Nationwide Children's Hosp., No. 2:15-CV-688, 2016 WL 5468338 (S.D. Ohio Sept. 29, 2016)

Partin v. Weltman Weinberg & Reis Co., No. 1:14-CV-216, 2016 WL 67299 (S.D. Ohio Jan. 5, 2016)

McFadden v. Tulsa Co. Bd. of Cty. Comm'rs, 2016 WL 6902182 (N.D. Okla. Nov. 23, 2016)

Earp v. Eucalyptus Real Estate, LLC, No. CIV-14-1195-D, 2016 WL 2939547 (W.D. Okla. May 19, 2016)

Knight v. Barry Callebaut USA Serv. Co., No. CV 15-6450, 2016 WL 7338759 (E.D. Pa. Dec. 19, 2016)

Garner v. Phila. Housing Auth., No. CV 15-183, 2016 WL 4430639 (E.D. Pa. Aug. 22, 2016)

Fullerton v. Pottstown Hosp. Corp., No. CV 15-5329, 2016 WL 3762811 (E.D. Pa. July 13, 2016)

Checa v. Drexel Univ., No. 16-108, 2016 WL 3548517 (E.D. Pa. June 28, 2016)

Duncan v. Chester Cty. Hosp., No. CV 14-1305, 2016 WL 1237795 (E.D. Pa. Mar. 29, 2016)

Farkas v. NRA Grp. LLC, No. 1:15-CV-356, 2016 WL 3997432 (M.D. Pa. July 26, 2016)

Bertig v. Julia Ribaudo Healthcare Grp., No. 3:15CV2224, 2016 WL 3683439 (M.D. Pa. July 12, 2016)

Mangel v. Graham Packaging Co., No. 14-CV-0147-BR, 2016 WL 1266257 (W.D. Pa. Apr. 1, 2016)

Harris-Bethea v. Babcock & Wilcox Tech. Servs Y-12, LLC, No. 3:13- CV-669-TAV-HBG, 2016 WL 4379232 (E.D. Tenn. Aug. 16, 2016)

Sasser v. ABF Freight Sys., Inc., No. 3:14-CV-1180, 2016 WL 6600428 (M.D. Tenn. Nov. 7, 2016)

Epps v. Vanderbilt Univ., No. 3:14-CV-01411, 2016 WL 540717 (M.D. Tenn. Feb. 11, 2016)

Phipps v. Accredo Health Grp., Inc., No. 2:15-cv-02101-STA-cgc, 2016 WL 3448765 (W.D. Tenn. June 20, 2016)

Duong v. Bank of Am., N.A., No. 1:15-CV-784, 2016 WL 899273 (E.D. Va. Mar. 2, 2016)

Holland v. Prot. One Alarm Monitoring, Inc., No. C15-259 RSM, 2016 WL 1449204 (W.D. Wash. Apr. 13, 2016)

Hartman v. Ohio Dep't of Transp., No. 16AP-222, 2016 WL 4093471 (Ohio Ct. App. Aug. 2, 2016)

ii. Statements

***Patterson v. Triangle Tool Corp.*, No. 14-C-1557, 2016 U.S. Dist. LEXIS 81216 (E.D. Wis. June 22, 2016)**

Plaintiff was a polisher for a company that produced molds. In January 2013, employee had a meeting with the company's owner in which the owner stated it was "bullshit" that employee had missed 22 days of work due to illness and FMLA-protected leave. He was laid off in February 2013, purportedly because there was not enough work and because his coworkers were more skilled.

Employee filed a claim under the FMLA, and the court denied employer's motion for summary judgment. The court held the owner's alleged statement was sufficient for a jury to conclude employee had been discharged for taking FMLA leave.

Summarized elsewhere:
***Labranche v. Frisbie Mem'l Hosp.*, No. 14-CV-566-PB, 2016 WL 4401994 (D.N.H. Aug. 17, 2016)**

***Padilla v. Yeshiva Univ.*, No. 15-CV-9203 (VEC), 2016 WL 6584485 (S.D.N.Y. Nov. 7, 2016)**

***Pulchalski v. Franklin Cty.*, No. 1:15-CV-1365, 2016 U.S. Dist. LEXIS 133663 (M.D. Pa. Sept. 27, 2016)**

2. Articulation of a Legitimate, Nondiscriminatory Reason

***Chase v. U.S. Postal Serv.*, No. 16-1351, 2016 WL 7228809 (1st Cir. Dec. 14, 2016)**

Plaintiff, a former letter carrier, brought suit against the USPS and his former supervisor alleging, among other things, FMLA interference and retaliation related to an on-the-job motor vehicle accident. The Massachusetts district court dismissed all of plaintiff's claims except for his FMLA retaliation claim on summary judgment. After a bench trial, the district court entered judgment for defendants, finding that they could not have acted with retaliatory *animus* because plaintiff's former supervisor, in terminating plaintiff due to drug possession, lacked the requisite knowledge that plaintiff's leave was protected under the FMLA. Plaintiff appealed and the circuit court affirmed the district court's decision.

On appeal, plaintiff argued the district court erred in determining plaintiff's former supervisor did not have knowledge of plaintiff's FMLA leave. Specifically, plaintiff noted that his supervisor had visited the scene of the motor vehicle accident, filed a report regarding the same, was aware that the FMLA covered the first 12 weeks of medical leave, and made derogatory comments with respect to plaintiff's medical leave. Defendants responded that the supervisor had believed plaintiff was out on paid workers' compensation leave rather than FMLA leave. The supervisor's basis for this belief was an employer computer program which designated plaintiff's leave as either "injured on duty" or "out on workers' compensation." The

district court and the circuit court credited the supervisor's testimony that "even though seriously injured, it would not make sense [for plaintiff] to take FMLA leave until—at the earliest—his paid leave expired." The supervisor also testified that he never saw an FMLA notice which was allegedly mailed to both plaintiff and the supervisor. Similarly, the supervisor's derogatory statements, while inappropriate, actually supported the supervisor's belief that plaintiff was out on worker's compensation leave as opposed to FMLA leave. Accordingly, the circuit court affirmed the district court's dismissal of the matter on the basis that it "was the workers' compensation leave—not the concurrent FMLA leave—which angered [the supervisor] and contributed to [plaintiff's] termination." Finally, the circuit court also rejected plaintiff's argument that employer had general corporate knowledge of his FMLA leave noting that such an argument was not supported by applicable legal precedent.

***Thomas v. Dolgencorp, LLC*, No. 15-13399, 2016 WL 1008622 (11th Cir. Mar. 15, 2016)**

Plaintiff brought, among other claims, FMLA interference and FMLA retaliation claims against defendant. The district court granted summary judgment on both FMLA claims and the Eleventh Circuit affirmed. Plaintiff had breast cancer and took FMLA leave to have a double mastectomy. Defendant refused to reinstate her, but instead, terminated her employment. Defendant's nondiscriminatory reason for not reinstating her, and instead terminating her, was because she took computer training modules for subordinate employees and had subordinate employees work off the clock. The court held the FMLA interference claim failed because an employer is not liable under the FMLA if it can show it refused to reinstate employee for a reason unrelated to FMLA leave. The evidence showed defendant refused to reinstate plaintiff because it uncovered instances of plaintiff's misconduct—a reason entirely unrelated to FMLA leave. The court affirmed summary judgment on the FMLA retaliation claim because the evidence of causation was insufficient for a reasonable factfinder to infer defendant terminated plaintiff for taking FMLA leave. Even though plaintiff's termination closely followed her FMLA leave, this temporal proximity did not create a genuine issue of fact because her leave permitted the company to discover her professional misconduct. Therefore, the court affirmed the district court's decision to grant summary judgment on plaintiff's FMLA claims.

***Miles v. Howard Univ.*, No. 15-7027, 2016 WL 3545192 (D.C. Cir. June 14, 2016)**

Plaintiff served as the manager of a client service center for a subcontractor that contracted the center out to defendant, a university. While plaintiff was on parental leave, defendant terminated subcontractor's contract, closing plaintiff's location due to the center's very low performance and its inability to correct several identified issues. In fact, the center that plaintiff ran was identified as the worst-performing center in the organization. Because plaintiff's salary was paid from funds provided under that contract, subcontractor terminated plaintiff.

Plaintiff filed suit against defendant university (not her employer, the subcontractor) alleging that her termination following the center's closing violated the FMLA. The district court granted defendant's motion for summary judgment and plaintiff appealed, arguing that defendant's reasons for closing the service center, which led to her termination, were pretextual and discriminatory. The D.C. Circuit Court, however, affirmed summary judgment for defendant, holding that it had a legitimate, non-discriminatory justification for closing the service

center based on the center's persistent underperformance under plaintiff's leadership. The court also found that under the *McDonnell-Douglas* burden-shifting framework, plaintiff failed to make any plausible showing that defendant chose to close the service center specifically because plaintiff took parental leave. Plaintiff argued that: (1) her maternity leave was singled out as a precipitating factor for the center's closure; (2) the center was closed because the organization refused to replace her while she was on leave; (3) defendant demonstrated discriminatory animus by expecting a continuity of service plan at plaintiff's center when this was not required at other centers; and (4) temporal proximity between employer's learning of plaintiff's FMLA leave and the closing of the center created a reasonable inference of retaliatory intent. The circuit court disagreed with plaintiff's arguments, holding that defendant provided a legitimate, non-discriminatory reason for closing the center for underperformance, and therefore affirmed the district court's summary judgment ruling.

***Battle v. Corizon, LLC*, No. 2:15-CV-403-WC, 2016 WL 3583812 (M.D. Ala. June 30, 2016)**

In *Battle v. Corizon, LLC*, the district court granted employer's motion for summary judgment as to plaintiff's FMLA interference and retaliation claims. Plaintiff was a dental assistant for employer, a contractor providing health care services to Alabama state prisons. Plaintiff requested and was granted FMLA leave due to personal health issues. After exhausting her FMLA leave availability, she was granted an additional three weeks of leave, but denied a subsequent request for a second extension. The day after her return to work, state prison officials contacted employer regarding concerns about discrepancies in logs of dental tools and instruments used at the facility where plaintiff was employed. The logs were required to be completed on a daily basis when such instruments were used as a security precaution to prevent prisoners from obtaining and secreting potentially sharp instruments. When the prison noticed discrepancies in the logs, it contacted employer. Employer reviewed the logs and found plaintiff's signature on logs that were believed to be falsified. They interviewed plaintiff the next day, confirmed that she signed the logs, and discharged her for falsification of records.

With respect to the interference claim, the court held that plaintiff could not establish a denial of a right to benefits, including reinstatement. Plaintiff had exhausted her leave entitlement for the year, and did not return after the conclusion of her 12-week FMLA entitlement. Instead, she returned after an additional three weeks of leave. The court concluded, citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), and numerous other cases, that plaintiff could not establish an entitlement to reinstatement under these facts.

With respect to the retaliation claim, the issue was whether the factual record contained sufficient evidence that plaintiff was discharged for taking leave, rather than for other reasons. In the absence of direct evidence, the court analyzed the record under the *McDonnell Douglas* standard. The court concluded that plaintiff had established a *prima facie* case of retaliation, because her discharge only three days after her return to work showed a sufficient temporal connection between her leave and discharge. After concluding that employer had offered legitimate non-retaliatory justifications for its actions, the court engaged in an extensive analysis of the evidence regarding pretext. The court concluded that plaintiff's evidence was insufficient to raise a triable issue of fact. Although employer did not conduct a full and thorough investigation, plaintiff failed to show it acted contrary to its own discretionary policies. The court also concluded that the explanation employer gave for the discharge during the case was

not materially different from that offered in the termination letter. The court further determined that the individuals that employer did not investigate or discipline were not similarly situated to plaintiff, in that none of them had their initials on the logs. Finally, the court concluded that even if plaintiff had not falsified the logs, the individual who reviewed the issue and made the decision to terminate plaintiff was not aware at that time that another employee had allegedly copied the logs while plaintiff was on leave. Accordingly, the court found insufficient evidence of pretext, and granted judgment for employer.

[Author's note: This is an unusual case. Although the opinion does not specifically say so, it seems clear that employer, after getting an inquiry from the contractor, fired plaintiff for alleged falsification of logs that were prepared while she was on leave simply because they had her initials on them. Plaintiff later offered evidence that while plaintiff was out on leave, the dentist falsified the logs with plaintiff's initials because he was told to do so by a supervisor, since he did not know how to prepare them. The individual making the termination decision was not aware of this (because no interviews were conducted of other personnel), but the individual knew or could have known plaintiff was out on leave during this time. It appears that employer may have also discharged plaintiff because other logs were missing during the time she was working, and that she was thus not fulfilling her duties at that time. Nonetheless, this appears to be one of the most extreme examples of successful use of the "idiot" defense, i.e., we were stupid, not retaliatory.]

***Szestakow v. Metro. Dist. Comm'n*, No. 3:10-CV-00567-WWE, 2016 WL 4639129 (D. Conn. Sept. 6, 2016)**

Plaintiff, while working for employer as a Senior Human Resources Analyst, lodged a written complaint against her supervisor, alleging her supervisor had treated her in a hostile and derogatory manner for the previous five years. Employer performed an investigation and concluded that no violation of employer's policies had occurred. In early 2008, plaintiff took leave from her job based upon her own medical issues—depression and anxiety—and to care for her special needs son. On returning to work from leave, plaintiff levied new complaints against her supervisor, including an allegation that her supervisor had shown her animosity based on her attendance at a medical appointment for her son. Employer performed an investigation, concluded that plaintiff's complaints stemmed from a personality conflict between her and her supervisor, and transferred plaintiff from human resources to customer service. Plaintiff filed a charge with the Commission on Human Rights and Opportunities, asserting discrimination based on her being disabled and taking leave. Employer terminated plaintiff due to a reduction in force. Plaintiff filed an action against employer, alleging retaliation in violation of the FMLA. Employer filed a motion for summary judgment. Concluding that the factual circumstances, and intent and state of mind of defendant were in dispute, the court denied employer's motion.

***Thomas v. D.C.*, No. CV 13-1551 (RDM), 2016 WL 7496720 (D.D.C. Dec. 30, 2016)**

Plaintiff had worked for the District of Columbia for several years before transferring to a new agency as its Director of Human Resources. She and the director of the new agency did not get along well, and they had several run-ins during her first few months of working for him. During this time, plaintiff was investigated by the District's ethics office for taking a loan from a subordinate, refusing to repay it, then issuing retaliatory discipline against the subordinate. The

investigation determined that effectively, plaintiff had inappropriately borrowed $80 from the subordinate, but it vindicated her on the other two allegations. During the pendency of the investigation, plaintiff developed a health problem requiring surgery. Plaintiff applied and was approved for intermittent FMLA leave prior to her surgery date, and then for a block of FMLA leave for the surgery and recovery. A week prior to her surgery, plaintiff's supervisor met with her and terminated her, telling her that it was "not for cause" and that she would be eligible for severance pay. The termination letter was also silent on the reasons for plaintiff's discharge. Plaintiff filed suit, asserting both interference and retaliation claims under the FMLA.

Defendant moved for summary judgment on all counts which the court granted. In a detailed analysis, the court found that neither plaintiff's supervisor's statement that she was not being discharged for cause, nor the termination letter's failure to list any rationale for her discharge did not prevent defendant from relying on evidence of the reasons for its decision. The court determined that the history of the poor relationship with the Director of her department, the informal but negative feedback she received, and the ethical violation all provided a legitimate basis for defendant's decision, and were not linked to plaintiff's application for or use of FMLA leave.

Plaintiff contended that temporal proximity (she was terminated just a month after she applied for intermittent FMLA leave) would allow a reasonable jury to infer that the District retaliated against plaintiff for requesting FMLA leave. The court stated, "Thomas's argument, however, confuses the use of temporal proximity evidence to make out a *prima facie* case at the first step of the *McDonnell Douglas* framework, and the use of such evidence 'to defeat [a defendant's] proffer and support a finding of retaliation' once it has proffered a non-retaliatory reason for its actions." *Woodruff v. Peters*, 482 F.3d 521, 530 (D.C. Cir. 2007). The court ruled, once a defendant provides a legitimate, non-discriminatory for an adverse action, temporal proximity standing alone is not sufficient to support a finding of retaliation.

***Lance v. Bd. of Educ. of the City of Chi.*, No. 14 C 8709, 2016 WL 4417074 (N.D. Ill. Aug. 19, 2016)**

Plaintiff was terminated from his job as a teacher while he was on FMLA leave and later filed suit against the Board of Education, alleging FMLA interference and retaliation. The Board moved for summary judgment, which the district court granted. The court held that plaintiff was terminated due to budgetary reasons and plaintiff had provided no evidence to the contrary. Indeed, while plaintiff was on FMLA, the school had a weaker-than-expected enrollment, so teachers needed to be restaffed. Teachers with unsatisfactory performance evaluations were, per Board policy, required to be displaced first, and plaintiff had several. Accordingly, because plaintiff's selection for displacement was pursuant to Board policy, plaintiff could not establish that his termination had anything to do with his FMLA leave or rebut defendant's legitimate, nondiscriminatory reason for his displacement.

***Federico v. Town of Rowley*, No. CV 15-12360-FDS, 2016 WL 7155984 (D. Mass. Dec. 7, 2016)**

Plaintiff, an administrative assistant in the Rowley Water Department, brought suit in the district court under the Family and Medical Leave Act, 29 U.S.C., § 2601 *et seq.*, for interference

and retaliation claims against the Town of Rowley and his supervisor. The district court granted defendants' motion for summary judgment on both claims. On the interference claim, the court held that plaintiff provided no evidence of interference. Rather, the facts show that he received all FMLA leave to which he was entitled including an extended paid leave once his 12 weeks of FMLA expired. As to the retaliation claim, plaintiff was able to show that he was terminated after taking FMLA leave; however, defendants were able to show legitimate, non-discriminatory reasons for plaintiff's termination. The court found, and it was uncontroverted, that plaintiff "spent virtually all day, every day watching television and viewing sexual services advertisements instead of performing his work." Plaintiff admitted to the evidence provided by defendant and offered no evidence of pretext.

***Archambault v. Kindred Rehab. Servs., Inc.*, No. 14-CV-11675-ADB, 2016 WL 4555590 (D. Mass. Aug. 31, 2016)**

Plaintiff was a speech pathologist who requested and was granted intermittent FMLA during the last three years of her employment with defendant. Plaintiff was suspended because her supervisor believed that she was engaged in improper billing activities and was providing her services to patients who did not have a medical need for them. During the course of its investigation, defendant discovered that plaintiff had been failing to document her treatment of her patients in their medical charts as required by defendant's policy and she was discharged. Plaintiff filed suit alleging, *inter alia*, that her discharge was in retaliation for having taken FMLA leave.

Defendant moved for summary judgment, which the court granted. It found that plaintiff admitted that she was a month behind in her clinical notes, and that there was no evidence of anti-FMLA statements made by any decision makers or better treatment by defendant of any similarly-situated coworkers. The court also rejected plaintiff's argument that the fact that she took two days of intermittent leave immediately prior to her suspension created a genuine issue of material fact, as the issue which led to her suspension was raised a month prior to her FMLA leave, and the supervisor who voiced the concern was unaware that plaintiff took FMLA leave.

***Daughenbaugh v. Macomb Residential Opportunities, Inc.*, No. 15-CV-12390, 2016 WL 7158648 (E.D. Mich. Dec. 8, 2016)**

A former Home Manager for assisted living homes for adults with developmental diseases and mental illness filed suit against her former employer after being terminated for alleged performance issues. Home Managers are charged with ensuring compliance with the law and are ultimately responsible for the care of residents. A 2013-2014 report prepared to show complaints of treatment for all entities owned by the company showed that the homes managed by plaintiff had between four and nine times the number of complaints that other areas serviced by the company had. It also showed that plaintiff's area had the lowest scores in compliance with the law and safety. Plaintiff admitted to these problems, and others, in her deposition. Eventually two of the four homes plaintiff managed were shut down. Plaintiff took FMLA leave (both consecutive and later intermittent) from December 2014 through late March when her doctor stated that she could return to "full time." Plaintiff, however, stated that her doctor said she could return to 40 hours, and full time typically meant 40, 50, or 60, depending on the week. Her employer asked for clarification regarding the number of hours she was cleared to work, but

never received anything until after termination. Plaintiff had been kept apprised of her inadequate performance and eventually was terminated after she failed to follow a policy of notifying an outside agency and the family of a patient that was injured. The next day—April 10, 2015—plaintiff was terminated for insubordination, misconduct, poor management, unprofessional conduct, and continued poor judgment.

The court granted employer's motion to dismiss and for summary judgment on plaintiff's interference and retaliation claims. Although it rejected employer's contention that temporal proximity alone is insufficient to meet the causation element, it ultimately found employer proffered a legitimate, non-discriminatory reason for the termination and plaintiff failed to offer sufficient evidence of pretext. Finally, the court rejected plaintiff's argument that an interference claim could be supported by plaintiff's affidavit that claimed she was harassed and pressured into working more hours than allowed by her restrictions where the affidavit was the only evidence of this nature and it conflicted with her prior deposition testimony. Plaintiff filed an appeal on January 9, 2016.

***Gardner v. Andersen Eye Assocs., PLC*, 150 F. Supp. 3d 860 (E.D. Mich. 2016)**

Plaintiff's lawsuit alleged defendant retaliated against her in violation of the FMLA by not granting her extended leave and terminating her employment. Plaintiff performed a number of billing-related tasks for defendant, an eye care provider, and suffered from pain in her lower legs and feet. She was placed on FMLA leave beginning June 24, 2014. Plaintiff's 12 weeks of FMLA were set to expire in September. Defendant advised her that it did not have an extended leave of absence policy but would hold her position until October 2—the date set by her doctor to reevaluate whether she could return to work. Plaintiff then sought advice from a former employee, who told plaintiff she could continue on disability for up to 26 weeks. Plaintiff was deemed as unable to return to work when her FMLA leave expired, and defendant terminated her employment on October 3, 2014.

The court granted summary judgment in part for employer because plaintiff could not prove defendant denied her an extended leave policy because such policy did not exist, and it could not be an adverse action to deny plaintiff extended leave that would have violated defendant's policies. The termination of plaintiff's employment was proper because she was medically unable to return to work at the expiration of her FMLA leave, and the court ultimately dismissed plaintiff's FMLA claim.

***Shell v. Tyson Foods, Inc.*, No. 5:15-CV-00037-RLV-DCK, 2016 WL 4490716 (W.D.N.C. Aug. 25, 2016)**

Plaintiff sued employer for retaliating against him for exercising his FMLA rights. Employer filed a motion for summary judgment, alleging that, although plaintiff had returned to work from an FMLA-approved leave only one month prior, it had terminated plaintiff for a legitimate, nondiscriminatory reason—that of plaintiff's multiple policy violations. Employer had received several complaints regarding plaintiff's bullying and harassing conduct toward other employees, regarding which it conducted an internal investigation. The investigation revealed that plaintiff bullied and demeaned other employees, made nationality-based comments,

and knowingly violated company policy. In light of these findings, defendant terminated plaintiff one month after he returned from an approved FMLA leave.

Under the *McDonnell Douglas* burden shifting analysis, the court found that, although the one-month gap between plaintiff's FMLA leave and his termination was sufficient to establish a *prima facie* case of discrimination, it was insufficient to demonstrate that defendant's legitimate, non-discriminatory reason for termination was a pretext for FMLA discrimination. Plaintiff also argued pretext had been established because the investigation conducted had "disturbing procedural irregularities." However, the court noted that the Fourth Circuit had not adopted a "disturbing procedural irregularities" test and, further, there was no allegation that evidence was falsified or that the onsite human resources manager manipulated the investigation. Moreover, the termination decision was made by the corporate human resources director who had not been involved in the investigation. Thus, even if a "disturbing procedural irregularities" test was appropriate for this analysis, the court found it was not met here. Plaintiff also argued that he did not engage in the misconduct alleged in the investigation. The court explained that the crucial issue for pretext analysis is whether the relevant decisionmaker honestly believed that employee engaged in the misconduct alleged when he or she made the termination decision. Because it was undisputed that the corporate human resources director believed that plaintiff had committed the misconduct alleged in the investigation, the veracity of the misconduct allegations was irrelevant. Therefore, the court granted summary judgment for employer.

***Hill v. N.Y. City Hous. Auth.*, No. 15 CIV. 8663 (CM), 2016 WL 6820759 (S.D.N.Y. Nov. 14, 2016)**

Plaintiff began working for the New York City Housing Authority as a City Seasonal Aide, and approximately four months later was appointed as the Community Associate at the Department for Social Services in the Bronx. Despite a history of misconduct and poor performance, she was appointed Housing Assistant after 12 years with the Housing Authority, a job for which she was on probationary status for one year and subject to quarterly ratings. The district court granted employer's motion for summary judgment as to plaintiff's interference and retaliation claims, despite that she was terminated while she was out on FMLA leave, finding that the decision to fire plaintiff was made before she requested FMLA leave and was based on her history of well-documented abysmal performance and repeated misconduct. The district court noted that an employee on leave is not entitled to any greater rights than employees who have not taken leave, and can be terminated while on leave as long as the FMLA leave was not the cause for the termination.

***Kelly v. Univ. of Pa. Health Sys.*, No. CV 16-618, 2016 WL 414991 (E.D. Pa. Aug. 2, 2016)**

Plaintiff, a call center operator for a hospital system, suffered from two chronic conditions, Hepatitis B and osteoarthritis. Beginning in 2009, plaintiff used a combination of FMLA leave and her employer's "Other Medical Leave," during periods when she had exhausted her FMLA leave, to have multiple surgeries and leave work early when she was in pain. In 2014, after returning from a three month long leave, plaintiff was issued the first of several written disciplinary warnings for failing to submit a certification for her FMLA request and failure to follow work-related procedures. Plaintiff was terminated after an incident where she incorrectly routed an emergency call while simultaneously on the phone with her husband, which

resulted in the call being sent to the wrong hospital. Employer claimed that the incident was her final warning, which necessitated plaintiff's termination.

Plaintiff sued her employer for interference and retaliation for exercising her FMLA rights, and discrimination in violation of the American with Disabilities Act ("ADA"), claiming that her supervisor's attitude toward her became very negative after she returned from the three month leave. The district court granted summary judgment for employer, holding that plaintiff did not present evidence that employer's stated reason for her termination was pretextual. The court found the trail of disciplinary write-ups preceding plaintiff's termination to be a legitimate, non-discriminatory reason for her termination, and that plaintiff's offered rebuttal of stray remarks and past positive performance reviews to be insufficient to create a genuine issue of material fact.

***Duncan v. Chester Cty. Hosp.*, No. CV 14-1305, 2016 WL 1237795 (E.D. Pa. Mar. 29, 2016)**

Plaintiff worked as an Interventional Radiology Technologist for defendant, a hospital. Defendant said that plaintiff was terminated due to his general conduct and behavior, his comments to his superiors at a meeting involving the quality of his work, and his explicit statements that he wanted to leave his department. Plaintiff requested to go out on FMLA leave after the decision to terminate his employment had been made but prior to his official notification of termination. Accordingly, plaintiff's request for leave was granted, but when plaintiff attempted to return to work upon the conclusion of his approved FMLA leave, his employment was terminated. Plaintiff in turn filed suit against defendant. The complaint contained two FMLA counts, one for interference and one for retaliation. Defendant moved for summary judgment; its motion was granted.

The court held that summary judgment on plaintiff's interference claim was proper because his allegations were more akin to a retaliation claim. Nevertheless, even if construed in plaintiff's favor, defendant had planned to terminate plaintiff's employment regardless of his request for leave. Accordingly, defendant's failure to reinstate plaintiff subsequent to his FMLA leave could not form the basis for an FMLA interference claim. Moreover, the court held that defendant was entitled to summary judgment on the retaliation claim because plaintiff could not satisfy the causal nexus element of the *prima facie* case. The court noted that the temporal proximity between plaintiff's request for leave and his termination was "not so suggestive that, by itself, it raise[d] an inference of causation." Moreover, even taking the record as a whole, plaintiff's allegations of improper conduct towards him were not sufficient to show that they were "part of a pattern of antagonism or that it demonstrated retaliatory animus." Rather, the evidence demonstrated that defendant was reasonable in its treatment of plaintiff in light of his mistakes and conduct, and the reasons defendant gave for its termination of plaintiff's employment, in totality, were not inconsistent over time or with each other.

***Rice v. Charter Commc'ns, Inc.*, No. 6:15-2492-HMH-JDA, 2016 WL6804331 (D.S.C. Nov. 17, 2016)**

Plaintiff, a sales advisor and representative, filed suit against her former employer after she was laid off, alleging that it interfered with her right to FMLA leave and retaliated against her for requesting FMLA leave. Defendant moved for summary judgment on all counts, and the

district court granted the motion. As to the interference claim, the court held that plaintiff did not set forth sufficient evidence that she was terminated because of requesting leave. Plaintiff had sought leave to attend her daughter's birthday party, at which time her daughter was to be evaluated by a medical professional. However, defendant denied her request for leave, so when plaintiff left her shift early in order to attend her daughter's party, defendant was entitled to count that absence as "unapproved" for purposes of employee discipline. Plaintiff also affirmatively declined FMLA leave for that day after her employer later questioned her regarding the absence. Additionally, plaintiff did not "make a reasonable effort to schedule [her daughter's] treatment so as not to disrupt the operations of the employer," as required under 29 U.S.C., § 2612(e)(2)(A). Nor did she adequately plead or set forth evidence demonstrating that any personal condition requiring treatment after the unapproved absence was sufficient to justify FMLA leave. As to the retaliation claim, defendant provided a legitimate, nondiscriminatory reason for plaintiff's termination—i.e., plaintiff accumulated too many unexcused absences—and plaintiff did not set forth facts demonstrating defendant's stated reason for plaintiff's termination was pretextual.

***Harris-Bethea v. Babcock & Wilcox Tech. Servs Y-12, LLC*, No. 3:13- CV-669-TAV-HBG, 2016 WL 4379232 (E.D. Tenn. Aug. 16, 2016)**

Plaintiff brought suit under 29 U.S.C. § 2615(a)(2) alleging FMLA retaliation, and the district court granted the company's motion for summary judgment on this issue. Plaintiff alleged that her termination from employment one week after she began taking intermittent FMLA leave constituted unlawful retaliation. However, it was undisputed that a week before plaintiff received FMLA leave, she had used profanity at work. After a human resources investigation, it was determined that plaintiff had violated the company's code of conduct, which prohibited the use of abusive or threatening language while on work grounds. Subsequently, plaintiff was terminated from employment for using foul language at work. Notwithstanding plaintiff's allegation that there was a culture of using foul language at the company's workplace, the court held, upon applying the *McDonnell Douglas* burden-shifting framework, that even assuming plaintiff satisfied the low threshold of proof required to establish a *prima facie* case of retaliatory discharge, plaintiff was unable to prove that the company's proffered legitimate, nondiscriminatory reason for plaintiff's termination was pretext for discrimination. As a result, plaintiff's FMLA retaliation claim was dismissed.

***Obrock v. Int'l Auto. Components, LLC*, No. 3:15-CV-00279, 2016 WL 3905668 (M.D. Tenn. July 18, 2016)**

Facility engineer at automotive component design, engineering, and manufacturing company brought FMLA interference and retaliation claims, alleging that he was terminated for exercising his FMLA rights. The court awarded summary judgment to employer on both claims. Although questions of fact may have existed as to whether plaintiff established a *prima facie* cases of interference and retaliation, plaintiff's failure to adhere to a company safety procedure provided a legitimate reason for his termination.

***French v. Gray Television Grp., Inc.*, No. CV H-14-2146, 2016 WL 5315491 (S.D. Tex. Sept. 22, 2016)**

A meteorologist sued his former employer television station for FMLA retaliation. After working for the television station for more than a decade and having been disciplined many times for inappropriate angry outbursts, unexcused absences and leaving work during his shift and severe weather events, among other performance issues, plaintiff refused to appear for a meeting to discuss a performance improvement plan, but the following day was hospitalized and the doctor backdated his leave to before the scheduled meeting. The television station approved his leave, giving him more than 12 weeks, and restored him to his position following his illness. Upon his return, he was given the performance improvement plan, but his performance and inappropriate behavior continued. His contract was terminated for cause, and the district court granted the television station's motion for summary judgment finding the nondiscriminatory genuine reasons for plaintiff's termination were not pretext.

***Caldwell v. KHOU-TV & Gannett Co.*, No. CV H-15-0308, 2016 WL 3181167 (S.D. Tex. June 3, 2016)**

Plaintiff sued his employer for allegedly interfering with his FMLA rights. Plaintiff and employer, however, disagreed about whether plaintiff gave notice of his upcoming need for FMLA leave. Defendant explained that plaintiff was terminated in a reduction in force ("RIF"). In response, plaintiff pointed to what he believed were employer's changing reasons for his termination. These changing reasons or inconsistent explanations were evidence of pretext, according to plaintiff. In the end, the district court disagreed. After describing the difference between the prescriptive (or "retaliation") and proscriptive (or "interference") provisions of the FMLA, the court clarified that plaintiff made an interference claims. To establish a *prima facie* interference case, plaintiff must establish: (1) his eligibility, (2) FMLA coverage, (3) an entitlement to leave, (4) he gave proper notice of his intention to take FMLA leave, and (5) employer denied him the benefits to which he was entitled.

The court noted that there was a fact issue as to whether plaintiff provided sufficient notice to "reasonably apprise" employer that his request for time off could fall under the FMLA. The court explained that the Fifth Circuit "does not apply categorical rules for the content of the notice but, instead, focuses on what is 'practicable' based on the facts and circumstances of each individual." Though an employer does not have to be clairvoyant, it might have a duty to inquire further if an employee's statements warrant it.

Nonetheless, the court ultimately granted employer's motion to dismiss because plaintiff did not provide any evidence that employer's legitimate, non-discriminatory reason (i.e., RIF) was pretext for interference. And employer's "story" had not changed over time. Plaintiff did not show inconsistencies in the decision-maker's explanation. Rather, he showed that others, who were not decision-makers, made statements inconsistent with the decision-maker. This was not pretext, according to the court. The court granted the motion to dismiss plaintiff's FMLA claim.

***Duong v. Bank of Am., N.A.*, No. 1:15-CV-784, 2016 WL 899273 (E.D. Va. Mar. 2, 2016)**

Plaintiff was hired as a "small business banker" by defendant in January 2012 to work at a San Diego, California bank branch. In November 2012, plaintiff requested, and was granted, a transfer to defendant's Annandale, Virginia branch. She was looking to transfer to Virginia because she planned to get married. Plaintiff began working at the Annandale office on February 2, 2013, and in doing so, made a one-year commitment to work at the Annandale office. One month later, plaintiff requested to be transferred to the Alexandria, Virginia branch. That request was denied. In May 2013, plaintiff complained about her relationship with one of her co-managers, and in June 2013, requested to be transferred back to California because her father had become ill. For roughly two months thereafter, plaintiff traveled to California and interviewed for various positions in California; she did not tell her manager of these plans or trips. Plaintiff was offered a position in Laguna Niguel, California, but her current manager's approval was required for the transfer to occur. And given the fact plaintiff had only worked in Virginia for six months up to that point, her then-manager denied the request.

When plaintiff's manager learned about plaintiff's California trips, he called her on August 5, 2013, to discuss them. During that call, plaintiff admittedly lied about her whereabouts, but said she did so because she was embarrassed about her husband's mental health problems and her failing marriage. Shortly thereafter, defendant made the decision to terminate plaintiff's employment due to her dishonesty and performance, but before it could do so, plaintiff submitted a request for FMLA leave, which was granted for roughly two weeks. During her leave, plaintiff and her husband travelled to Florida, and plaintiff did not return to work until August 28, 2013. Plaintiff met with her manager upon her return, and according to plaintiff's manager, plaintiff did not provide a reasonable explanation for why plaintiff did not tell him about her trip to California in early August. Plaintiff was then terminated for dishonesty.

Defendant moved for summary judgment on plaintiff's FMLA interference and retaliation claims, which the court granted. As to the interference claim, defendant provided evidence that it planned to terminate plaintiff prior to her request for FMLA leave, so plaintiff could not set forth any causal connection between plaintiff's taking of leave and her termination. Moreover, defendant provided evidence that plaintiff's use of FMLA leave was not for its intended purpose, which was an independent basis to defeat her interference claim. As to the retaliation claim, the court reasoned that it also failed because plaintiff lied to her manager, and the decision to terminate plaintiff arose prior to plaintiff's request for leave. Similarly, any temporal proximity between plaintiff's taking of leave and her termination was insufficient to defeat defendant's legitimate, non-discriminatory reason for plaintiff's termination.

Summarized elsewhere:
***Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296 (4th Cir. 2016)**

***Olson v. Penske Logistics, LLC*, 835 F.3d 1189 (10th Cir. 2016)**

***Brisk v. Shoreline Found., Inc.*, No. 15-13028, 2016 WL 2997122 (11th Cir. May 25, 2016)**

***Talley v. Triton Health Sys., LLC*, No. 2:14-CV-02325-RDP, 2016 WL 4615627 (N.D. Ala. Sept. 6, 2016)**

***Palmer v. Liberty Mut. Grp.*, No. 3:14-CV-00953-WWE, 2016 WL 4203375 (D. Conn. Aug. 9, 2016)**

***D'Ambrosio v. Cresthaven Nursing & Rehab. Ctr.*, No. 14-06541 (JBS/KMW), 2016 WL 5329592 (D.N.J. Sept. 22, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

***Dennis v. Nationwide Children's Hosp.*, No. 2:15-CV-688, 2016 WL 5468338 (S.D. Ohio Sept. 29, 2016)**

***Wells v. Retinovitrous Assocs.*, No. CV 15-5675, 2016 WL 3405457 (E.D. Pa. June 21, 2016)**

***Wheeler v. Jackson Nat'l Life Ins. Co.*, 159 F. Supp. 3d 828 (M.D. Tenn. 2016)**

***Burnette v. Rategenius Loan Servs.*, No. A-16-CV-577-SS, 2016 WL 3004671 (W.D. Tex. May 23, 2016)**

***Balding v. Sunbelt Steel Tex., Inc.*, No. 2:14–cv–00090, 2016 WL 6208403 (D. Utah Oct. 24, 2016)**

***Wintz v. Cabell Cty. Comm'n*, No. CV 3:15-11696, 2016 WL 7320887 (S.D. W. Va. Dec. 15, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

***Burrer v. Boeing Co.*, No. C14-1676RSL, 2016 WL 1615433 (W.D. Wash. Apr. 22, 2016)**

3. Pretext

***Douyon v. N.Y. City Dep't of Educ.*, No. 15-3932, 2016 WL 6584894 (2d Cir. Nov. 7, 2016)**

In *Douyon v. New York City Department of Education*, plaintiff served as defendant's Deputy Executive Director of Special Education for schools in the Bronx. In April 2010, plaintiff learned of a school system reorganization that would result in her position being eliminated, and that she needed to find a new one. By June 2010, she had not interviewed and secured a new position. On June 18, 2010, plaintiff met with her supervisor to discuss taking FMLA leave due to some health concerns. On June 24, 2010, plaintiff's supervisor handed her a termination letter from defendant's human resources department, stating that her last day of employment would be July 9, 2010. Plaintiff's supervisor signed plaintiff's FMLA application on June 24, 2010, after notifying her of her termination, and submitted it to human resources for approval. The HR department approved plaintiff's FMLA request from June 26, 2010 through her termination date. Plaintiff sued alleging retaliation and interference under the FMLA. The U.S. District Court for the [district] granted defendant summary judgment.

The Second Circuit concluded that plaintiff could not present evidence that the stated reason for her termination –defendant's reorganization—was pretextual. Specifically, the court noted that all five remaining Deputy Executive Director positions within defendant's schools, including plaintiff's, were eliminated as part of the reorganization. The court rejected plaintiff's contention that she could show pretext from the fact that defendant hired two of those former Deputy Executive Directors because they were hired before plaintiff requested FMLA leave. Furthermore, the court rejected plaintiff's interference claims because she could not identify a benefit to which she was entitled and denied. Rather, the court explained, defendant provided plaintiff with leave to which she was entitled, and defendant's obligation to continue her FMLA leave expired when she was terminated.

***Rodriquez v. Eli Lilly & Co.*, 820 F.3d 757 (5th Cir. 2016)**

Defendant discharged plaintiff, a sales employees, for submitting false reports. Shortly before his discharge, plaintiff applied for FMLA leave related to his previously diagnosed PTSD. Plaintiff received notice from defendant that his leave application was approved on the same day he was discharged. Plaintiff sued for retaliation under the FMLA, 29 U.S.C., § 2615(a)(1). The district court granted defendant summary judgment and the court of appeals affirmed. The Fifth Circuit evaluated the case according to the *McDonnell-Douglas* framework. While the court acknowledged the temporal proximity between plaintiff's request for FMLA leave and his discharge, it rejected his claim because he was otherwise unable to show that the reason defendant provided for his termination was a pretext for retaliation.

***Partin v. Weltman Weinberg & Reis Co.*, No. 16-3191, 2016 WL 6936537 (6th Cir. Nov. 28, 2016)**

Plaintiff, a clerk in defendant's Legal Processing Department, brought suit in the district court after being terminated as part of reduction in force. The district court granted defendant's motion to dismiss on plaintiff's FMLA interference and retaliation claims, citing failure to show pretext on the retaliation claim. Plaintiff appealed, arguing the district court gave short-shrift to her evidence of pretext.

The appellate court reviewed the facts of the claim on appeal. The court agreed with the lower court's decision, finding that plaintiff did not provide sufficient evidence that would permit a jury to reject defendant's non-discriminatory reason for plaintiff's termination. Plaintiff was terminated in the third or fourth round of a large, company-wide reduction in force, while she was on FMLA leave for knee replacement surgery. Defendant created and followed a list of five criteria in choosing employees for layoff. The factors included (1) work, functionality, and ability to absorb responsibility, (2) performance, (3) discipline history, (4) ability to adapt to change and work on a team, and (5) seniority. Plaintiff argued that (1) defendant terminated other employees who had exercised FMLA rights, (2) defendant retained less experienced and lower performing clerks, and (3) defendant could not produce documentation of the decision made to terminate her and a coworker. The court pointed out that plaintiff was looking only at her office and not at the full company-wide effect of the reduction in force; plaintiff was focusing on select criteria and not all of the required criteria as a whole; and that defendant's inconsistent use of documentation of the termination decisions by certain supervisors did not create pretext for the inclusion of plaintiff on the list.

***Hartman v. DOW Chem. Co.*, No. 15-2318, 2016 WL 4363161 (6th Cir. Aug. 16, 2016)**

Plaintiff brought an action against her former employer, alleging that the company violated the FMLA by firing her after she returned from FMLA leave when the reason for the termination was pretextual. After a jury found the company liable and awarded plaintiff damages, the company filed a motion for judgment as a matter of law, which was denied by the district court. On appeal, the Sixth Circuit Court of Appeals reviewed *de novo* the district court's analysis of whether the company's reason for firing plaintiff constituted evidence of pretext.

The company argued that it fired plaintiff for timecard fraud, which an employee who supervised plaintiff began to suspect around the time plaintiff took FMLA leave. Because plaintiff did not show that employees who suspected and investigated the timecard issue (1) were aware of the issue prior to plaintiff's request for FMLA leave but ignored the issue and (2) ndertook the investigation only after plaintiff used her FMLA leave, the court (invoking the settled principle in the circuit that temporal proximity cannot be the sole basis for finding pretext) held that the record was insufficient to establish retaliatory animus.

The court further determined that the following communications could not raise an inference of retaliatory animus as a matter of law: An email that made no mention of plaintiff's use of FMLA leave, set forth examples of plaintiff's apparent misuse of company time, and ended with the question, "Do we have enough now to take action? Please?"; an email containing the company's assessment of potential litigation risk for terminating or disciplining plaintiff while she was on leave; and alleged comments by a supervisor that he was skeptical of plaintiff's need for FMLA leave but who accepted the request for leave after receiving a note from plaintiff's doctor certifying that she needed more rehabilitation. Upon rejecting the grounds on which the inference of pretext had been based, the Sixth Circuit reversed the district court's denial of the company's motion for judgment as a matter of law and remanded for entry of judgment in favor of the company.

***Ethridge v. Nichols Aluminum – Ala., LLC*, No. 5:14-CV-02126-KOB, 2016 WL 4540907 (N.D. Ala. Aug. 31, 2016)**

Plaintiff, a team leader on the paint line at an aluminum company, alleged that he was terminated in retaliation for exercising his FMLA rights. After a shoulder injury and taking FMLA leave, work restrictions would not allow plaintiff to fully perform his current job. The company terminated him after he refused to bid for an open position that would accommodate his work restrictions.

Defendant moved for summary judgment. The District Court for the Northern District of Alabama granted the motion, analyzing the claim under the *McDonnell Douglas* framework. Defendant first argued that plaintiff could not show a causal connection between plaintiff's FMLA leave and termination, which is an element of the *prima facie* case. The court determined that, because defendant terminated plaintiff immediately after his request to return to work—even though plaintiff took a Workers' Compensation leave that extended beyond his 12 weeks or FMLA leave –plaintiff had shown enough temporal proximity to establish a causal connection with his FMLA leave. The court then found that defendant articulated a legitimate non-discriminatory reason for terminating plaintiff, and that plaintiff failed to present sufficient

evidence that the reasons given by employer were pretextual. Defendant contended that it terminated employment because plaintiff could not perform his job and refused to bid on the open position. The court rejected the following attempts by plaintiff to show pretext: (1) offering conclusory allegations based on plaintiff's subjective beliefs and impressions that he was terminated because of FMLA leave; (2) arguing that employer failed to tell him that the new job was restructured to fit his restrictions; (3) suggesting the bidding requirement was a pretext for discrimination when no evidence supported this; and (4) suggesting the court could find pretext because defendant did not follow its policy of allowing workers to return to work when they failed to meet the requirements of a job description. Regarding plaintiff's last argument, the court found that, although plaintiff could describe a few occasions where defendant acted in this manner, this was not enough to demonstrate it was defendant's "policy." Even if it was a policy, plaintiff failed to show that its application constituted pretext, because he had not shown that defendant applied it so inconsistently as to treat employees who did not take FMLA leave more favorably.

***Mileski v. Gulf Health Hosps., Inc.*, No. CA 14-0514-C, 2016 WL 1295026 (S.D. Ala. Mar. 31, 2016)**

Hospital unit tech brought an action in the District Court for the Southern District of Alabama claiming her former employer retaliated against her by terminating her employment after she returned from FMLA leave. Defendant filed summary judgment, and the court denied defendant's motion as to the FMLA retaliation claim. Plaintiff arrived at work, clocked-in, and left work without clocking out or advising a supervisor. Later that day, plaintiff was admitted to the same hospital for suicidal intentions and a drug overdose. She was subsequently granted FMLA leave for all but one-hour of her time based on her treatment for depression. Employer met its light burden of proffering a legitimate, non-discriminatory reason for its termination of plaintiff, specifically failure to report for duty and clocking out without authorization constituted job abandonment. However, the court found that defendant's reliance on job abandonment could be pretext because the phrase "job abandonment" was not specifically defined or listed as a terminable offense, and by definition, leaving work early without authorized approval, was only a single violation of the attendance policy.

Plaintiff also attempted to bring claims for interference with her rights under the FMLA for the first time in her opposition to defendant's motion for summary judgment. Although it was clear to the court that plaintiff could have, and should have, raised interference claims in her complaint because defendant terminated her for an absence from work which was approved as protected FMLA leave, it was not the proper course of action to do so in her opposition.

***Frachiseur v. Graphic Packaging Int'l, Inc.*, No. 2:15-CV-02027, 2016 WL 3661560 (W.D. Ark. July 5, 2016)**

A district court in Arkansas granted employer's motion for summary judgment. Employee worked for employer beginning in 1983 and began receiving disciplinary actions at least as early as 2008. In 2008 through 2011, she was given both verbal and written warnings for attendance issues, writing warnings for setting up her work equipment wrong and deficiencies in work performance, and she was temporarily suspended for a policy breach and unsatisfactory performance. In May 2012, employee was diagnosed with breast cancer and was granted FMLA

leave for treatment. She returned to work in January 2013 and soon after, continued to receive disciplinary actions. In February 2013 she received a verbal warning for unsatisfactory performance for failing to properly verify a work order which led to a "label mix" where the wrong label went on the wrong carton. In May 2013 she received a written warning for another mistake that lead to a label mix. In August 2013 she was suspended for one day for failing to sign in on her work machine's Daily Management Board, and she also received an unsatisfactory performance evaluation. She was suspended for three days in October 2013 for continued performance issues, and in December 2013, her production fell short of minimum requirements and she was moved to another machine where she caused a third label mix issue. In December 2013, employer terminated her employment pursuant to its progressive disciplinary process.

Employee claimed FMLA discriminatory retaliation, among other things. The court determined that under the *McDonnell Douglas* burden shifting framework employee failed to offer sufficient evidence to demonstrate that her termination was a pretext for discrimination. Employee attempted to (1) describe the series of disciplinary actions taken against her as "highly unusual"; (2) point out the temporal proximity between her return from FMLA leave and discipline, including termination; and (3) explain her general disagreement with employer's reason for her termination and general disapproval of employer's progressive discipline policies. The court noted that employee was essentially asking the court to make an inference of discrimination based solely upon employee's characterization of the circumstances rather than any actual evidence supporting her position or rebutting employer's, which the court refused to do. The court dismissed employee's claims with prejudice.

***Brian v. Wal-Mart Stores, Inc.*, No. 4:14-CV-00139-BLW, 2016 WL 1222221 (D. Idaho Mar. 28, 2016)**

Plaintiffs, both retail store associates, claimed, *inter alia*, that they had each suffered retaliation for exercising their right to take leave pursuant to the FMLA. Plaintiff B had alleged that he was terminated in retaliation for his exercise of his FMLA rights, while Plaintiff G alleged that he had been constructively discharged for taking FMLA leave. Defendant employer filed a motion to strike an expert report submitted by plaintiffs and a motion for summary judgment on all of plaintiffs' claims. The district court denied the motion for summary judgment. With regard to Plaintiff B, the court found that, despite employer's assertion that it had engaged in a program of progressive discipline with regard to Plaintiff B, the record contained evidence that raised questions of fact sufficient to deny summary judgment, including testimony that a manager had threatened that "someone who took FMLA didn't deserve to be a manager," and had directed another manager to terminate Plaintiff B so as to avoid the appearance of retaliation. With regard to Plaintiff B, the court found that Plaintiff G had adduced sufficient evidence to raise questions of fact sufficient to deny summary judgment, including testimony that he had been ridiculed and humiliated in front of his coworkers and subordinates for his use of FMLA leave. The court also denied the motion to strike as moot, as it had not relied on the expert report in resolving the motion for summary judgment.

***Peterson v. Martin Marietta Materials, Inc.*, No. C14-3059-LTS, 2016 WL 2886376 (N.D. Iowa May 17, 2016)**

Plaintiff brought a claim for FMLA retaliation against his former employer after he was discharged for purportedly violating the company's safety policy. Plaintiff took FMLA leave several times during his employment for a stroke. A few months after returning from his last FMLA leave, plaintiff backed a skid loader into a truck, causing property damage. A few months later, plaintiff was involved in another incident causing property damage. After an investigation, employer terminated his employment 10 days later.

The court first noted that although plaintiff termed his claim FMLA "retaliation," it was actually FMLA discrimination because plaintiff claimed that he was discharged for simply exercising his FMLA rights, rather than opposing or complaining about unlawful practices under the FMLA. The court then found that plaintiff could not establish a *prima facie* case because he could not establish that the safety-policy reason for his discharge was pretextual. In particular, plaintiff did not contend any similarly-situated employees were treated differently. And plaintiff's evidence regarding another employee's reduction in hours after returning from FMLA leave was too speculative and vague to establish discriminatory intent. Finally, the court found that the timing of plaintiff's discharge—seven months after his return from leave—failed to create an inference of discriminatory motive. Therefore, the court granted summary judgment to employer.

***Cote v. T-Mobile USA, Inc.*, No. 1:14-CV-00347-JAW, 2016 WL 865222 (D. Me. Mar. 2, 2016)**

Plaintiff was a former call-center employee with defendant, T-Mobile USA, Inc. Plaintiff sued defendant under the FMLA and the Maine equivalent, alleging that defendant interfered with her right to take medical leave and terminated her in retaliation for taking such leave. Defendant moved for summary judgment. Plaintiff conceded on her interference claim, and the district court therefore granted summary judgment on that claim and turned to the remaining retaliation claims. The court's decision turned on the third and last part of the *McDonnell Douglas* framework: whether plaintiff generated a genuine issue of material fact as to whether defendant's stated reason was pretextual. In its analysis, the court considered six guideposts: (1) temporal proximity, (2) falsity of employer explanation, (3) pattern of conduct, (4) employer comments, (5) employer's inquiry before termination, and (6) cat's paw inquiry. The court concluded that the combined considerations of temporal proximity (in this case, a four-day gap between taking leave and termination), the falsity of defendant's explanation, employer's comments, and the precipitousness of employer discharge precluded summary judgment because there were genuine issues of material fact that only a jury may resolve. Similarly, the court concluded that there were genuine issues of material fact as to whether the final decisionmakers who terminated plaintiff may have acted as "cat's paws," i.e. conduits, for her supervisor's alleged prejudice against her for taking FMLA leave. Additionally, because the court found summary judgment on the FMLA claims was inappropriate, it held that it was likewise inappropriate on the MFMLA claims. The motion for summary judgment was therefore granted in part and denied in part.

***Rentz v. William Beaumont Hosp.*, No. 15-11931, 2016 WL 3753554 (E.D. Mich. July 14, 2016)**

A clinical clerk at a hospital who was terminated following several leaves of absences due to breast cancer alleged that her termination violated the FMLA and state and federal disability acts. Denying employer's motion for summary judgment, the court found there was sufficient evidence that employee provided notice of the need for leave. Although employee did not expressly request FMLA leave, her supervisor was aware of the need for leave for an upcoming surgery.

Addressing the retaliation claim, the court found that it was "not a stretch" that a fact finder could determine that whenever employee used leave or suggested using leave, her supervisor "aimed for her," as evidenced by repeated requests to human resources to determine whether employee had sufficient leave time remaining. The court also concluded that there was sufficient evidence of pretext, rejecting employer's argument that it reasonably and honestly believed in the particularized facts that led to its termination decision following an incident. The court found that the lack of evidence as a basis for the investigation and termination created a factual dispute. Finally, the court rejected employer's argument that the termination decision was made by a committee that was unaware of employee's history of FMLA leave, concluding that the committee that made the final recommendation was simply the supervisor's "cat's paw" in the action.

***Britko v. Bay Reg'l Med. Ctr.*, No. 15-CV-12219, 2016 WL 3213387 (E.D. Mich. June 10, 2016)**

Plaintiff brought a claim against defendant for retaliation under the FMLA. Plaintiff claimed that defendant terminated his employment in retaliation for taking FMLA leave to have a heart ablation procedure. The district court granted defendant's motion for summary judgment. The court found that plaintiff was able to establish a *prima facie* case. The Sixth Circuit has held that a span of less than three months is sufficient to create an inference of a causal connection. Here, there was a span of less than two months between the time that plaintiff took leave and the time that defendant terminated his employment, which was sufficient to establish the causation prong of a *prima facie* case.

Plaintiff could not prove that defendant's legitimate non-discriminatory reason for plaintiff's termination was pretextual. The court found that evidence of a failure to furnish an FMLA notice—which is an interference claim—does not, without more, demonstrate a question of pretext for FMLA retaliation. In addition, an employer's request to an employee to reschedule a planned medical treatment so that it will not disrupt employer's operation does not prove pretext.

***Mikan v. Arbors at Fairlawn Care, LLC*, No. 5:15 CV 250, 2016 WL 5463056 (N.D. Ohio, Sept. 29, 2016)**

Plaintiff, a registered nurse who worked at a resident care facility, brought a claim of interference against defendant under the FMLA, asserting that the termination of her employment was retaliatory and intended to interfere with her rights under the FMLA. The court

granted defendant's motion for summary judgment. The court found that plaintiff's employment was terminated because she had failed to follow a protocol that required checking a resident's vital signs at specified intervals, after a resident had an unexplained fall. While plaintiff alleged that her termination was retaliation for asking defendant's business office for information about taking FMLA leave on the same day that she was terminated, the court found no evidence that the individuals making the termination decision were aware of her inquiry. The court found that FMLA requests were a matter of routine at the care center, and there was no indication that plaintiff's inquiry factored into the termination decision. In so finding, the court rejected plaintiff's claim of "suspicious timing," noting that temporal proximity cannot be the sole basis for finding pretext, and that there must be some other independent evidence.

***Partin v. Weltman Weinberg & Reis Co.*, No. 1:14-CV-216, 2016 WL 67299 (S.D. Ohio Jan. 5, 2016)**

A processing clerk plaintiff sued her employer for FMLA interference and discrimination for a termination as part of a reduction in force that took effect three days before she was scheduled to return from medical leave. The district court granted employer summary judgment on the interference claim because employer indisputedly gave plaintiff the full 12 weeks of leave to which she was entitled. On the discrimination claim, the court held that the one-day temporal proximity between plaintiff informing employer of her return and her termination was sufficient to state a *prima facie case*, but that employer asserted a reduction in force as its legitimate, nondiscriminatory reason for the termination. The court found that employer's reason was genuine because employer had eliminated employees who had not taken FMLA leave in earlier rounds of the layoff, had eliminated others who had not taken FMLA leave at other locations during the round that affected plaintiff, and had selected plaintiff for an earlier round of the layoff—before she took her FMLA leave—but then allowed her to keep working when another employee left voluntarily. The court also found that plaintiff's seniority and relatively good performance reviews and the inability of employer to produce a document it referred to as containing the reasons for plaintiff's layoff were insufficient to create a material fact dispute, because the five criteria for the layoff indicated plaintiffs' layoff was based on those criteria, others who had taken FMLA leave remained working for employer, and a lack of a written explanation of reasons despite it being mentioned to plaintiff failed to create a material fact dispute.

***Epps v. Vanderbilt Univ.*, No. 3:14-CV-01411, 2016 WL 540717 (M.D. Tenn. Feb. 11, 2016)**

Plaintiff was a registered nurse with defendant, Vanderbilt University Medical Center. Plaintiff sued defendant under the FMLA, alleging that defendant disciplined her more than other employees and ultimately terminated her employment in retaliation for her use of FMLA leave. Defendant moved for summary judgment. The magistrate judge applied the *McDonnell Douglas* burden-shifting framework to assess the retaliation claim. The framework requires a plaintiff to first establish a causal nexus between the protected activity and the adverse employment action as part of the *prima facie* case of a claim for retaliation. The magistrate judge found that the short amount of time between plaintiff's FMLA leave, the discipline received, and the ultimate termination established a causal relationship. Defendant met its burden of providing a nondiscriminatory rationale for the discipline and termination, citing plaintiff's history of unprofessional conduct. To demonstrate defendant's reasons were a pretext, plaintiff alleged that

other employees had not been similarly punished for similar conduct. Further, plaintiff pointed to an email from the executive director of human resources to others in the human resources department asking how many employees were on FMLA leave that was sent shortly before plaintiff was terminated. The magistrate judge found that the circumstantial evidence, combined with the temporal proximity of events at issue, established a genuine issue of material fact as to causation and recommended that summary judgment be denied as to plaintiff's claim of FMLA retaliation.

***Phipps v. Accredo Health Grp., Inc.*, No. 2:15-cv-02101-STA-cgc, 2016 WL 3448765 (W.D. Tenn. June 20, 2016)**

Plaintiff brought a claim for FMLA interference and retaliation against her former employer after she was terminated during FMLA leave. The court found that plaintiff had no direct evidence of interference, despite plaintiff's citation to comments by her supervisor that plaintiff's time off would leave the office short-handed. In particular, the court noted that a jury would be required to make more than one inference from the comments to find they constituted interference, and therefore they were not direct evidence.

The court, however, did find that there were issues of genuine material fact preventing summary judgment on both the FMLA retaliation and interference claims. In particular, plaintiff could establish her *prima facie* case of interference because she an eligible employee, defendant was a covered employer, and she was entitled to FMLA leave at the time of her termination. The court found defendant established a legitimate reason for plaintiff's discharge. Specifically, because she falsified her on-call time log. Nonetheless, the court found genuine material fact issues precluded summary judgment on both claims because employer never informed plaintiff of the investigation into her time-recording issues, and although her supervisor recommended termination prior to plaintiff's FMLA leave, the supervisor recommended that the termination not take effect until after the holidays (which were a few weeks away). The court found that the timing between plaintiff's FMLA request on January 7, 2014, and her discharge on January 10, 2014, might suggest to a fact finder that employer was willing to allow plaintiff to continue working, but then decided to terminate her employment because of her FMLA request.

The court also addressed the parties' argument regarding applicability of the honest belief rule to plaintiff's employment. The honest belief rule shields an employer from liability when its honest belief in the proffered reason for an adverse action, even the reason is mistake, foolish, trivial, or baseless. Applying an unreported decision from the Sixth Circuit, the court found that the honest belief rule did not apply in FMLA interference claims.

***Hartman v. Ohio Dep't of Transp.*, No. 16AP-222, 2016 WL 4093471 (Ohio Ct. App. Aug. 2, 2016)**

Plaintiff filed suit against his former employer, alleging his employment of over 20 years was terminated in retaliation for his requesting FMLA benefits. As evidence, plaintiff proffered that his employment was terminated within two months after he gave defendant notice that he was seeking FMLA benefits. Defendant's stated reason for terminating plaintiff was his series of on-the-job accidents and his violation of a work rule after he had entered a "Last Chance

Agreement" pursuant to which defendant would terminate plaintiff's employment if he violated any work rule within a two-year period.

The court of claims granted defendant's motion for summary judgment, and the court of appeals affirmed. Viewing the facts in the light most favorable to plaintiff, the court held that plaintiff could establish a *prima facie* case for retaliation under the FMLA due to the temporal proximity between his taking FMLA leave and the termination. However, under the *McDonnell Douglas* burden-shifting framework, because defendant demonstrated that plaintiff's termination resulted from progressive disciplinary measures implemented in response to a series of accidents plaintiff caused while on the job, the court held that the record factually supported defendant's stated reason for terminating plaintiff. As a result, plaintiff's FMLA retaliation claim could not proceed.

Summarized elsewhere:
***Chase v. U.S. Postal Serv.*, No. 16-1351, 2016 WL 7228809 (1st Cir. Dec. 14, 2016)**

***Sharif v. United Airlines, Inc.*, No. 15-1747, 2016 WL 6407391 (4th Cir. Oct. 31, 2016)**

***Wheeler v. Jackson Nat'l Life Ins. Co.*, No. 16-5163, 2016 WL 7241403 (6th Cir. Dec. 15, 2016)**

***Tennial v. UPS*, 840 F.3d 292 (6th Cir. 2016)**

***Boileau v. Capital Bank Fin. Corp.*, 646 F. App'x 436 (6th Cir. 2016)**

***Arrigo v. Link*, 836 F.3d 787 (7th Cir. 2016)**

***Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149 (8th Cir. 2016)**

***Han v. Emory Univ.*, No. 15-14858, 2016 WL 5436895 (11th Cir. Sept. 29, 2016)**

***Talley v. Triton Health Sys., LLC*, No. 2:14-CV-02325-RDP, 2016 WL 4615627 (N.D. Ala. Sept. 6, 2016)**

***Nettles v. Hytrol Conveyor Co.*, No. 3:15-CV-00123-KGB, 2016 WL 6089873 (E.D. Ark. Sept. 9, 2016)**

***Mendillo v. Prudential Ins. Co. of Am.*, 156 F. Supp. 3d 317 (D. Conn. 2016)**

***Chumbley v. Bd. of Educ. for Peoria Dist. 150*, No. 14-1238, 2016 WL 7188093 (C.D. Ill. Dec. 9, 2016)**

***Kemp v. Cty. of Cook*, No. 15-CV-4176, 2016 WL 6524945 (N.D. Ill. Nov. 3, 2016)**

***Feagans v. Carnah*, No. 2:15-CV-00222-JMS-DKL, 2016 WL 7210944 (S.D. Ind. Dec. 13, 2016)**

***Shields v. Boys Town La., Inc.*, No. CV 15-3243, 2016 WL 3690052 (E.D. La. July 12, 2016)**

***Lopez v. City of Gaithersburg*, No. CV RDB-15-1073, 2016 WL 4124215 (D. Md. Aug. 3, 2016)**

***Kempton v. Delhaize Am. Shared Servs. Grp. LLC*, No. 2:14-CV-00494-JDL, 2016 WL 1069647 (D. Me. Mar. 17, 2016)**

***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 1366442 (E.D. Mich. Apr. 6, 2016)**

***Norring v. Pace Indus. Casting, LLC*, CV 15-3715 (RHK/ KMM), 2016 WL 6078289 (D. Minn. Oct. 14, 2016)**

***Disbrow v. Oticon, Inc.*, No. 4:15 CV 308 CDP, 2016 WL 427946 (E.D. Mo. Feb. 4, 2016)**

***Stephenson v. Potterfield Grp. LLC*, No. 2:15-CV-04180-NKL, 2016 WL 5030377 (W.D. Mo. Sept. 19, 2016)**

***Fountain v. First Data Merch. Servs.*, No. 14-CV-121-LM, 2016 WL 344520 (D.N.H. Jan. 27, 2016)**

***McGuigan v. Appliance Replacement Inc.*, No. 14-7716 (RBK/JS), 2016 WL 5380927 (D.N.J. Sept. 26, 2016)**

***Lasher v. Medina Hosp.*, No. 1:15CV00005, 2016 WL 455642 (N.D. Ohio Feb. 5, 2016)**

***Lightner v. CB&I Constructors, Inc.*, No. 14-CV-2087, 2016 WL 6693548 (S.D. Ohio Nov. 14, 2016)**

***Burnett v. Gallia Cty., Ohio*, No. 2:14-CV-2544, 2016 WL 4750107 (S.D. Ohio Sept. 12, 2016)**

***Kelly v. Univ. of Pa. Health Sys.*, No. CV 16-618, 2016 WL 414991 (E.D. Pa. Aug. 2, 2016)**

***McNelis v. Pa. Power & Light, Susquehanna*, LLC, No. 4:13-CV-02612, 2016 WL 4991440 (M.D. Pa. Sept. 19, 2016)**

***Quattlebaum v. Boeing Co.*, No. 2:14-CV-3664-DCN-MGB, 2016 WL 3746578 (D.S.C. June 20, 2016)**

***Bullard v. Fedex Freight, Inc.*, No. 3:15-CV-00905, 2016 WL 6648910 (M.D. Tenn. Nov. 9, 2016)**

***Johnson v. Fortune Plastics of Tenn.*, No. 3:14-CV-01310, 2016 WL 6249181 (M.D. Tenn. Oct. 26, 2016)**

***Alexander v. Kellogg USA, Inc.*, No. 2:15-cv-02158-STA-tmp, 2016 WL 1058110 (W.D. Tenn. Mar. 14, 2016)**

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 4376610 (S.D. Tex. Aug. 17, 2016)**

***Francisco v. Sw. Bell Tel. Co.*, No. CV H-14-3178, 2016 WL 3974820 (S.D. Tex. July 25, 2016)**

***Caldwell v. KHOU-TV & Gannett Co.*, No. CV H-15-0308, 2016 WL 3181167 (S.D. Tex. June 3, 2016)**

***Balding v. Sunbelt Steel Tex., Inc.*, No. 2:14–cv–00090, 2016 WL 6208403 (D. Utah Oct. 24, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

***Esler v. Sylvia-Reardon*, 46 N.E.3d 534 (Mass. 2016)**

a. Timing

***Kelley v. Amazon.com, Inc.*, No. 13-36114, 2016 WL 3249750 (9th Cir. June 13, 2016)**

Plaintiff was a customer service associate for defendant. Plaintiff brought suit under various laws, including the Family and Medical Leave Act. For the claim under the FMLA, plaintiff alleged that defendant interfered with her rights under the FMLA when it discharged her for taking intermittent time off that was covered by the FMLA. This case comes before the circuit court on appeal from the district court's grant of summary judgment to defendant. The appellate court affirmed the grant of summary judgment. Plaintiff had a two-year history of using approximately eight days of intermittent FMLA leave per month. In the month prior to discharge, plaintiff used five days of intermittent leave. The appellate court found that defendant's history of freely granting FMLA use the prior two years belies any claim that the use of fewer days of FMLA in the month before discharge could have motivated the decision to discharge.

Summarized elsewhere:
***Casagrande v. OhioHealth Corp.*, No. 15-3292, 2016 WL 7378404 (6th Cir. Dec. 20, 2016)**

***Hartman v. DOW Chem. Co.*, No. 15-2318, 2016 WL 4363161 (6th Cir. Aug. 16, 2016)**

***Szestakow v. Metro. Dist. Comm'n*, No. 3:10-CV-00567-WWE, 2016 WL 4639129 (D. Conn. Sept. 6, 2016)**

***Moore v. Def. Home Sec. Co.*, No. 15-10997, 2016 WL 3522305 (E.D. Mich. June 28, 2016)**

***Dinardo v. Medco Health Sols., Inc.*, No. 14-5716, 2016 WL 2994092 (D.N.J. May 24, 2016)**

***Fuentes v. Cablevision Sys. Corp.*, No. 14-CV-32 (RRM) (CLP), 2016 WL 4995075 (E.D.N.Y. Sept. 19, 2016)**

***Hockenjos v. Metro. Transp. Auth.*, No. 14-CV-1679 (PKC), 2016 WL 2903269 (S.D.N.Y. May 18, 2016)**

***Hice v. David J. Joseph Co.*, No. 1:15-CV-534, 2016 WL 1625824 (S.D. Ohio Apr. 25, 2016)**

***Darby v. Temple Univ.*, No. CV 15-4207, 2016 WL 6190560 (E.D. Pa. Oct. 24, 2016)**

***Mangel v. Graham Packaging Co.*, No. 14-CV-0147-BR, 2016 WL 1266257 (W.D. Pa. Apr. 1, 2016)**

***Phipps v. Accredo Health Grp., Inc.*, No. 2:15-cv-02101-STA-cgc, 2016 WL 3448765 (W.D. Tenn. June 20, 2016)**

***Holland v. Prot. One Alarm Monitoring, Inc.*, No. C15-259 RSM, 2016 WL 1449204 (W.D. Wash. Apr. 13, 2016)**

***Hartman v. Ohio Dep't of Transp.*, No. 16AP-222, 2016 WL 4093471 (Ohio Ct. App. Aug. 2, 2016)**

b. Statements and Stray Remarks

Summarized elsewhere:
***Hartman v. DOW Chem. Co.*, No. 15-2318, 2016 WL 4363161 (6th Cir. Aug. 16, 2016)**

***Brian v. Wal-Mart Stores, Inc.*, No. 4:14-CV-00139-BLW, 2016 WL 1222221 (D. Idaho Mar. 28, 2016)**

***Marshall v. Rawlings Co.*, No. 3:14-CV-359-TBR, 2016 WL 1389991 (W.D. Ky. Apr. 7, 2016)**

***Shoemaker v. Conagra Foods, Inc.*, No. 2:14-CV-153, 2016 WL 6639158 (E.D. Tenn. Nov. 9, 2016)**

***Patterson v. Triangle Tool Corp.*, No. 14-C-1557, 2016 U.S. Dist. LEXIS 81216 (E.D. Wis. June 22, 2016)**

***Esler v. Sylvia-Reardon*, 46 N.E.3d 534 (Mass. 2016)**

4. Comparative Treatment

***Kemp v. Cty. of Cook*, No. 15-CV-4176, 2016 WL 6524945 (N.D. Ill. Nov. 3, 2016)**

Plaintiff was a Commissary Manager for a youth detention facility owned and operated by the county defendant. Defendants decided to discharge plaintiff from employment due to repeated failures to properly manage her food inventory and the retention of expired food product in the commissary. Plaintiff filed suit in the district court and claimed that the discharge was actually in retaliation for her taking protected leave under the FMLA. Plaintiff claimed the leave contributed to the performance issues. The matter was before the court on defendants' motion for summary judgment. The court noted that the Seventh Circuit recently directed the lower courts to use the newly combined direct and indirect approach to proving a *prima facie* case of FMLA retaliation. Specifically, plaintiffs must present evidence from which a

"reasonable fact finder" could conclude that the exercise of FMLA protected rights caused the adverse employment action. The court noted that plaintiff established her use of FMLA and the adverse action. Thus, the court advised that plaintiff needed to establish a causal connection between her use of FMLA leave and the adverse action by establishing either a direct admission, "'convincing mosaic' of circumstantial evidence" or pretextual statements for the adverse action. Plaintiff raised issues of less favorable treatment than comparators and pretext. The court rejected plaintiff's claim that similarly situated individuals were treated more favorably because the individuals she identified did not have similar job descriptions, performance expectations, supervisors, employment record or conduct. The court also rejected plaintiff's claim that the expectations of employer were unreasonable and, thus, pretextual. The court noted that plaintiff was essentially claiming that she thought defendant asked "too much" of her given the circumstances. The court noted that so long as an employer's expectations are made in good faith and not for reasons of fraud or deceit, it will not explore whether such expectations are reasonable or appropriate. Thus, the court granted defendants' motion for summary judgment with respect to the claim of retaliation.

Summarized elsewhere:
***Brian v. Wal-Mart Stores, Inc.*, No. 4:14-CV-00139-BLW, 2016 WL 1222221 (D. Idaho Mar. 28, 2016)**

***Lopez v. City of Gaithersburg*, No. CV RDB-15-1073, 2016 WL 4124215 (D. Md. Aug. 3, 2016)**

***Brown v. Rock-Tenn Servs., Inc.*, No. 1:14-CV-1196, 2016 WL 6808173 (W.D. Mich. Nov. 17, 2016)**

***Norring v. Pace Indus. Casting, LLC*, CV 15-3715 (RHK/ KMM), 2016 WL 6078289 (D. Minn. Oct. 14, 2016)**

***Epps v. Vanderbilt Univ.*, No. 3:14-CV-01411, 2016 WL 540717 (M.D. Tenn. Feb. 11, 2016)**

***Ogden v. Pub. Util. Dist. No. 2 of Grant Cty.*, No. 2:12-CV-584-RMP, 2016 WL 1274543 (E.D. Wash. Mar. 31, 2016)**

C. Mixed Motive

***Kirkland v. S. Co. Servs. Inc.*, No. 2:15-CV-1500-WMA, 2016 WL 880200 (N.D. Ala. Mar. 8, 2016)**

Plaintiff sued his employer for, among other things, FMLA interference and retaliation. Defendant's answer stated failure to state a claim as a defense, and the District Court for the Northern District of Alabama considered it as a Rule 12(b)(6) motion on all claims. The court considered whether plaintiff's FMLA retaliation claim must allege and prove that "but for" the retaliatory motive of employer, the adverse employment action would not have occurred. The court initially indicated it would follow the Seventh Circuit's precedent of requiring FMLA retaliation cases to satisfy the "but for" standard announced by the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013), but declined to do so because the "issue is still a toss-up" in the Eleventh Circuit. 2016 U.S. Dist. LEXIS 29241, * 11;

citing *Coleman v. Redmond Park Hosp.*, LLC, 589 F. App'x 436, 438-39 (11th Cir. 2014) ("we decline to address [defendant's] argument that we should require [plaintiff] to prove that her FMLA leave was the "but-for" cause of its decision not to rehire her").

Summarized elsewhere:
***Fullerton v. Pottstown Hosp. Corp.*, No. CV 15-5329, 2016 WL 3762811 (E.D. Pa. July 13, 2016)**

***Vincent v. Coll. of the Mainland*, No. CV G-14-048, 2016 WL 5791197 (S.D. Tex. Sept. 30, 2016)**

D. Pattern of Practice

Summarized elsewhere:
***Jones v. Sharp Mfg. Co. of Am.*, No. 2:14-cv-03020-STA-tmp, 2016 WL 2344228 (W.D. Tenn. May 3, 2016)**

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

***West v. Wayne Cty.*, No. 16-1419, 2016 WL 6994226 (6th Cir. Nov. 30, 2016)**

Plaintiff was the Chief of Staff and Chief Deputy Clerk for the elected County Clerk of Wayne County, Michigan. In the course of his employment, the County Clerk directed that plaintiff terminate the employment of another County employee. Plaintiff refused, believing that such a discharge would be violative of the FMLA. The County Clerk eventually fired plaintiff who, in turn, filed a lawsuit in the federal District Court for the Eastern District of Michigan. He alleged he was fired for, among other things, voicing opposition to the discharge of the other employee due to FMLA concerns. The lower court granted summary judgment in favor of defendants and the appeals court affirmed.

Plaintiff's claim failed in that he could not establish himself as an "employee" under the FMLA. The appeals court noted that the FMLA borrows its definition of "employee" from the Fair Labor Standards Act which, in turn, excludes from the definition any individual "selected by

the holder of… an [elective office] to be a member of his personal staff." Given the plain language of the definition, the appeals court refused to expand the FMLA's protection from retaliation to other individuals. The appeals court concluded that, given the facts as presented and particularly with regard to the County Clerk's powers of appointment and removal, plaintiff's personal accountability only to the County Clerk, and the actual intimacy of the working relationship, plaintiff could not genuinely dispute that he was a member of the County Clerk's personal staff.

***West v. Wayne Cty.*, No. 2:14-cv-11559-RHC-MKM, 2016 WL 880322 (E.D. Mich. Mar. 8, 2016)**

Plaintiff was formerly employed as chief deputy Wayne County clerk and chief of staff by defendants, Wayne County and its elected clerk. Plaintiff brought a claim for retaliation in violation of the FMLA. Defendants moved for summary judgment. Plaintiff alleged that his employment was wrongly terminated after he opposed the unfair treatment of another employee where that treatment violated the FMLA. Defendant argued that plaintiff was part of the "personal staff" of an elected official and thus was not eligible to sue under the FMLA. The court considered six factors of a non-exhaustive list derived from Title VII cases to assess the applicability of the personal staff exemption under the FMLA: "(1) whether the elected official had plenary powers of appointment and removal; (2) whether the person in the position is personally accountable to only the elected official; (3) whether the person in the position at issue represents the elected official in the eyes of the public; (4) whether the elected official exercises a considerable amount of control over the position; (5) the level of the position within the organization's chain of command; and (6) the actual intimacy of the working relationship between the elected official and the person filing the position." The court found that there was no genuine issue of material fact regarding any of these factors such that plaintiff is "exactly the type of employee for whom the exemption was designed." Plaintiff argued that because the FMLA prohibits discrimination against any individual, the FMLA allows any individual to bring a suit. The court rejected this argument as inconsistent with the unambiguous limitation that only "eligible employees" or the Secretary of Labor may bring a civil action to enforce the anti-retaliation provision. The court granted summary judgment for defendant. Plaintiff filed an appeal to the Sixth Circuit Court of Appeals.

c. Class Actions

***Wilkinson v. Greater Dayton Reg'l Transit Auth.*, No. 3:11-CV-247, 2016 WL 183918 (S.D. Ohio Jan. 14, 2016)**

Plaintiffs represented a putative class of employees of defendant, alleging that defendant violated numerous provisions of the FMLA. At issue was plaintiff class' second motion for class certification. The operative complaint described the class to include them and any current or future employees who were eligible under the FMLA and who "applied for, been denied, disciplined, terminated or otherwise had their rights under the FMLA interfered with or who were retaliated against for their exercise of their rights under the FMLA."

In September 2014, plaintiffs responded to an interrogatory by identifying 105 employees that comprised the class. They then filed their second class certification motion. In that motion,

they claimed that 321—and not 105—of defendant's 708 employees could seek relief under their class definition. Defendant responded that the new number of class members would expand the scope of the class and that plaintiffs' motion added a new group to their class, which were those employees who simply applied for FMLA leave. Plaintiffs acknowledged this oversight but argued that their class definition always included this overlooked group of employees. Consistent with this view, plaintiffs amended their interrogatory response, stating that there were 321 employees as part of the class.

The court denied plaintiffs' second class certification motion and disagreed that the newly added set of employees were clearly embraced by plaintiffs' class definition. This was because the current class definition was too poorly worded to understand who belonged in it. More specifically, the language "who applied for, been denied, disciplined, terminated" could be read in different ways. On the one hand, it could be read to mean those "who applied for, *and were* denied, disciplined, terminated." In the alternative, it could be read to include all eligible employees "who *have* applied" for FMLA leave. Further adding to the confusion was that the operative complaint made no mention of any employee who simply applied for FMLA leave as part of the class and who did not otherwise suffer any subsequent FMLA violation. In addition, the conclusion of plaintiffs' motion stated that all 708 employees were part of the class. Despite these inconsistent definitions of the class, the court noted that there was sufficient evidence in the record to support plaintiffs' new class definition. It therefore allowed them to file another motion setting forth a clear definition of the class they were seeking to certify.

2. Possible Defendants

Summarized elsewhere:
***Gray v. City of Montgomery*, No. 2:16cv48-WHA, 2016 U.S. Dist. LEXIS 48505 (M.D. Ala. Apr. 11, 2016)**

***Corbett v. Richmond Metro. Transp. Auth.*, No. 3:16cv470-HEH, 2016 WL 4492815 (E.D. Va. Aug. 25, 2016)**

3. Jurisdiction

***Jackson v. La. Dep't of Pub. Safety & Corr.*, No. CV 15-490-JJB-RLB, 2016 WL 482049 (M.D. La. Feb. 5, 2016)**

Plaintiff initially brought claims against defendants Louisiana Department of Public Safety and Corrections and a correctional institute alleging discrimination based on age and race in violation of Title VII of the Civil Rights Act of 1964. Defendants removed the case to federal court. After removal, plaintiff amended his complaint to add a claim under the self-care provision of the FMLA. Defendants moved to dismiss the FMLA claim for lack of subject matter jurisdiction. Defendants claimed jurisdiction was inappropriate because the Eleventh Amendment provides them with sovereign immunity as an arm of the state. Relatedly, they claim that removal does not waive immunity to the FMLA claim because the FMLA claim was added after the litigation was removed. Plaintiff contended that immunity is inapplicable because Congress abrogated state sovereign immunity under the FMLA and because defendants waived sovereign immunity when they removed the case to federal court. Plaintiff also argued

defendants waived immunity when they accepted federal funds, but the court did not address this point. The district court rejected plaintiff's first argument, finding that Congress did not abrogate a state's immunity under the self-care provision of the FMLA, noting that it did abrogate immunity for the family-care provision. The court sided with plaintiff, however, in finding that removal waived Eleventh Amendment immunity. The court adopted the reasoning of the Ninth and Eleventh Circuits, and held that "removal is case based, not claim based" such that removing the case to federal court waived immunity for claims subsequently added in an amended complaint. Accordingly, the court denied defendants' motion to dismiss. Defendants filed an interlocutory appeal to the Fifth Circuit Court of Appeals.

***Palazzolo v. Harris-Stowe State Univ.*, No. 4:16-CV-00826 JAR, 2016 WL 3878470 (E.D. Mo. July 18, 2016)**

University maintenance technician alleged his employer terminated him for several reasons, including his taking FMLA leave, his race, and his complaining about perceived racial discrimination. Plaintiff filed suit in state court pursuant to both the FMLA and the Missouri Human Rights Act. Defendant removed the action to federal court based on federal question jurisdiction, and plaintiff moved to remand. The district court denied the motion to remand because the complaint stated a federal question.

***Parrish v. ARC of Morris Cty., LLC*, No. CV-15-6395 (KSH) (CLW), 2016 WL 3625664 (D.N.J. June 30, 2016)**

Group home manager terminated from her employment filed suit in New Jersey state court alleging discrimination, retaliation, and aiding and abetting liability under New Jersey statutes. Plaintiff had previously requested and received FMLA leave. Plaintiff's supervisor harassed plaintiff while she was on FMLA leave, requesting that plaintiff perform work while she was on leave and/or that plaintiff return to work prior to her scheduled return date. Plaintiff complained of supervisor's harassment to employer's personnel department, which instructed supervisor to cease harassing plaintiff. Supervisor's harassment continued once plaintiff returned to work, culminating in plaintiff's allegedly pretextual termination.

Employer removed to federal court based on federal question jurisdiction, and plaintiff moved to remand. The district court granted the motion to remand, stressing that resolution of plaintiff's claims did not require resolution of any FMLA issue. That supervisor harassed plaintiff while she was on FMLA leave provided factual context for plaintiff's harassment claims, but the harassment claims at issue were based entirely on events that occurred subsequent to plaintiff's return from FMLA leave.

Federal question jurisdiction is not based on whether the facts of the complaint align with the elements of a federal claim. Federal question jurisdiction exists where a plaintiff raises a federal issue that is actually disputed, is substantial, and is capable of resolution in federal court without disturbing principles of federalism. Plaintiff could not be forced to bring an FMLA claim, even if she arguably alleged the elements of an FMLA claim. The FMLA recognizes and protects state law intricacies and does not usurp state law or an individual's ability to choose to litigate in state court.

B. Arbitration

1. Introduction

2. Individual or Employer-Promulgated Arbitration Agreements and Plans

***Robinson v. Universal Prot. Serv., L.P.*, No. CV-16-01408-PHX-DGC, 2016 WL 4194536 (D. Ariz. Aug. 9, 2016)**

Plaintiff sued his employer in federal court under the FMLA after he was terminated following an FMLA authorized leave of absence. Plaintiff, however, had signed an agreement in which he agreed to submit all disputes to arbitration. As such, employer moved for an order compelling arbitration and moved to dismiss the claim in its entirety. Opposing the motion, plaintiff argued that Congress never intended to allow employees to waive judicial remedies with respect to their rights under the FMLA, citing 29 U.S.C. § 2617(a)(2) ("[a]n action to recover the damages or equitable relief prescribed [by the FMLA] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction"); 29 C.F.R. § 825.220(d) ("[e]mployees cannot waive . . . their prospective rights under FMLA)"; and the Seventh Amendment. The district court granted employer's motion, agreeing with the decisions from the Fourth and Eighth Circuit, which held that the FMLA does not confer an unqualified right to a judicial forum. Instead, the court stated that the FMLA simply creates a cause of action and ensures that federal and state courts have subject matter jurisdiction over cases asserting these claims, also noting that the Seventh Amendment can be waived if done so knowingly and intentionally. Accordingly, plaintiff waived his right to a jury trial by agreeing to the arbitration agreement.

3. Arbitration Under a Collective Bargaining Agreement

***Cloutier v. Trans States Holdings, Inc.*, No. 16 C 1146, 2016 WL 3181708 (N.D. Ill. June 8, 2016)**

After his ultimate termination, plaintiff, a pilot, filed several claims against defendant employer, including FMLA interference and retaliation claims. During his employment, plaintiff was diagnosed with diabetes and unable to fly until he received a certification that his diabetes was well controlled. He was approved for FMLA leave. When the time to return to work came, he claimed he was unable to return to work because of the time needed to complete the certification process for his diabetes. Roughly a month later, he received a termination letter for failure to return to work. Defendant argued the claims should be dismissed because the collective bargaining agreement included an arbitration clause. But the arbitration clause did not include any language requiring that the arbitration process should be the exclusive alternative to pursuing his claims in federal court. Accordingly, the court denied defendant's motion to dismiss plaintiff's FMLA claims.

Summarized elsewhere:
***Siddiqua v. N.Y. State Dep't of Health*, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)**

III. Remedies

A. Damages

***Douglas v. Mayor & City Council of Balt. City*, No. CV RDB-15-0718, 2016 WL 927146 (D. Md. Mar. 4, 2016)**

Plaintiff Joanne Douglas sued defendants the Mayor and City Council of Baltimore, Baltimore City Department of Transportation ("DOT"), and Hazel Crowell in her official capacity as a DOT Office Supervisor. Plaintiff was a typist at DOT, and Crowell was her supervisor. Plaintiff alleged deprivation of her rights under the FMLA when employer denied her request for FMLA leave and issued a written warning in response to her Certification of Health Provider form. Plaintiff sought front and back pay, benefits, and equitable relief, as well as damages based on her claim of intentional infliction of emotional distress.

The District Court for the District of Maryland granted defendants' motion to dismiss on the grounds that (1) plaintiff failed to provide notice within 180 days after an injury, as required by the Maryland Local Government Tort Claim Act for any claim against a local government or its employees for unliquidated damages; and (2) plaintiff's claim damages were not authorized by the FMLA, whose damages provision limits recovery to "any wages, salary, employment benefits, or other compensation denied or lost."

***Canady v. Pender Cty. Health Dep't*, No. 7:15-CV-17-D, 2016 WL 927180 (E.D.N.C. Mar. 4, 2016)**

Employee worked for the county health department and was discharged shortly after taking FMLA leave to care for her husband. Employee challenged employer's decision through a state administrative process for public employees and prevailed, receiving full backpay and reinstatement. Employee then filed an FMLA lawsuit in federal court seeking "back pay, front pay, and liquidated damages, less offset of any amounts previously paid to" her as well as punitive damages. Her employer moved to dismiss.

The court granted defendant's motion to dismiss, finding that there were no remedies it could award to plaintiff given the prior administrative ruling. It determined that she had already received all backpay due to her, and that it could not award liquidated damages under the FMLA without an underlying damages award. The court also held that frontpay was inappropriate since it is an alternative to reinstatement, and that plaintiff's punitive damages claim failed because they were not recoverable under the FMLA.

Summarized elsewhere:
***Calderone v. TARC*, 640 F. App'x 363 (5th Cir. 2016)**

***Smith v. AS Am., Inc.*, 829 F.3d 616 (8th Cir. 2016)**

***Alger v. Prime Rest. Mgmt., LLC*, No. 1:15-CV-567-WSD, 2016 WL 3741984 (N.D. Ga. July 13, 2016)**

1. Denied or Lost Compensation

***Henderson v. Mid-South Elecs., Inc.*, No. 13-CV-1166-KOB, 2016 WL 3068413 (N.D. Ala. June 1, 2016)**

Plaintiff brought suit against her employer of 20 years, alleging, among other claims, FMLA interference and FMLA retaliation. Having abandoned her FMLA retaliation claim at trial, the court ruled only on the FMLA interference claim. Based on the fact that it was undisputed plaintiff was eligible for FMLA leave, that plaintiff was entitled to such leave because medical documents in the record indicated she had a serious medical condition, and that plaintiff provided sufficient notice when she informed the company representative responsible for handling personnel matters that she needed to be off work for medical reasons, the court held that the company interfered with plaintiff's FMLA rights when it did not allow plaintiff to take FMLA leave and terminated her employment.

When assessing damages, the court held that plaintiff was entitled to the pay that she would have received had the company properly allowed her to take FMLA leave, which included 13 weeks of salary under the company's salary continuation policy. However, the court rejected plaintiff's argument seeking additional backpay for the period she would have continued to work at the company upon returning from FMLA leave. The court's decision was grounded in its determination that plaintiff would not have been restored to her position at the end of her FMLA leave (had she taken one) because the record showed that at that time, plaintiff was unable to perform an essential element of her job. Whether a reasonable accommodation could have been made had plaintiff been provided FMLA leave and sought to return to work after exhausting the leave was not a question the court would entertain. Noting that the FMLA omits any reasonable accommodation requirement, the court held that "the questions of whether an employee is entitled to restoration under the FMLA and whether an employee is entitled to an accommodation under the [Americans with Disabilities Act] are two separate and distinct inquiries" and plaintiff was not entitled to backpay for any period during which she was unable to perform an essential function of the job because in that event, she would not have been entitled to restoration under the FMLA.

Summarized elsewhere:
***Lovely-Coley v. D.C.*, No. CV 12-1464 (RBW), 2016 WL 3198227 (D.D.C. June 8, 2016)**

2. Actual Monetary Losses

3. Interest

Summarized elsewhere:
***Isom v. JDA Software Inc.*, No. CV-12-02649-PHX-JAT, 2016 WL 1253392 (D. Ariz. Mar. 31, 2016)**

***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 6524144 (E.D. Mich. Nov. 3, 2016)**

4. Liquidated Damages

***Isom v. JDA Software Inc.*, No. CV-12-02649-PHX-JAT, 2016 WL 1253392 (D. Ariz. Mar. 31, 2016)**

Plaintiff, a sales employee, brought suit against defendant, her former employer for unlawful interference with her rights under the FMLA. At trial, the jury awarded plaintiff $114,618.00 in compensatory damages. Following the verdict, the District Court for District of Arizona instructed the parties to file proposed findings of fact and conclusions of law with respect to whether defendant acted in good faith. Plaintiff argued that defendant's repeated failure to provide her with reasonable information regarding whether she would be entitled to a commission payment if she took FMLA leave demonstrated defendant's failure to act in good faith. Defendant argued it acted in good faith by routinely consulting with its human resources department and legal counsel and that it was forced to react to plaintiff's FMLA leave without the benefit of any on-point statute or regulation. The court held that defendant did not act in good faith and awarded liquidated damages and prejudgment interest to plaintiff. The court found plaintiff's repeated inability to obtain information from defendant was dispositive of the issue.

Summarized elsewhere:
***Clements v. Prudential Protective Servs., LLC.*, No. 15-1603, 2016 WL 4120679 (6th Cir. Aug. 3, 2016)**

***Hicks v. City of Tuscaloosa*, No. 7:13-CV-02063-TMP, 2016 WL 1180119 (N.D. Ala. Mar. 28, 2016)**

***Helton v. Wesley Health Sys., LLC*, No. 2:15-CV-20-KS-MTP, 2016 WL 913271 (S.D. Miss. Mar. 9, 2016)**

a. Award

Summarized elsewhere:
***White v. Beltram Edge Tool Supply, Inc.*, No. 8:13-CV-478-T-30MAP, 2016 WL 1458528 (M.D. Fla. Apr. 14, 2016)**

b. Calculation

5. Other Damages

***Joseph v. SEIU UHW*, No. 16-cv-01644-EMC, 2016 WL 4073354 (N.D. Cal. Aug. 1, 2016)**

Plaintiff worked for defendant employer as an organizer for defendant up until it fired her on August 27, 2015. Prior to her termination, she took unpaid FMLA leave sometime in 2015. That leave was supported by a doctor's note indicating that she would be out on leave until October 1, 2015. Despite having sufficient FMLA leave to cover her absence up to at least September 21, 2015, defendant discharged her on August 27, 2015. Defendant contended that plaintiff's FMLA leave expired on August 20, 2015 and that she failed to return to work after that date.

The court denied a motion to dismiss filed by defendant. It explained that the allegations plaintiff made in her complaint—in particular, the fact her leave was an FMLA-qualifying and was supported by a doctor's note—stated a claim under the statute. However, the court also struck her prayer for pain and suffering damages, holding that such relief was not available under the FMLA. That was because the only relief the FMLA provides are (1) wages, salary, employment benefits, or other compensation (collectively wages), (2) interest on wages, and (3) liquidated damages. (29 U.S.C., § 2617(a)(1)(A).)

***Pulchalski v. Franklin Cty.*, No. 1:15-CV-1365, 2016 U.S. Dist. LEXIS 133663 (M.D. Pa. Sept. 27, 2016)**

Plaintiff correctional officer sued his county government employer for FMLA retaliation, alleging he was terminated based on leave for a work-related injury. The magistrate judge held that only the compensatory damages listed in the FMLA statute, and not pain and suffering or emotional distress, were available to plaintiff. The court denied employer's motion to dismiss, finding that plaintiff's allegations of rude comments and demeaning behavior by coworkers was sufficient to state a claim for FMLA retaliation for his termination, rejecting employer's argument that the passage of several months from when plaintiff took his leave and his termination foreclosed his claim at the pre-discovery, motion-to-dismiss stage.

Summarized elsewhere:
***Lynn v. True N. Mgmt., LLC*, No. 15-CV-2650, 2016 WL 6995290 (N.D. Ohio Nov. 30, 2016)**

B. Equitable Relief

1. Equitable Relief Available in Actions by the Secretary

2. Equitable Relief Available in all Actions

a. Reinstatement

Summarized elsewhere:
***Canupp v. Children's Receiving Home of Sacramento.*, No. 2:14-01185 WBS EFB, 2016 WL 1587195 (E.D. Cal. Apr. 20, 2016)**

b. Front Pay

Summarized elsewhere:
***Esler v. Sylvia-Reardon*, 46 N.E.3d 534 (Mass. 2016)**

c. Other Equitable Relief

Summarized elsewhere:
***Bento v. City of Milford*, No. 3:13-CV-01385 (VAB), 2016 WL 5746340 (D. Conn. Sept. 30, 2016)**

C. Attorneys' Fees

***Clements v. Prudential Protective Servs., LLC.*, No. 15-1603, 2016 WL 4120679 (6th Cir. Aug. 3, 2016)**

Following a jury's finding that plaintiff's employer violated the FMLA, employer appealed the district court's award of pre- and post-judgment interest, liquidated damages, attorney's fees, and costs. On appeal, the Sixth Circuit Court of Appeals reviewed the attorneys' fees award under an abuse-of-discretion standard. "[T]he plain language of § 2617(a)(3) mandates the award of attorneys' fees only when plaintiff has proved that defendant violated the FMLA. A court then calculates the lodestar amount by multiplying the reasonable number of hours billed by a reasonable billing rate in the relevant community. Afterward, the court may adjust this amount by applying the 12-factor *Johnson* test. The most critical factor is the degree of success obtained. That being so, employer disputed the first (the time and labor required by a given case), sixth (whether the fee is fixed or contingent), and eighth (the amount involved and the results obtained) factors. First, it argued that opposing counsel's time and labor were unreasonable. Second, employer argued that opposing counsel would be compensated twice because of his contingency-fee arrangement with plaintiff. Third, employer pointed to the jury awarding less than half of the damages requested at trial.

The court of appeals did not agree with employer. Specifically, the court found no duplicative work, despite five different attorneys working on the case, according to employer. Billing records showed that no more than two attorneys worked on the case at any given time. Also, the court rejected employer's argument that one of plaintiff's attorneys was not licensed in the federal district during the course of the case. It held that the accusation did not "speak to the quality or reasonableness of the work" performed by the supposedly unlicensed attorney (i.e. first factor). In response to employer's remaining arguments, the court explained that the time an attorney spends in attaining a fee award is generally compensable. And the preparation of an unfiled motion *in limine* was not an unreasonable expense because plaintiff's counsel argued the admissibility of certain evidence at trial and prevailed on the issue. Plaintiff thus benefitted from it. Regarding the sixth and eighth factors, the court recognized the U.S. Supreme Court's holding that a fee award should not be reduced or limited in every contingency-fee arrangement. Furthermore, the court added that employer's double-recovery argument was based on pure speculation. If it accepted such speculation without factual support in plaintiff's case, it would mean that similar speculation in other cases with contingency-fee arrangements would result in the reduction of attorneys' fees. Besides, a district court is particularly well suited to determine whether fees are reasonable for the nature and scope of success on a case. Therefore, considering the amount requested at trial, the amount ultimately received, the history of settlement negotiations, and the previous appeal, a fee reduction was not warranted in plaintiff's case.

Because of the strong presumption for liquidated damages under the FMLA, the court of appeals reviewed employer's appeal of the liquidated damages under an abuse-of-discretion standard. Initially, the court of appeals recognized that "liquidated damages are the norm in cases where an employer violates" the FMLA. Still, a court may decline to award liquidated damages in such a case only if an employer "show[s] both good faith and reasonable grounds for the action or omission." But in plaintiff's case, employer did not show good faith or reasonable

grounds. Moreover, the liquidated damages provision in the FMLA does not include a prejudice requirement and so, whether plaintiff was prejudiced by the FMLA violation is not relevant. Likewise, it does not matter that an employer merely believes—reasonable or otherwise—that its actions would not cause prejudice. Rather, an employer must have a good-faith, objective belief that its actions were consistent with the FMLA's technical requirements. It must have "honestly intended to ascertain the dictates of the FMLA and to act in conformance with it." Additionally, the court was unpersuaded by the lack of prior FMLA lawsuits against employer. That plaintiff previously took FMLA leave was also not persuasive. Nor was it persuasive that at least 50 employees of employer take family-related leave annually. Even if true, these circumstances failed to prove that employer acted reasonably in attempting to ascertain the FMLA's requirements.

The court of appeals affirmed the district court's attorneys' fees and liquidated damages awards.

***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 6524144 (E.D. Mich. Nov. 3, 2016)**

Plaintiff filed suit against his employer alleging various claims, including FMLA interference. After a six-day jury trial, the jury returned a verdict in favor of plaintiff on one count of FMLA interference and awarded him $187,500 in past economic damages. Plaintiff's counsel sought attorneys' fees and costs in a post-trial motion, which the district court granted in the amounts of $125,473.50 and $7,038.95, respectively. The court also awarded plaintiff $6,379.14 in prejudgment interest.

***Atwood v. PCC Structurals, Inc.*, No. 3:14-CV-00021-HZ, 2016 WL 2944757 (D. Or. Apr. 1, 2016)**

Plaintiff brought a multi-count complaint against her former employer claiming violations of the FMLA, the state equivalent statute, whistleblower violations, and religious and disability discrimination. All claims except her FMLA and state law interference claims were dismissed on defendant's motion for summary judgment or motion for directed verdict. The jury awarded plaintiff $5,000 in damages on her FMLA interference claim, and an equal amount of liquidated damages.

Plaintiff filed a motion for attorneys' fees and costs, seeking $206,480.63 in attorney's fees and $29,739.48 in costs. Defendant objected to this amount, *inter alia*, due to plaintiff's very limited success on the entirety of her complaint. The court agreed, finding that dismissal of three of plaintiff's five claims on directed verdict, and her receipt of an amount of damages that "just barely hurdles the inference that her victory was purely technical or *de minimis*" and was a "miniscule percentage" of what plaintiff sought, merited a 50% lodestar reduction, resulting in an attorneys' fee award of $111,790.15.

***Lee v. State*, 874 N.W.2d 631 (Iowa 2016)**

Employee clerk, having successfully obtained judgment against her employer (the County Clerk of the Court and the State of Iowa), for prospective injunctive relief under the self-care provision of the FMLA, sought an award of attorney fees and costs. The trial court awarded employee attorney fees and costs and the State appealed. On appeal, the Supreme Court of Iowa

considered three issues: (1) what the source of authority is for an award of prospective relief to plaintiff; (2) whether state sovereign immunity bars an award of attorney fees and costs for prospective relief; and (3) whether plaintiff in this instance was entitled to an award of attorneys' fees and costs under the FMLA.

First, the court analyzed the holding of *Ex parte Young*, 209 U.S. 123 (1908), which serves as a means for overcoming state sovereign immunity in allowing a party to maintain a suit to enforce federal law against a state, in the context of prospective relief. The Court held that, because it previously found that plaintiff was entitled to reinstatement as the State had violated the self-care provisions of the FMLA, plaintiff could maintain her suit seeking prospective relief against defendant. In addition, proving that the state violated the self-care provision of the FMLA is what entitled plaintiff to prospective relief.

Second, the court held that sovereign immunity does not bar the court from awarding plaintiff attorneys' fees and costs in seeking prospective relief in plaintiff's action against State officials because (1) the Supreme Court has emphasized that ordering states to pay attorneys' fees does not depend on congressional abrogation of state sovereign immunity; (2) awarding costs in actions against state officials honors the prohibition in awarding retroactive monetary relief established in *Ex parte Young*; (3) the FMLA fee provision requires courts to award attorneys' fees as a part of costs; and (4) it is well-settled that an award of attorneys' fees ancillary to prospective relief is not barred by state sovereign immunity.

Third, the court held that the FMLA fee provision requires an award of attorneys' fees and costs to any plaintiff awarded any judgment in an FMLA action and there is no exception prohibiting fee awards to defendants who happen to be states. Whether employee was entitled in this case to attorney fees based on her FMLA claim turned on whether she had a judgment in her favor, i.e. was a prevailing plaintiff, on that claim, which would result in a mandatory award of fees and costs. In that circumstance, the court can exercise discretion only to the amount of the award. Here, the court determined that employee did have judgment in her favor and should be awarded attorney fees and costs, but only for prospective relief. Therefore, the court reversed the trial court's award because it included fees for retroactive relief (which plaintiff did not prevail on), and remanded the case to the trial court to determine the appropriate amount of attorneys' fees and costs relative to plaintiff's claims for prospective relief only.

Summarized elsewhere:
***Hernandez v. Bridgestone Ams. Tire Operations*, 831 F.3d 940 (8th Cir. 2016)**

D. Tax Consequences

***Gunter v. Cambridge-Lee Indus., LLC*, No. CV 14-2925, 2016 WL 3762992 (E.D. Pa. July 14, 2016)**

Plaintiff filed a lawsuit against defendant, his employer, alleging that it violated the FMLA. Both parties reached a settlement wherein defendant agreed to pay plaintiff a specified sum of money. The parties' settlement agreement, however, did not address whether the settlement monies were taxable. Plaintiff moved to enforce the settlement, alleging that the

settlement proceeds were not wages and that, as a result, defendant could not deduct any tax withholdings from the settlement.

The court agreed and granted plaintiff's motion. While there was no applicable circuit precedent to refer to, the court found persuasive two district court opinions in that circuit addressing the issue raised by plaintiff's motion. Those cases held that where settlement funds are not being paid for services performed, but instead correspond to an amount of backpay that is owed to an employee, they do not constitute wages and thus are not taxable. In doing so, it disagreed with two other cases that arrived at contrary conclusions, one of which noted that the caselaw the court relied on was the minority view and that there was no consensus on this issue. Instead of explaining why it was choosing one line of cases over the other, the court offered no rationale in doing so. By relying on the rulings in the two district court opinions above, it held that defendant could not make any tax withholdings from the settlement proceeds in that case.

IV. Other Litigation Issues

Summarized elsewhere:
***Reeder v. Cty. of Wayne*, No. 15-CV-10177, 2016 WL 3548217 (E.D. Mich. June 30, 2016)**

A. Pleadings

***Tirpak v. Del. Dep't of Tech. & Info.*, 648 F. App'x 263 (3d Cir. 2016)**

Plaintiff was a former employee of defendants and sued under the FMLA, alleging that a month after he returned from FMLA leave, defendants placed him on a Performance Improvement Plan. The district court granted summary judgment to defendants, concluding that the Eleventh Amendment barred plaintiff's claim because defendant Delaware Department of Technology and Information ("DTI") was a state agency. The district court also held that plaintiff had failed to plead his claims properly. Plaintiff had pleaded his FMLA claim only against DTI, while he had pleaded a different, non-FMLA claim against DTI's employee-defendants, and only in their individual (and not representative or official) capacities. The Third Circuit Court of Appeals affirmed the district court's decision, finding the lower court's analysis to be "correct in all respects."

***Rhodes v. WCA*, No. 1:15-CV-187-MW-GRJ, 2016 WL 827936 (N.D. Fla. Feb. 2, 2016)**

Plaintiff filed a *pro se* complaint alleging defendant's violation of the FMLA and requesting worker's compensation, disability, and leave. After removing the case to Federal Court, defendant moved to dismiss plaintiff's complaint, which was granted. The Court, however, provided plaintiff with 20 days to amend his complaint. However, plaintiff's subsequent filings were limited to conclusory assertions of an FMLA violation and lacked factual allegations sufficient to constitute a complaint. Neither plaintiff's amended complaint nor his other filings included any grounds to support plaintiff's FMLA claim. The magistrate judge therefore granted defendant's motion to strike plaintiff's amended complaint and recommended that the district court dismiss the case for failure to prosecute and failure to comply with the court's order to file an adequate complaint.

***Strulson v. Chegg, Inc.*, No. 3:15-CV-00828-CRS, 2016 WL 3094050 (W.D. Ky. June 1, 2016)**

Plaintiff sued her former employer alleging, among other things, interference and retaliation under the FMLA. Defendant moved to dismiss. Referring to a previous court's dismissal without prejudice of a highly similar complaint that plaintiff filed, the court held that plaintiff's claims that she had "scheduled a CT scan" and that "something was recently found in her other lung" did "not support an inference that her condition would involve inpatient care, continuing treatment, or would render her unable to perform the functions of her job." As to plaintiff's additional assertion that her "serious medical condition was lung cancer," the court stated that such was a "legal conclusion to which the Court owes no deference." The court also held that plaintiff had failed to allege sufficient facts showing that defendant was a covered employer under the FMLA when she alleged the existence of only 42 employees, short of the required 50. Although plaintiff referred to "team leaders" who presumably led other employees, the court found her allegations insufficient for it to conclude there were additional employees. The court dismissed both FMLA claims for failure to state a claim.

***Taylor v. J. C. Penney Co.*, No. 16-CV-11797, 2016 WL 4988054 (E.D. Mich. Sept. 19, 2016)**

Plaintiff took an FMLA leave from her retailer employer due to lower back surgery. She returned to work with certain physical restrictions such as no excessive bending or lifting over 25 pounds. She was only allowed to work for four hours per day. Several months later, she was allowed to work full time but with the same physical restrictions. She was then approved for and used paid time off ("PTO") for two weeks. When she returned to work, her store manager told her that employer could not accommodate the restrictions set by plaintiff's doctor, and plaintiff was sent home. For the next week, plaintiff continued to come to work, but was told each day to go home. During this period, plaintiff contacted the Powerline Specialists ("PS") to coordinate her Illness Recovery Time ("IRT"). PS initially told plaintiff she was not entitled to IRT but could use PTO. Following a visit with her doctor, plaintiff's physical restrictions were removed. Several days later, PS sent her a letter saying she was approved for a week of IRT. A few months later, plaintiff informed her supervisor she was planning to have knee surgery. About a week after this conversation, plaintiff was terminated for insubordination and a fraudulent incident involving a coupon. Plaintiff filed an action against employer, alleging that employer had interfered with her FMLA rights by not approving and certifying her for intermittent FMLA leave. The court said plaintiff's interference claim seemed to refer to PS initially having told plaintiff she was not entitled to IRT. But plaintiff acknowledged that PS subsequently sent her a letter saying she was approved for a week of IRT. The court ruled, "with no other allegations of harm, [plaintiff] has failed to plead specific factual allegations that she was prejudiced by the alleged violation that would support a plausible claim for FMLA interference." The court dismissed plaintiff's FMLA interference claim without prejudice.

***Burns v. Catholic Health*, No. CV 16-1661, 2016 WL 1385676 (D.N.J. Apr. 7, 2016)**

The district court, in granting the *pro se* hospital employee plaintiff's motion to proceed in forma pauperis, reviewed the complaint to determine whether it stated a claim upon which relief could be granted, pursuant to 28 U.S.C. § 1915(e)(2), which must be considered under the same standard of review as a Rule 12(b)(6) motion to dismiss. The court held that because

plaintiff's complaint contained no facts that plaintiff was denied leave or that plaintiff was terminated or suffered an adverse employment action, plaintiff's claims for FMLA interference and retaliation were due to be dismissed.

***Arnold v. Research Found. for SUNY*, No. 15–cv–05971 (ADS) (SIL), 2016 WL 6126314 (E.D.N.Y. Oct. 20, 2016)**

Plaintiff brought a claim against her former employer for failure to provide FMLA leave and FMLA retaliation after it denied her request for FMLA leave and terminated her employment. Six months later, plaintiff submitted a motion for leave to amend her complaint. She sought to change her failure-to-provide-leave claim to an FMLA discrimination claim, to add an FMLA interference claim based on her termination, and to add several other claims. Defendant argued plaintiff should not be permitted to add an FMLA interference claim. Defendant attached numerous documents to disprove the allegation in the proposed amended complaint.

The United States District Court for the Eastern District of New York granted plaintiff's motion to amend her complaint to add an FMLA interference claim, but denied her motion as to the FMLA discrimination claim. The court first concluded defendant was not prejudiced by plaintiff's six-month delay in amending her complaint, and that plaintiff did not act in bad faith. The court then held plaintiff's FMLA discrimination claim would be duplicative of her FMLA retaliation claim, and therefore futile. The court allowed plaintiff to amend her complaint to include an FMLA interference claim, finding plaintiff alleged the requisite elements of an FMLA interference claim. It declined to consider documents outside the four corners of the proposed amended complaint or its exhibits.

***Diby v. Kepco Inc.*, No. 16-CV-583(KAM)(LB), 2016 WL 5879595 (E.D.N.Y. Oct. 7, 2016)**

Plaintiff, a junior accountant, brought suit against her former employer, an electronic parts supplier, and her former supervisor alleging interference and retaliation under the FMLA. Plaintiff was denied an FMLA leave by both her former supervisor and the human resources department, which informed plaintiff she did not meet the eligibility requirements under the FMLA. Subsequently, plaintiff took time off and was terminated when she did not call in to the human resources director while she was gone. The New York district court dismissed plaintiff's interference claim against her employer because she failed to allege facts sufficient to assert a *prima facie* case. First, the complaint failed to adequately plead that she was an eligible employee under the FMLA because it did not allege that she worked at least 1,250 hours in the 12 months before she filed for an FMLA leave. Second, plaintiff failed to plead that defendant was an employer under the FMLA because she did not allege that defendant employed 50 or more employees for each working day during each of 20 or more calendar workweeks in the calendar year of the request of the preceding calendar year. Third, plaintiff did not allege sufficient facts that she was entitled to leave under the FMLA based on a "serious health condition" when she simply asserted that she had an injury to her knee. Accordingly, the court dismissed her interference claim against employer and granted her 30 days to amend her complaint. The court did not, however, dismiss plaintiff's retaliation claim against employer. The court found the complaint did plead sufficient facts by alleging that she was exercising rights protected under the FMLA by contesting the denial of her FMLA leave request, that she

was qualified enough at her job to train another individual on a particular system, and that she was terminated within a few weeks of asking for leave under the FMLA.

The court dismissed both the interference and retaliation claims against her supervisor because plaintiff failed to allege sufficient facts to establish that the supervisor was an "employer" under the FLMA. The court noted that personal liability under the FMLA is appropriate only if the individual defendant is an "employer" within the definition in the statute, that is, "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." The court noted that an "economic reality" test is used to evaluate whether an individual qualifies as an employer, and that courts consider the following non-exhaustive list of factors: whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. Plaintiff gave no indication in her complaint that the supervisor did any of those functions. Thus, the court dismissed both claims against the supervisor, granting plaintiff 30 days to amend her complaint.

***Donahue v. Asia TV USA Ltd.*, No. 15 CIV. 6490 (NRB), 2016 WL 5173381 (S.D.N.Y. Sept. 21, 2016)**

Plaintiff, the head of a sales department, brought suit against her employer, a television network, alleging retaliation under the FMLA. The defendant moved to dismiss the claim. The New York district court granted defendant's motion, finding that plaintiff failed to sufficiently plead an FMLA claim. First, the court found that plaintiff failed to sufficiently allege that he was eligible for an FMLA leave. Plaintiff did not allege that he worked at least 1,250 hours of service during the previous 12 month period, which is required to be eligible for leave. The court rejected plaintiff's argument that it is reasonable to infer from his full-time employment that he worked at least 1,250 hours, instead noting that a simple allegation that he was employed full-time is not enough to satisfy the 1,250 hours prong of the test. The court then noted that if plaintiff had otherwise properly pleaded an FMLA retaliation claim, it would have granted plaintiff leave to amend his complaint. However, plaintiff failed to allege that (assuming he was eligible) he experienced FMLA retaliation by failing to plead facts giving rise to an inference of retaliatory intent. Plaintiff argued that he had sufficiently plead these facts by alleging that after he went on medical leave, employer removed his name on marketing materials and replaced it with a new employee's name who continued to work there after employer terminated plaintiff "due to continued losses warranting a restructuring." Plaintiff argued that those facts show that employer decided to fire him when he took an FMLA leave, even though it actually terminated him three months after the expiration of the 12 weeks provided by the FMLA. The court stated that an FMLA retaliation claim cannot be premised on such unremarkable allegations. The court also noted that plaintiff was placed on 30 days' notice before he took an FMLA leave that his employment would end and emphasized that his FMLA leave had well expired by the time he was terminated. Therefore, the court dismissed the FMLA retaliation claim.

***Earp v. Eucalyptus Real Estate, LLC*, No. CIV-14-1195-D, 2016 WL 2939547 (W.D. Okla. May 19, 2016)**

Plaintiff, a manager of subsidized-rent apartment complexes owned or managed by defendants, brought suit against her former employer or joint employers alleging interference and retaliation under the FMLA. Plaintiff experienced medical problems at work and requested immediate leave. Her supervisor first denied the request, but, that same day, two different supervisors granted the request. Plaintiff was hospitalized overnight and then told by her medical provider not to return to work until 5 days later. Plaintiff returned to work five days later with a doctor's note but was terminated that same day. Defendants filed a motion to dismiss the FMLA claims, claiming plaintiff's second amended complaint failed to state a plausible FMLA interference or retaliation claim.

The District Court for the Western District of Oklahoma dismissed plaintiff's FMLA interference claim. To establish the interference claim, a plaintiff must show that: (1) she was entitled to FMLA leave; (2) an adverse action by employer interfered with her right to take leave; and (3) employer's action was related to the exercise of her FMLA rights. The court found that the complaint sufficiently pleaded that a serious health condition existed, which could entitle her to leave, by alleging she experienced an illness or condition that required inpatient treatment. The court stated that entitlement to leave also requires sufficient notice to employer that an employee is claiming a right to medical leave. The court found plaintiff had sufficiently alleged that she gave sufficient notice to her employer, even though the complaint only generally asserted that she complied with all policies and procedures of her employer regarding an unforeseeable request for medical leave. However, the court found plaintiff did not sufficiently allege an adverse action of interference with an FMLA-created right. The complaint alleged that employer first denied plaintiff's request for treatment but then granted her request that same day, only resulting in an hours-long delay. The court found that the allegations do not assert that plaintiff was harmed by this action, and the FMLA only provides relief if employee was prejudiced by the violation. Thus, the claim was dismissed. In contrast, the court refused to dismiss the FMLA retaliation claim. Defendants argued that the pleading contained only a formulaic recitation of the elements of a retaliation claim, and that this was insufficient. The court first noted that temporal proximity between protected conduct and termination is relevant evidence of a causal connection sufficient to lead to an inference of retaliatory motive. The court then found that, accepting the factual allegations in the complaint as true, the facts were minimally sufficient to state a plausible FMLA retaliation claim.

***Byrd v. Elwyn*, No. 16-02275, 2016 WL 566173 (E.D. Pa. Sept. 30, 2016)**

Plaintiffs sued their former employer for FMLA interference and retaliation. The district court in Pennsylvania granted defendant's Motion to Dismiss with leave to amend the FMLA-related claims. One plaintiff properly alleged that he worked sufficient hours to qualify for FMLA leave, but failed to allege facts to support his conclusory statement that he suffered a "serious health condition." Plaintiff was afforded the option to amend the claim to include facts establishing that he suffered from a "serious health condition."

As to the FMLA retaliation claim, plaintiff failed to allege facts that he invoked his right to FMLA leave. Plaintiff did not allege that he either gave a 30-day notice to his employer or

that his need for leave was unforeseeable as required by the statute. The court dismissed the cause of action with leave to amend so that plaintiff could attempt to allege facts to support a find that he provided sufficient notice to invoke his FMLA rights.

***Drumm v. Triangle Tech, Inc.*, No. 4:15-CV-00854, 2016 WL 1384886 (M.D. Pa. Apr. 7, 2016)**

A district court in Pennsylvania granted an employer's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, but granted plaintiff employees leave to amend their complaint. Defendant employer operated technical schools throughout Pennsylvania. On June 5, 2014, one of the plaintiffs was allegedly directed by one of defendants to fraudulently sign and back-date a document to secure financial aid funds by the U.S. Department of Education. After refusing to do so, plaintiff reported the incident internally, an investigation was conducted, and no wrong-doing was found. Plaintiff then filed a complaint with the Accrediting Commissioner of Career Schools and Colleges. Two of the plaintiffs met with the Office of the Inspector General (OIG), which was investigating the complaint, and provided statements. In July and August 2014 the OIG investigated the claims and defendant had to repay approximately $70,000 to the Department of Education for financial aid it improperly received. Thereafter, defendants allegedly began an effort to investigate plaintiffs' actions in the workplace with the intent of finding a basis for immediate termination. Plaintiffs who were involved in the complaint and OIG investigation were terminated for various reasons.

Plaintiff McElwee was terminated due to poor performance but alleged an FMLA violation claim. The day before meeting with the OIG investigator, plaintiff notified his supervisor that he intended to request time off for the birth of his child, due September 2014. On September 24, 2014, plaintiff provided notice to defendant that he would be taking two weeks of FMLA leave beginning September 30, 2014 for the birth of his child. Two days later the appropriate paperwork was exchanged and defendant indicated that plaintiff was eligible for the leave. The child was born on September 29, 2014 with serious medical issues; the next day plaintiff informed his supervisors who asked him to provide sufficient certification to support his request for leave pursuant to the FMLA. On that same day plaintiff provided a certificate reflecting the child's birth. On October 7, 2014, defendant instructed one of the other plaintiffs to prepare termination paperwork for plaintiff McElwee due to poor performance. The next day, plaintiff McElwee submitted documentation reflecting the child's serious health condition and two weeks of consecutive leave with intermittent leave thereafter. On October 13, 2014, plaintiff McElwee was terminated for poor performance as planned. Defendants argued that plaintiff McElwee pleaded that he submitted an FMLA certification for two weeks off for the birth, but that he failed to plead that he submitted a second FMLA certification for the separate and distinct leave he allegedly required after the child was born and he learned of the child's serious medical condition. Defendants argued that plaintiff McElwee failed to satisfy his duties and obligations under the FMLA and was therefore not eligible for any FMLA leave for the child's illness. The court agreed that the claim must be dismissed because plaintiff did not plead that he submitted a second request for the additional time off.

***Nguyen v. Boeing Co.*, No. C15-793RAJ, 2016 WL 2855357 (W.D. Wash. May 16, 2016)**

Plaintiff was a systems engineer with defendant, The Boeing Company. Following her termination, plaintiff sued defendant in federal court under the FMLA and several other state and federal employment discrimination laws. Plaintiff argued that defendant violated the FMLA and its Washington equivalent, the Washington's Family Leave Act ("WFLA"), when defendant refused to grant plaintiff's request for leave to care for her father. However, plaintiff's own complaint admitted that defendant allowed her to "flex" her work schedule to care for her father. In light of this, the district court determined that plaintiff did not have a claim under the FMLA or WFLA. Accordingly, plaintiff's FMLA and WFLA claims were dismissed with leave to amend. The district court cautioned plaintiff that she should bring these claims only if she could identify an instance where defendant denied her FMLA or WFLA benefits.

***Hopkins v. MWR Mgmt. Co.*, No. 15 CVS 697, 2016 WL 2840305 (N.C. Super. Ct. May 13, 2016)**

Plaintiff sued defendant employer after defendant allegedly fired him for seeking shoulder surgery. Plaintiff's complaint set forth both interference and retaliation claims under the FMLA. In particular, plaintiff asserted that defendant violated the FMLA when it repeatedly discouraged him from taking FMLA leave (interference) and terminated him for requesting leave under the statute (retaliation). Defendant moved to dismiss both claims, contending that plaintiff failed to plead compliance with defendant's usual notice and procedural requirements for requesting leave as required by 29 C.F.R. § 825.302(c). Under that regulation, an employer may require an employee to follow its normal leave policies in seeking FMLA leave. An employee's failure to abide by an employer's internal leave policies can, pursuant to the regulation, constitute sufficient grounds for terminating an employee and dismissing his or her FMLA claim.

The court denied defendant's motion to dismiss. It explained that, while the regulation could form the basis of a later argument resulting in dismissal of plaintiff's two FMLA claims, plaintiff need not plead facts at the motion to dismiss stage to "anticipate and defeat defendant's expected defenses." This was because, in order to prevail on an interference theory, plaintiff need only show entitlement to an FMLA benefit, interference with that benefit, and resulting harm. Under a retaliation claim, plaintiff must demonstrate that he engaged in protected activity, adverse action, and a causal connection between the two. Because the elements of these two claims do not require plaintiff to demonstrate compliance with 29 C.F.R. § 825.302(c), plaintiff's complaint did not need to contain allegations with respect to such compliance. Defendant's motion to dismiss was therefore denied.

Summarized elsewhere:
***Alexander v. Bd. of Educ. of City of N.Y.*, 648 F. App'x 118 (2d Cir. 2016)**

***Brisk v. Shoreline Found., Inc.*, No. 15-13028, 2016 WL 2997122 (11th Cir. May 25, 2016)**

***Mileski v. Gulf Health Hosps., Inc.*, No. CA 14-0514-C, 2016 WL 1295026 (S.D. Ala. Mar, 31, 2016)**

***Joseph v. SEIU UHW*, No. 16-cv-01644-EMC, 2016 WL 4073354 (N.D. Cal. Aug. 1, 2016)**

***Cortese v. Terrace of St. Cloud, LLC*, No. 6:15-cv-2009-Orl-40DAB, 2016 WL 1618069 (M.D. Fla. Apr. 22, 2016)**

***Smith v. MGM Resorts Int'l*, No. 16 CV 07215, 2016 U.S. Dist. LEXIS 167099 (N.D. Ill. Dec. 5, 2016)**

***Brady v. Bath Iron Works Corp.*, No. 2:16-CV-4-NT, 2016 WL 3029948 (D. Me. May 25, 2016)**

***Dement v. Twp. of Haddon*, No. 15-6107 (RBK/KMW), 2016 WL 6824362 (D.N.J. Nov. 17, 2016)**

***Tiffany v. Dzwonczyk*, No. 3:15-cv-00108 (MAD/DEP), 2016 WL 3661410 (N.D.N.Y. July 5, 2016)**

***Tuggle v. Las Vegas Sands Corp.*, No. 2:15-cv-01827-GMN-NJK, 2016 WL 3456912 (D. Nev. June 16, 2016)**

B. Right to Jury Trial

***Balding v. Sunbelt Steel Tex., Inc.*, No. 2:14–cv–00090, 2016 WL 6208403 (D. Utah Oct. 24, 2016)**

A federal district court granted a plaintiff's motion for reconsideration. Plaintiff, a salesperson, had gone on leave after suffering a panic attack, and was discharged after his employer determined that he had not been honest about the status of a purchase order. Plaintiff argued that his employer discharged him in interference with, or in retaliation for, exercising his FMLA rights. The court had granted employer's motion for summary judgment after determining that employer provided a non-retaliatory reason for the discharge. Upon reconsideration, however, the court found that plaintiff provided enough facts regarding employer's attitude toward plaintiff's leave and the purchase order that a jury could find that the non-retaliatory reason was, in fact, pretext. Additionally, the court noted that unlike *Olson v. Penske Logistics, LLC*, 835 F.3d 1189 (10th Cir. 2016), where employer had not discharged an employee until it conducted a thorough investigation, here employer had done a quick investigation that concluded the same day it started.

C. Protections Afforded

D. Defenses

Summarized elsewhere:
***Canady v. Pender Cty. Health Dep't*, No. 7:15-CV-17-D, 2016 WL 927180 (E.D.N.C. Mar. 4, 2016)**

***Hopkins v. MWR Mgmt. Co.*, No. 15 CVS 697, 2016 WL 2840305 (N.C. Super. Ct. May 13, 2016)**

1. Statute of Limitations

***Yazzie v. Cty. of Mohave*, No. CV-14-08153-PCT-JAT, 2016 WL 3916213 (D. Ariz. July 19, 2016)**

Plaintiff was employed in the road maintenance department for the County. In July 2013, she was discharged for violating the County's Merit Rules by testing positive for, and subsequently admitting to using, marijuana. Plaintiff filed suit *pro se*, alleging a kitchen-sink variety of claims, including that the County had interfered with her FMLA rights. The County moved for summary judgment and the district court granted the motion. With respect to plaintiff's FMLA claim, the trial court held that the last time plaintiff had even requested (and was granted) FMLA leave was in 2008, more than five years before her discharge. Accordingly, plaintiff's FMLA claim was untimely. Regardless, plaintiff failed to demonstrate that she had ever requested leave within the statutory period or that the County had sufficient reason to believe that she (or her son, as she had alleged) suffered from serious health conditions such that it should have known that she might be eligible for FMLA leave. In short, this *pro se* plaintiff asserted an FMLA claim without any factual basis for it.

***Sparenberg v. Eagle All.*, No. CV JFM-14-1667, 2016 WL 447831 (D. Md. Feb. 4, 2016)**

The District Court for the District of Maryland denied employer's motion for reconsideration partially denying its motion for summary judgment. Employer argued that the court erred on two grounds: (1) finding that the statute of limitations had not run on employee's FMLA claims; and (2) finding that attendance was not a justifiable occupational qualification supporting employee's transfer. The court denied employer's motion for reconsideration.

The court outlined that a plaintiff must bring an FMLA claim within two years after the date of the last event constituting the alleged violation. Here, employee's complaint contained two qualifying events, the first was his removal from his post which fell outside of the two year period, and the second was the reduction in his salary due to removal, which fell inside of the two year period. Employer argued that the cause of action accrued when employee knew or reasonably should know of the wrong and cited to Title VII. The court determined that grafting Title VII's statute of limitations law onto the FMLA was inappropriate due to differences in language between the two statutes. The court determined that the two events in this case were inexorably linked and therefore the reduction in pay was the last event.

Additionally, employer argued that attendance is a *bona fide* occupational qualification (BFOQ) permitting it to make employment decisions based on attendance. The court determined that recognizing attendance as a BFOQ would significantly weaken the FMLA's protections and allow employers to punish employees for taking FMLA leave. Additionally, the court stated that even if attendance was a BFOQ under the FMLA, persuasive authority suggests that an employee fails to meet such a requirement only when they amass unscheduled and unpredictable, but cumulatively substantial, absences or asserts a right to take unscheduled leave at a moment's notice for the rest of their career.

***Mozingo v. Oil States Energy, Inc.*, No. 3:14-CV-924-CWR-LRA, 2016 WL 617837 (S.D. Miss. Feb. 16, 2016)**

Plaintiff successfully took a period of several weeks of FMLA, fully complying with all of his employer's policies, including the completion of all paperwork. Shortly after returning to work, plaintiff needed additional FMLA leave for another reason. Plaintiff never completed the FMLA paperwork for the second leave, and claimed never to have received it. Upon returning from leave, plaintiff was discharged. He filed his FMLA lawsuit two and a half years after his termination, and his employer moved for summary judgment.

The court determined that since plaintiff's lawsuit was filed after the normal two-year statute of limitations, summary judgment for employer was appropriate unless there was a genuine issue that a reckless violation of the FMLA had occurred. The court found plaintiff's allegations that his employer recklessly or intentionally failed to send FMLA paperwork to him were contradicted by evidence that one of the company's human resources personnel had spoken to plaintiff about his need for FMLA leave, including the need to complete the paperwork and where it would be mailed, as well as the fact that plaintiff had just completed an FMLA leave for which he properly completed all paperwork, so he understood how the process worked. The court determined that if employer had, in fact, failed to mail the FMLA paperwork, this failure was at worst negligence, and plaintiff's claim was therefore covered by the two year statute of limitations and untimely.

***Denson v. Atl. Cty. Dep't of Pub. Safety*, No. 13-5315 (JS), 2016 WL 5415060 (D.N.J. Sept. 27, 2016)**

Plaintiff, a corrections officer, sued her employer, the county department of public safety, alleging interference and retaliation under the FMLA. The defendant moved for summary judgment. Defendant had taken disciplinary action against plaintiff in response to her absences from work for two days. Plaintiff submitted an FMLA application for leave covering those days, but her first few submissions were denied because defendant stated that she did not comply with the requirement that her doctor review her job description and identify which core job functions were impacted by her diagnosis. Although plaintiff's FMLA application was eventually granted, covering leave for those two days, defendant did not withdraw disciplinary actions it had taken, asserting that despite the fact she was granted retroactive leave, plaintiff had still violated defendant's job requirements that had collectively been bargained by her union when she failed to initially provide sufficient information regarding her leave. The New Jersey district court found that there were factual issues to be resolved regarding plaintiff's claims. First, the court found that a factual question existed as to whether plaintiff provided adequate FMLA notice. The court noted that her disputed allegation that she told defendant she was "sick in lieu of" and that she intended to take an FMLA leave was sufficient evidence to create a fact question, given the low bar set for notice in the third circuit and the third circuit's holding that notice is a matter of fact in most circumstances. Second, the court found that a fact question existed as to whether defendant interfered with plaintiff's FMLA rights. Plaintiff argued that defendant interfered because she had to re-submit her FMLA application multiple times due to a "job description requirement" that was only applied to her. The court found that because the requirement was not listed in defendant's written policy, there was a fact question as to whether all employees were subject to such requirement. Third, the court found there were factual issues regarding plaintiff's

retaliation claim. In addition to factual issues regarding notice and whether she suffered an adverse employment action, the court found that the temporal proximity of plaintiff's purported invocation of FMLA rights to the disciplinary actions taken by defendant created an inference of causality which defeats summary judgment.

Although the court found that factual questions existed, it granted defendant's motion for summary judgment because the claims were barred by the statute of limitations. Plaintiff filed the lawsuit after the applicable two-year statute of limitations. While the FMLA allows for an extension of the statute of limitations to three years where an employer willfully denies an FMLA application, the court found there was no evidence of a willful denial. There was no evidence to support that defendant's initial denials of plaintiff's FMLA application were done with knowledge that denial was improper or with reckless disregard of plaintiff's FMLA rights. In addition, there was no evidence that the failure to withdraw disciplinary action against plaintiff was willful. Thus, summary judgment was entered in favor of defendant.

Corley v. Farrell, No. 16-CV-3367 (NGG) (SMG), 2016 WL 3950080 (E.D.N.Y. July 19, 2016)

(Reconsideration denied, 2016 WL 5115341 (E.D.N.Y. Sept. 20, 2016)

Summary for July 19, 2016 opinion:

Plaintiff, acting *pro se* and incarcerated when he filed the lawsuit, brought several claims against his former employer, including FMLA interference for refusing to grant him FMLA leave. On June 17 and 18, 2010, plaintiff requested sick leave. Defendant's physician required him to return to work on July 21, with medical restrictions. He was later suspended without pay for another absence for which he failed to notify his employer. Later, on November 30, 2011 and December 1, 2011, plaintiff called his supervisor to indicate he was having trouble finding childcare and requested permission to either take leave or arrive several hours late for his shift. His request was denied. On January 9, 2012, plaintiff was suspended for three weeks for attendance related issues. Upon returning to work, on January 25, 2015, plaintiff was arrested at work and was thereafter arraigned on two counts of promoting prostitution in the third degree. On May 30, 2012, defendant terminated plaintiff's employment.

The court granted defendant's motion to dismiss because the FMLA's statute of limitations barred plaintiff's FMLA claims. Specifically, even if defendant's conduct was deemed "willful," extending the statute of limitations from two years to three years, it was barred by the statute of limitations. Because the last event constituting an alleged violation of the FMLA was plaintiff's termination, which occurred on May 30, 2012, the latest deadline to file the FMLA claim was May 30, 2015, therefore, the court dismissed the FMLA claims included in plaintiff's June 16, 2016 complaint.

Macklin v. Am. Bldg. Maint., No. 15-CV-3675 (PAC) (RLE), 2016 WL 423657 (S.D.N.Y. Jan. 7, 2016)

The District Court for the Southern District of New York dismissed plaintiff's claim that defendant unlawfully denied her requests for FMLA leave to flee from domestic violence. Plaintiff, a janitor, brought a *pro se* FMLA interference claim against defendant six years after

her termination. Even construing her construing her claim as a denial of leave to receive treatment for injuries related to domestic violence, the court held plaintiff's claims were time barred.

Summarized elsewhere:
***Sanders v. Ill. Dep't of Corr.*, No. 15-CV-0147-SMY-PMF, 2016 WL 3387804 (S.D. Ill. June 20, 2016)**

***Scott v. Valley Elec. Contractors, Inc.*, No. 15-CV-14281, 2016 WL 7100250 (E.D. Mich. Dec. 6, 2016)**

***Hensler v. Quality Temp. Servs., Inc.*, No. 16-CV-11210, 2016 WL 3137820 (E.D. Mich. June 6, 2016)**

a. General

***Sanders v. Ill. Dep't of Corr.*, No. 15-CV-0147-SMY-PMF, 2016 WL 3387804 (S.D. Ill. June 20, 2016)**

In November 2012, plaintiff, a correctional officer, sought several weeks of FMLA leave to care for his children while his wife underwent surgery. Plaintiff submitted FMLA paperwork to his employer, but his wife's treating physician failed to specify the wife's medical condition or why surgery was needed. Employer found the information insufficient and informed plaintiff that the FMLA did not cover childcare in the absence of a serious health condition. Employer repeatedly asked plaintiff to provide additional information, but he failed to do so in a timely manner. As a result, employer denied plaintiff's request for leave in January 2012. Plaintiff took the time off anyway and was ultimately discharged in March 2012. Plaintiff filed suit against his employer in February 2015, over two years after employer's final denial of plaintiff's request for leave. Employer moved for summary judgment, alleging that plaintiff's claims were time barred. The court agreed, finding that the two-year statute of limitations ran from employer's final denial of leave, not from the date plaintiff was discharged. The court also found plaintiff had not alleged willfulness on the part of employer that was sufficient to extend the statute of limitations to three years.

***Bullard v. Fedex Freight, Inc.*, No. 3:15-CV-00905, 2016 WL 6648910 (M.D. Tenn. Nov. 9, 2016)**

Plaintiff brought suit against her former employer after it terminated her for excessive absences and tardies. The District Court of Tennessee denied defendant's motion for summary judgment. At the time of hire, plaintiff signed a "Conditions of Employment" letter wherein she agreed to bring a complaint against defendant within the time prescribed by law or six months from the date of the event forming the basis of the complaint. Defendant filed a motion for summary judgment arguing that plaintiff brought her lawsuit after the six-month contractual limitations period expired. The court found that the six-month contractual limitations period unlawfully interfered with the statutory right to sue under the FMLA.

As to the FMLA retaliation claim, defendant claimed that it terminated plaintiff because of her tardiness and failure to utilize the correct call-in procedure when she was unable to call-in

an hour before her scheduled arrival time because she had a flare-up from lupus dermatomyositis on her way to work. Plaintiff claims that defendant's reasons are pretextual because defendant inconsistently applied plaintiff's FMLA from 2013 to 2014, she was written up each time she took FMLA leave, and defendant never complained about her performance. The court found that there was an issue of fact as to whether defendant's proffered reason motivated the termination.

Summarized elsewhere:
***Offor v. Mercy Med. Ctr.*, No. 15-cv-2219 (ADS)(SIL), 2016 WL 929350 (E.D.N.Y. Mar. 10, 2016)**

***Douglas v. City of Cleveland*, No. 14-CV-00887, 2016 WL 1110258 (N.D. Ohio Mar. 22, 2016)**

b. Willful Violation

***Yetman v. Capital Dist. Transp. Auth.*, No. 15-2683, 2016 WL 6242924 (2d Cir. Oct. 25, 2016)**

Plaintiff worked as a part-time bus driver for employer for approximately six years until she resigned in June 2010. During her employment, she requested and was granted FMLA leave on several occasions. Prior to her resignation, plaintiff missed work. Her absence was not covered by the FMLA, and plaintiff had not requested FMLA to cover the absence. Approximately two weeks later, plaintiff resigned, claiming that she was in constant stress of losing her job because of her autistic child "and other family and legal issues." Plaintiff applied to be rehired several times after her resignation, but employer declined to rehire her. Plaintiff filed suit in November 2012, alleging interference and constructive discharge in violation of the FMLA. The district court granted employer's motion for summary judgment, and the court of appeals affirmed. The court of appeals found that plaintiff's claims were time-barred, and that she had failed to show willfulness on the part of employer necessary to extend the limitations period to three years because employer had never denied any of plaintiff's requests for FMLA leave, and because the absence immediately prior to plaintiff's resignation was not covered by the FMLA. The court of appeals also affirmed the dismissal of plaintiff's remaining claims, finding that she had failed to establish a *prima facie* case of retaliation or constructive discharge.

***Mozingo v. Oil States Energy, Inc.*, No. 16-60125, 2016 WL 5831879 (5th Cir. Oct. 5, 2016)**

In December 2014, plaintiff sued defendant for alleged violation of the FMLA, including his termination from employment in June 2012 for failure to report to work. Defendant moved for summary judgment on the basis that the suit was time-barred because it was brought more than two years after plaintiff's termination. Defendant contended there was no dispute of material fact as to whether any alleged FMLA violation was willful. Plaintiff asserted that defendant's conduct was willful because, according to plaintiff, defendant did not send him proper FMLA forms, thereby adopting a "wait and see" position as to whether plaintiff actually would request FMLA leave. Reviewing the facts in the light most favorable to plaintiff, the court assumed that defendant did not send plaintiff FMLA forms, but also found there was no evidence that this alleged conduct constituted reckless disregard of FMLA requirements. Consequently, the court granted defendant's motion for summary judgment.

***Kalestian v. Performing Arts Ctr. of L.A. Cty.*, No. 2:16-CV-05928, 2016 WL 6155904 (C.D. Cal. Oct. 21, 2016)**

Plaintiff filed a lawsuit under the FMLA against his former employer more than two, but less than three, years after he was terminated for abusing his FMLA leave. Plaintiff had alleged that defendant had accused him of fraud in exercising his FMLA rights and that he was terminated shortly after taking FMLA leave. In denying defendant's motion to dismiss, the district court in California found plaintiff had pled sufficient facts to demonstrate defendant had willfully violated the FMLA and thus the statute of limitations was three years.

***Vick v. Brennan*, No. 14-CV-2193 (TSC), 2016 WL 1225857 (D.D.C. Mar. 28, 2016)**

Plaintiff Ella D. Vick sued defendant Megan J. Brennan in her official capacity as the Postmaster General of plaintiff's employer the United States Postal Service. Plaintiff alleged that employer violated the FMLA (1) when it denied plaintiff's right to take up to 12 weeks of leave under the FMLA to care for her mother, and (2) when plaintiff's supervisor issued her a seven-day suspension for not performing work while on FMLA leave. Defendant contended that plaintiff's FMLA claim was not brought timely within the two-year statute of limitation. However, the District Court for the District of Columbia held that a three-year statute of limitation applies since the complaint contains some express or implied allegations of willful conduct.

The court denied defendant's motion to dismiss and motion for summary judgment because plaintiff alleged facts sufficient to state claims for both interference and retaliation in violation of the FMLA. The court's reasoning was that (1) the interference claim survived because plaintiff successfully alleged that her mother's illness constituted an FMLA-qualifying event, and that plaintiff was eligible for more FMLA leave at the time she was ordered to return to work; and that (2) the retaliation claim survived because the post-FMLA leave suspension constituted an adverse employment action.

***Smith v. MGM Resorts Int'l*, No. 16 CV 07215, 2016 U.S. Dist. LEXIS 167099 (N.D. Ill. Dec. 5, 2016)**

Plaintiff, a casino cocktail waitress, began receiving treatment for cancer in November 2009. For the next three years, plaintiff missed work intermittently and in blocks of time for treatment and recovery. In June of 2011, plaintiff notified her supervisors that her cancer had returned but alleged that her request for FMLA was denied. Plaintiff asserted she was then afraid to ask about FMLA coverage until July of 2012 due to how it would impact the start date of her benefits in 2012. After returning from a leave in October of 2012, plaintiff again refrained from asking about FMLA coverage for her subsequent intermittent treatments. Despite her fear of requesting FMLA, plaintiff claimed she gave notice of the reason for her absence each time she requested time off or was cited for attendance issues. Defendant discharged plaintiff on May 31, 2013.

Plaintiff filed suit on July 13, 2016 alleging unlawful interference with her rights under the FMLA. Her employer moved to dismiss her FMLA claim due to the failure to file the complaint within the two-year limitations period. In response, plaintiff asserted she was entitled

to a three-year limitations period due to the willful nature of the violations. In addition, she also claimed to be unaware of her employer's willful FMLA scheme until well after her termination. In order to have availed herself of the three-year statute of limitations, plaintiff needed to show that she discovered the last event relating to her employer's willful FMLA violations on or after July 13, 2013. To the contrary, the court determined that the allegations in her own complaint established plaintiff was aware of the FMLA violations prior to that date. In dismissing her FMLA claim, the court found that plaintiff had pled herself out of court with her own complaint.

***Hensler v. Quality Temp. Servs., Inc.*, No. 16-CV-11210, 2016 WL 3137820 (E.D. Mich. June 6, 2016)**

Almost three years after plaintiff's termination from employment, plaintiff filed a lawsuit alleging the termination violated the FMLA. The company filed a motion to dismiss on the grounds that plaintiff's claim was barred by the statute's two-year limitations period. The court agreed, finding that the complaint had failed to establish that the three-year limitations period for willful violations was appropriate in this case.

In light of *Iqbal* and *Twombly*, the court held that to invoke the three-year limitations period, the complaint must do more than merely assert that the alleged violation was willful; it must plead facts about defendant's mental state, which, if accepted as true, would make the state-of-mind allegation plausible on its face. Where plaintiff did not allege that he specifically requested FMLA leave from the company, or that he notified the company that his leave was FMLA-qualifying, or that the company employee who allegedly told plaintiff that "your diabetes is your problem" was a decision-maker in plaintiff's discipline and discharge, the court found that plaintiff had pled no facts to suggest that the company's decision-makers should have been aware of the alleged discriminatory nature of their actions. Further, the court held that allegations that the company did not ask plaintiff if his incapacity was FMLA-qualifying when it knew of plaintiff's diabetes were insufficient to render the willfulness allegation plausible on its face. Applying the standard two-year limitations period, the court dismissed plaintiff's lawsuit with prejudice for having been filed beyond the statute of limitations.

***Offor v. Mercy Med. Ctr.*, No. 15-cv-2219 (ADS)(SIL), 2016 WL 929350 (E.D.N.Y. Mar. 10, 2016)**

Plaintiff was a neonatologist employed by defendant, Mercy Medical Center. Plaintiff sued the medical center and her former supervisors under the FMLA for repeatedly denying her requests to use her accrued vacation time to visit her daughter, who was experiencing a difficult pregnancy. Plaintiff made the requests throughout 2012. Plaintiff brought suit alleging FMLA violation (among other claims) on April 20, 2015. Defendants moved to dismiss on the grounds that plaintiff's FMLA claim was time-barred. Under 29 U.S.C. § 2617(c)(1), a plaintiff must initiate a lawsuit within two years of the last event that made up part of the FMLA violation. The time bar is extended to three years if plaintiff can show that employer's FMLA violation was "willful," which was defined as either knowledge or "reckless disregard," and not simply acting unreasonably. The court agreed that plaintiff's suit was time-barred. The court provided several rationales for its ruling. The court found that plaintiff did not assert willfulness in her complaint. Additionally, plaintiff had requested paid vacation time, rather than unpaid FMLA leave, and did not give notice to defendants that she was attempting to vindicate a right under the FMLA.

Absent such notice, the court held, there was no plausible basis for finding that employer acted with reckless disregard. The evidence further showed that employer denied the vacation requests because it would have left plaintiff's department short-staffed. Plaintiff's requests were eventually granted several months later. Thus, the court concluded that employer's behavior was reasonable and that any violations could not be considered willful. As such, plaintiff's claim did not meet the standard for the three-year window. The court also noted that plaintiff failed to respond to employer's timeliness argument, which would be sufficient grounds for dismissal even without the other factors. The court granted the motion to dismiss.

***Cruz v. Wyckoff Heights Med. Ctr.*, No. 13 CIV. 8355 (ER), 2016 WL 5339540 (S.D.N.Y. Sept. 23, 2016)**

Plaintiff employee worked as an x-ray technologist. He was terminated for unprofessional behavior and improper conduct toward coworkers. Prior to his termination, plaintiff took FMLA leave due to a medical condition off and on over an eight-year period. His last FMLA request was three months before his discharge and it was denied because he failed to work the requisite 1,250 hours. Plaintiff filed this lawsuit approximately one year after he was discharged claiming FMLA interference and retaliation. Initially, the court granted summary judgment to defendant on all FMLA claims related to violations that occurred more than two years before suit was filed on statute of limitations grounds. The court found no evidence of willfulness in order to extend the statute of limitations to three years, concluding that defendant had complied with the requirements of the FMLA and granted multiple requests for FMLA leave at the same time plaintiff claims defendant was intentionally and recklessly violating the FMLA. The court also granted summary judgment on plaintiff's interference and retaliation claims within the two-year limitations period. Again, the court found that defendant complied with the FMLA, including the rules on requesting recertification and eligibility requirements. The court similarly dismissed plaintiff's retaliation claim finding no evidence of retaliatory intent. For example, the court concluded that plaintiff was not retaliated against for an attendance suspension where plaintiff failed to request FMLA leave. The court was also persuaded by the abundant evidence that defendant repeatedly granted plaintiff FMLA leave upon request, including retroactive leave on several occasions where he failed to timely submit documentation. The court further reasoned that the termination was too remote to support an inference of retaliation coming three months after his last FMLA leave request was properly denied. Finally, the court found insufficient evidence of pretext noting plaintiff was not discharged for attendance, but based on the overwhelming evidence of multiple incidents of inappropriate and unprofessional behavior.

***Yevak v. Nilfisk-Advance, Inc.*, No. 5:15-CV-05709, 2016 WL 1359745 (E.D. Pa. Apr. 6, 2016)**

Plaintiff was a regional sales manager with the company defendant. Upon termination, plaintiff sued the company and two former supervisors for willful violation of his FMLA rights. Defendants brought a motion to dismiss that argued, *inter alia*, that plaintiff's claim was barred by the FMLA's two-year statute of limitations. Plaintiff argued that his claim was timely under the FMLA's three-year statute of limitations for willful violations. The court agreed, finding that plaintiff's mere allegations of willful violations of his FMLA rights in his complaint were

sufficient to invoke the longer statute of limitations. Accordingly, the court denied defendants' motion to dismiss in part on this ground.

***Mesmer v. Charter Commc'ns, Inc.*, No. 3:14-CV-05915-RBL, 2016 WL 1436135 (W.D. Wash. Apr. 12, 2016)**

Plaintiff, a former call-center employee of defendant, sued three years after being terminated for poor performance and behavior that he attributed in part to post-traumatic stress disorder (PTSD). Among other causes of action, plaintiff claimed that defendant had unlawfully interfered with his ability to take FMLA leave for his PTSD after plaintiff had informed defendant of his need to take leave; plaintiff claimed, among other things, that defendant had interfered by terminating him for poor performance. Defendant, however, had provided an opportunity for plaintiff to submit his request for leave, but plaintiff never completed the necessary paperwork even though he had submitted the required documentation twice before for past leave requests. The court held that "[w]hile [defendant] did not take affirmative steps to inquire about [plaintiff]'s desire for leave, its inaction was at the very worst unreasonable—no reasonable fact finder could determine that it was reckless or willful." *Id*. at *4. Because there was no willfulness finding, a two-year statute of limitations applied and, as such, plaintiff's FMLA claim was time-barred. Additionally, the court found that plaintiff, in any case, had not presented evidence that his PTSD qualified as a "serious health condition" that would entitle him to FMLA leave. Defendant prevailed on summary judgment, and the court dismissed all of plaintiff's claims with prejudice.

2. Sovereign Immunity

***Bodi v. Shingle Springs Band of Miwok Indians*, No. 14-16121, 2016 WL 4183518 (9th Cir. Aug. 8, 2016)**

In *Bodi v. Shingle Springs Band of Miwok Indians*, the U.S. Ninth Circuit Court of Appeals reversed the district court's denial of a motion to dismiss on the basis of sovereign immunity. Plaintiff, a former executive director of a medical clinic who had been discharged, filed a complaint in California state court alleging claims under the FMLA and state law. Defendants were a federally-recognized Indian tribe and related entities within the tribe, including one individual sued in an official capacity. Defendants removed the case to district court on the grounds of federal question jurisdiction over the FMLA claim. They then moved to dismiss for lack of subject matter jurisdiction over defendants on the grounds of tribal sovereign immunity which they possessed under federal law. Plaintiff countered that defendants had waived sovereign immunity by removing the case to federal court. Plaintiff also raised additional arguments that were not reached by the district court or the Ninth Circuit Court.

The Ninth Circuit analyzed federal law regarding waiver of tribal sovereign immunity and agreed with the Eleventh Circuit's decision in Contour Spa at the *Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1206-08 (11th Cir. 2012), that removal of a case to federal court did not by itself constitute the kind of "unequivocal" waiver necessary for a tribe to relinquish sovereign immunity. The court agreed with the Eleventh Circuit that the U.S. Supreme Court decision in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), was limited to the specific circumstances in that case that were

not present here. The Ninth Circuit recognized that a party who removes a case to court is consenting to the jurisdiction of that court to decide that claim, but held that consent to jurisdiction to decide the case is not a waiver of defenses to a claim.

***Lamar v. State of Ala. Dep't of Conservation & Nat. Res.*, No. 1:14-cv-571-MHT-PWG, 2016 U.S. Dist. LEXIS 98158 (M.D. Ala. July 26, 2016)**

Plaintiff Key was a Park Ranger for defendant Department of Conservation and Natural Resources ("DCNR"). Defendant's motion for summary judgment was granted based on the Eleventh Amendment immunity.

***Mallery v. Jewell*, No. CV-15-08305-PCT-DGC, 2016 WL 3213217 (D. Ariz. June 10, 2016)**

Plaintiff was a federal employee of defendant National Park Service. Plaintiff sued defendant under Title II of the FMLA in federal court alleging that his rights with respect to family and medical leaves were violated. Defendant moved to dismiss for lack of subject matter jurisdiction pursuant to *Russell v. U.S. Dep't of the Army*, 191 F.3d 1016, 1020 (9th Cir. 1999), which held that federal employee's "claims under Title II of the [FMLA were] barred by sovereign immunity and preempted by the Civil Service Reform Act." Plaintiff argued that the government abdicated its duty to establish regulations implementing Title II and that he should therefore be provided a remedy by the court. The district court held that a federal employee like plaintiff could not enforce his FMLA rights in federal court as matter of law. Title II of the FMLA, unlike Title I, does not provide a statutory right of action and does not waive the federal government's sovereign immunity. The district court granted the motion to dismiss without leave to amend.

***Banner v. Dep't of Health & Soc. Servs. Div. for the Visually Impaired*, No. CV 14-691-LPS, 2016 WL 922058 (D. Del. Mar. 10, 2016)**

Plaintiff, proceeding *pro se*, alleged the Department of Health and Social Services and multiple supervisors suspended her for an absence that was covered by the FMLA. Plaintiff initially filed suit against the former employer for violations of 42 U.S.C. § 1983. She subsequently amended the complaint to name individuals and allege violations of the FMLA, the ADA, and Title VII. The District Court for the District of Delaware granted in part and denied in part defendants' motion to dismiss the amended complaint. The court held plaintiff's FMLA claims against employer and the individual defendants, in their official capacities, were barred by the Eleventh Amendment on sovereign immunity. Plaintiff's allegations that she called in sick due to the "harassing actions of management" fell within the self-care provision of the FMLA. Relying on relevant precedent, the court held the FMLA's self-care provisions do not abrogate sovereign immunity. The court found that defendants, in their individual capacities, met the definition of "employer" under the FMLA and could be held individually liable. However, plaintiff's allegations failed to meet the pleading requirements of *Iqbal* and *Twombly*, and the court dismissed the claims with leave to amend.

***Baker v. Univ. Med. Serv. Ass'n, Inc.*, No. 8:16-CV-2978-T-30MAP, 2016 WL 7385811 (M.D. Fla. Dec. 21, 2016)**

The court was faced with a Motion from the University Medical Service to dismiss Kathlene Baker's FMLA complaint based on the Eleventh Amendment barring suits against states in federal courts. Plaintiff alleged claims for interference and retaliation under the FMLA while working at the University Medical Service Association, Inc. She alleges that following a serious car accident in June 2015 in which she was injured, her supervisor discouraged her efforts to apply for FMLA leave, and became angry when plaintiff bypassed her immediate supervisor and went to the human resources office. In Florida, state universities and their boards are considered arms of the state entitled to Eleventh Amendment immunity. The court explored whether defendant, "a university direct-support organization," was an arm of the state and concluded that it was. The court also determined that it was controlled by the university based on the need for approval of its bylaws, inspection of books and records, approval of its budget, annual audit, conformance to a myriad of policies and control of funds. Funds are derived from income from the university's faculty practice and are used exclusively for the benefit of the university. Further, any award would be paid from state funds. Thus, the motion was granted and the case dismissed.

***Wayne v. Fla. Dep't of Corr.*, 157 F. Supp. 3d 1202 (S.D. Fla. 2016)**

Plaintiff employee alleged that defendant employer, a state department of corrections, retaliated against him for taking FMLA leave by assigning him an unreasonable workload upon his return from self-care leave, and sought injunctive relief. The defendant moved to dismiss. The district court granted the motion to dismiss without prejudice, and concluded that, because defendant is a state agency, it is entitled to immunity under the Eleventh Amendment to the U.S. Constitution against claims relating to self-care leave, citing to *Coleman v. Court of Appeals*, 132 S.Ct. 1327, 182 L.Ed.2d 296 (2012), and *Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir.1999), *rev'd in part on other grounds*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The court noted that Congress had abrogated state sovereign immunity for claims by state employees seeking money damages in federal court alleging that the state failed to comply with the family-care provisions of the FMLA.

***Hall v. La. Workforce Comm'n*, No. CV 15-00533-BAJ-RLB, 2016 WL 1756897 (M.D. La. Apr. 29, 2016)**

Plaintiff worked for defendant, a state workers' compensation agency. Plaintiff became pregnant on June 1, 2014, and advised her direct supervisor of her pregnancy on June 23, 2014. She then began coming in late or missed work due to morning sickness. Her direct supervisor told plaintiff that her absences would not be excused and did not inform her of her rights under the FMLA. On July 10, 2014, he then counseled plaintiff about her poor attendance and informed her that he would not approve further leave requests unless it was qualified as protected leave under the FMLA. The next day, plaintiff took previously approved leave to attend a prenatal appointment. Her direct supervisor terminated her when she returned from that appointment. Plaintiff then met with the director of the agency and the agency's human resources manager about her termination. The director stated that he was surprised by the

termination but conveyed to her plaintiff's direct supervisor's view that she would not be a good fit. Plaintiff sued the agency, plaintiff's direct supervisor, the director and human resources manager, asserting claims pursuant to 42 U.S.C. § 1983 and the FMLA. The defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

The court dismissed plaintiff's claims against the agency under the Eleventh Amendment, which confers immunity to a state from being sued in federal court. One exception to that rule, however, is that a state may be sued if Congress clearly abrogates a state's Eleventh Amendment immunity. As to the FMLA, Congress only abrogated a state's immunity for the statute's family-care—but not its self-care—provisions. Because plaintiff was suing for the latter, her suit against the agency was barred by the Eleventh Amendment. But the court denied defendants' motion as to the individual defendants, explaining that the agency was not the real party in interest. That was because plaintiff was not suing for a violation of a policy maintained by the agency but instead the conduct of the three individual defendants. That the agency may later indemnify each of the three individuals was not sufficient to justify dismissal against them under the Eleventh Amendment.

The court dismissed plaintiff's Section 1983 claim, which was asserted only against the individual defendants and where plaintiff asserted that each violated the Fourteenth Amendment by denying her FMLA leave. It reasoned that, because Congress intended that the FMLA's remedial scheme set forth in 29 U.S.C. § 2617 to be exclusive, plaintiff could not sue under Section 1983. Plaintiff also brought claims for employment discrimination under the Fourteenth Amendment against all three individual defendants. The court dismissed plaintiff's claims against the director and human resources manager, holding that their conduct, at most, amounted to ratification of the director supervisor's actions. Since ratification alone cannot state a claim under Section 1983, plaintiff's claims failed against them. However, plaintiff stated a claim against her direct supervisor because he was the one actively engaged in devising a scheme to terminate her employment in violation of the FMLA. For this same reason, the court rejected the direct supervisor's contention that he was entitled to qualified immunity under Section 1983. The court also rejected the his qualified immunity defense. It ruled that the same conduct giving rise to the FMLA violation also stated a claim for sex discrimination. Since sex discrimination is never considered reasonable, he could not establish a qualified immunity defense.

***Shreve v. N.J. Motor Vehicle Comm'n*, No. 15-7957 (MAS) (LHG), 2016 WL 5334661 (D.N.J. Sept. 22, 2016)**

Plaintiff brought suit against the MVC and Stephen Murphy, the Employee Relations Administrator of the MVC. In her complaint, plaintiff asserted three claims against Murphy: (1) FMLA Interference; (2) FMLA Retaliation, and (3) violation of the New Jersey Law Against Discrimination. This matter came before the court on defendants' motion to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

Defendants argued the Eleventh Amendment Immunity extended to Murphy. Plaintiff, however, argued that because Murphy was named individually, he's not afforded Eleventh Amendment protection. The court agreed with plaintiff. The court found plaintiff had sufficiently alleged enough facts to find Murphy responsible, in whole or in part, for the alleged

violation of plaintiff's FMLA right. Defendants argued plaintiff was not eligible to take FMLA leave when she was terminated because she admitted that she was 42 hours short of qualifying for FMLA leave when she was terminated. Plaintiff argued that the prohibition against interference also applies to interference with eligibility. The court agreed with plaintiff. Central to plaintiff's argument was that Murphy terminated her for the express purpose of denying her the opportunity to qualify for and use FMLA leave.

Plaintiff also alleged she was entitled to FMLA leave in 2011, 2012, and 2013 and, as a result of taking leave, Murphy demoted her and thereafter terminated her employment. Defendant argued plaintiff was reinstated and therefore did not suffer an adverse employment action. However, the court did not consider defendants' argument because it was raised for the first time in defendants' reply.

***Coley v. State of Ohio Dep't of Rehab.*, No. 2:16-CV-258, 2016 WL 5122559 (S.D. Ohio Sept. 21, 2016)**

Plaintiff sued her employer, an Ohio state agency, for violating the self-care provisions of the FMLA. Ultimately, the district court dismissed plaintiff's case. Although the U.S. Supreme Court has confirmed that family-care provisions of the FMLA abrogate sovereign immunity, it is not true for the self-care provisions. Therefore, the court concluded that employer (i.e., a state agency) was entitled to Eleventh Amendment immunity from self-care FMLA retaliation claims. The court granted employer's motion and dismissed plaintiff's FMLA claim.

***Nugent v. McNease*, 195 So. 3d 533 (La. 2016)**

Employee of special school district applied for and was granted an FMLA leave pursuant to the policy adopted by the district. Upon her return to work, she filed a charge with the EEOC claiming she was being retaliated against for taking FMLA leave. The school district discharged her almost immediately, and plaintiff filed a lawsuit for FMLA retaliation. The trial court granted summary judgment to the school district on the grounds of sovereign immunity, and plaintiff appealed. The appellate court held that the mere adoption of an FMLA policy, and its application to employees of the district was not sufficient to constitute a waiver of sovereign immunity.

Summarized elsewhere:
***Alfred v. Harris Cty. Hosp. Dist.*, No. 16-20058, 2016 U.S. App. LEXIS 21530 (5th Cir. Dec. 2, 2016)**

***Radeker v. Elbert Cty. Bd. of Comm'rs*, No. 14-CV-01238CMA-KMT, 2016 WL 1586391 (D. Colo. Apr. 19, 2016)**

***Jackson v. La. Dep't of Pub. Safety & Corr.*, No. CV 15-490-JJB-RLB, 2016 WL 482049 (M.D. La. Feb. 5, 2016)**

***Germanowski v. Harris*, No. CV 15-30070-MGM, 2016 WL 696097 (D. Mass. Feb. 19, 2016)**

***Ross v. State*, No. 15-CV-3286 (JPO), 2016 WL 626561 (S.D.N.Y. Feb. 16, 2016)**

***Miller v. N.Y. State Police*, No. 14-CV-00393A(F), 2016 WL 2868840 (W.D.N.Y. May 17, 2016)**

***Sanders v. State of Okla.ex. rel. Okla.Workers' Comp. Comm.*, No. CIV-15-0703-HE, 2016 WL 1737135 (W.D. Okla. May 2, 2016)**

***Lee v. State*, 874 N.W.2d 631 (Iowa 2016)**

3. Waiver

***White v. Detroit Med. Ctr.*, No. 15-13829, 2016 WL 4443174 (E.D. Mich. Aug. 19, 2016)**

Plaintiff was fired by Detroit Medical Center ("DMC") following an altercation with a coworker. Plaintiff filed suit, alleging claims under the ADA and FMLA. With respect to plaintiff's FMLA claim, DMC moved to dismiss, or alternatively, for summary judgment premised on a contractual term of plaintiff's employment, in which she agreed to bring any claim regarding her employment or its termination within six months of its occurrence. The district court denied DMC's motion, siding with a line of cases from within the district, going back as far as 2002, that held that the FMLA's two year/three year statute of limitations was a "right" that could not be abrogated by employer, even with agreement by employee, as set forth in 29 C.F.R. § 825.220(d) ("Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.")

***Zuber v. Boscov's*, No. CV 15-3874, 2016 WL 1392263 (E.D. Pa. Apr. 8, 2016)**

Plaintiff, a manager at a farmer's market, suffered an eye injury at work that required him to take a leave of absence. Plaintiff filed a workers' compensation claim, executed a compromise and release in resolution of that claim, and then brought an action alleging violation of his FMLA rights. Defendant argued that the language of the release was sufficiently broad to preclude plaintiff from bringing the FMLA claim. Plaintiff argued that the release only resolved liability for the work injury, resulting medical complications, and lost wages, but did not prevent him from recovering under the FMLA. The court considered existing case law, noting that decisions in similar cases had turned on the specific language of the compromise and release. The court found that the language of the release in this case was broad and all-encompassing, and that in executing the release with the advice of counsel, plaintiff had waived any FMLA claims against defendant. Accordingly, the court granted defendant's motion to dismiss.

4. *Res Judicata* and Collateral Estoppel

***Simmons v. Indian Rivers Mental Health Ctr.*, No. 5-11658, 2016 WL 3230676 (11th Cir. June 13, 2016)**

The administratrix of an estate appealed the district court's dismissal of the decedent employee's FMLA interference and retaliation claims against her hospital employer. The Eleventh Circuit Court of Appeals considered whether the district court properly applied issue preclusion to bar employee from relitigating the reason for her termination. The court reversed the district court's decision and remanded the matter for trial.

While on FMLA leave, employer discovered numerous irregularities in employee's work. Plaintiff's supervisor informed her of the performance concerns and stated that employer and plaintiff would need to discuss this upon her return from FMLA leave. Upon plaintiff's return to work, employer's executive director met with plaintiff about the irregularities discovered while she was out. Employer terminated plaintiff that day.

Plaintiff subsequently filed for unemployment compensation, which was denied because she engaged in "misconduct." Thereafter, plaintiff filed FMLA discrimination and retaliation claims with the EEOC and then district court. Employer argued that the retaliation claim was barred by issue preclusion in light of the unemployment compensation finding of termination for misconduct. The district court agreed with employer, and plaintiff appealed. The appellate court, looking to state law on the application of issue preclusion, reversed the district court's decision and remanded the retaliation claim for trial.

Summarized elsewhere:
***Siddiqua v. N.Y. State Dep't of Health*, No. 15-2702, 2016 WL 1039600 (2d Cir. Mar. 16, 2016)**

***Bastille v. Me. Pub. Emp. Ret. Sys.*, No. 1:16-CV-31-NT, 2016 WL 4250256 (D. Me. Aug. 10, 2016)**

5. Equitable Estoppel as a Bar to Certain Defenses

***Palan v. Inovio Pharm. Inc.*, No. 15-3327, 2016 WL 3440448 (3d Cir. June 23, 2016)**

Information technology employee terminated while on leave brought FMLA retaliation and interference claims against his employer. Plaintiff experienced an emergent medical situation that required surgery and requested and received leave for that purpose. Employer was not covered under the FMLA. Plaintiff invoked equitable estoppel to preserve his FMLA claims, stressing that the employee handbook stated that employer's leave policy was FMLA-compliant. The district court granted summary judgment in favor of employer, and the Third Circuit Court affirmed. Although the statement in the employee handbook that employer's leave policy was FMLA-compliant was a misrepresentation, plaintiff did not rely on the misrepresentation because his medical condition afforded him no choice but to have surgery, and because the record did not indicate that plaintiff reviewed the handbook at the time he requested or went on leave.

***Caporicci v. Chipotle Mexican Grill, Inc.*, No. 8:14-cv-2131-T-36EAJ, 2016 WL 3033502 (M.D. Fla. May 27, 2016)**

Plaintiff sued her employer under the FMLA. Though plaintiff was not employed for at least 12 months at the time she was fired, plaintiff argued that she "qualified" nonetheless. The district court disagreed. The court recognized that the FMLA protects employees who are not yet eligible for FMLA leave, if they put their employers on notice of a post-eligibility leave. Even though plaintiff claimed that she told employer that she would take FMLA leave following her completion of 12 months of work, the court noted that plaintiff produced no evidence that she requested post-eligibility leave. Further, the court refused to invoke the equitable estoppel doctrine in plaintiff's favor, while conceding that the Eleventh Circuit Court of Appeals had not

recognized the doctrine. Plaintiff claimed that employer refused her FMLA leave request only after it "falsely represented" that plaintiff was covered by the FMLA. Therefore, the equitable estoppel doctrine should apply to prevent employer from denying her leave request. Again, the court disagreed. The elements for the equitable estoppel doctrine are: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe that the party asserting the estoppel would rely on it; (4) the parting asserting the estoppel did not know, nor should it have known, the true facts: and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. Still, the court held that plaintiff failed to show that employer knew she was to be eligible. Nor did plaintiff show that employer intended for plaintiff to rely on any representations. Most importantly, plaintiff did not explain how she detrimentally relied on any representation. The court therefore granted employer's motion to dismiss as to plaintiff's FMLA claims.

***Bucks v. Mr. Bults, Inc.*, No. 3:16-CV-00322-NJR-DGW, 2016 WL 6521230 (S.D. Ill. Nov. 3, 2016)**

A truck driver filed suit against his employer alleging he was terminated in retaliation for taking FMLA leave. Defendant filed a motion to dismiss alleging plaintiff failed to state a claim under Fed. R. Civ. P 12(b)(6), and the Southern District Court of Illinois granted the motion with leave to file an amended complaint.

Defendant argued that plaintiff did not allege he suffered from a serious health condition, and plaintiff argued that an employer that grants FMLA leave is equitably estopped from later asserting lack of eligibility for said leave when defending a claim of retaliation. The court determined that this argument was premature. Plaintiff did not allege in his complaint that defendant approved his FMLA leave, provided him with forms or indicated, in any capacity, that would lead defendant to believe he had a serious health condition. The court held that plaintiff cannot use equitable estoppel to make up for pleading deficiencies.

***Weissberg v. Chalfant Mfg. Co.*, No. 1:14-CV-1567, 2016 WL 541466 (N.D. Ohio Feb. 11, 2016)**

Plaintiff worked for a company that employed 23 people. She needed surgery for a potentially life-threatening condition and spoke to the company's controller, who, plaintiff claimed, assured her that her leave would be protected by the FMLA. When plaintiff returned to work, the owner of the company informed her that her position had been eliminated due to an upgrade in the company's computer systems that was completed while employee was on leave. Plaintiff filed suit alleging that her termination violated the FMLA and the company moved for summary judgment.

The court granted defendant's motion, finding that plaintiff was not an eligible employee under the FMLA due to the small size of her employer, and could not establish equitable estoppel based upon the statement of the controller. The court determined that the statement from the controller, who was not a corporate officer, could not bind the company, and plaintiff demonstrated that she had not relied upon the controller's statement to her detriment by

testifying that plaintiff would have proceeded with the surgery regardless of whether her leave was covered or not.